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

CIVIL APPEAL NO. ABU 0073 of 2018
(Lautoka High Court Civil Action No.HBC 160 of 2015)

BETWEEN	:	**SUBHAG WATI**	***1st Appellant***
	:	**AVINESH PRASAD** **RAGNI DEVI**	***2nd Appellants***
A N D	:	**AMI CHAND**	***1st Respondent***
	:	**RITESHNI SHALINI LATA**	***2nd Respondent***
	:	**ITAUKEI LAND TRUST BOARD**	***3rd Respondent***

Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Almeida Guneratne, JA**
Counsel	:	**Mr R. Charan for 1st and 2nd Appellants** **Mr E Maopa for 1st and 2nd Respondents** **Ms L Komaitai for 3rd Respondent**
Date of Hearing	:	**11th May, 2022**
Date of Judgment	:	**27th May, 2022**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons, conclusions arrived at and orders proposed by Guneratne JA.

Lecamwasam, JA

[2] I agree with the reasons, conclusions arrived at and orders proposed by Guneratne JA.

Almeida Guneratne, JA

[3] This is an appeal against the judgment of the High Court dated 3rd July, 2018 (at pages 7 – 38 of the Copy Record), by which the Court held that on the evidence, on a balance of probabilities, the plaintiffs (1st and 2nd Respondents to the Appeal) were entitled to succeed in the reliefs they claimed inter alia:

(a) for a declaration that the last will of Chandu Lal dated 3 January, 2018 was null and void;

(b) the sale of the estate property to Avinesh Prasad and Ragni Devi, the 2nd defendants (the 2nd Appellants in this Appeal) and registered in their names be revoked and cancelled by the Registrar of Titles;

(c) that, the 2nd Appellants shall not deal, sell, transfer or assign whatsoever the Native Lease No.25971;

(d) that, the 2nd Appellants pay the sum of $40,000.00 to the plaintiff's, past judgment interest at the rate of 6% per annum from the date of the writ of summons (18th September, 2015) till the date of the judgment (viz: 3rd July, 2018).

(e) That, the 1st and 2nd plaintiff's (1st and 2nd Respondents to this Appeal) are entitled to 3 acres each of the land on the estate of Chandu Lal _ _ _ _.

[4] The grounds of appeal urged against that judgment are at pages 1 to 6 of the Copy Record which number 4 grounds by the 1st Appellant and 6 by the 2nd Appellant.

Ground 1 of the 1st Appellant's grounds of appeal

[5] That, the learned Judge erred in fact and/or in law in holding that the first Appellant was not the registered proprietor of Native Lease No. 25971 containing in extent approximately 10 acres 1 rood 24 perches.

Appellants' Counsel's arguments thereon

[6] Referring to the said lease at pages 96 to 99 of the Copy Record (CR), Counsel sought to demonstrate how the said lease was originally made out in the name of Chandu Lal (father's name Ram Adhar) on 22nd October, 2001 which had devolved on the 1st Appellant upon transmission of Chandu Lal's death which was registered on 12th June, 2014 and thereafter transferred to the 2nd Appellants and registered on 28th July, 2015. (the recorded entries at page 99 of the CR).

What was the reason given by the learned High Court Judge in holding that the 1st Appellant was not the registered proprietor of the lease in question?

[7] That reason is contained in paragraph [76] of the judgment (page 32 of the CR): viz –

> *"The transfer deed (second defendant's BOD page 12) and subsequent entry in the register has been procured or made by fraud with the intention to defraud the plaintiffs. Therefore, such a transfer is void as against the plaintiffs and the second defendant cannot take any benefit therefrom. I would, therefore, order the Registrar of Title to cancel the entry of the*

transfer of the subject land to the second defendants. The Registrar of Title must do all things necessary to cancel that entry."

[8] If that finding on fraud is to bear scrutiny there were two requirements the plaintiffs (respondents) needed to satisfy (i) Plead '*fraud'* with particulars and (ii) Evidence to sustain such plea.

[9] The plaintiffs Statement of Claim pleaded the particulars of fraud: *viz* – (page 41 of the Copy Record)

PARTICULARSS OF FRAUD

"i) That prior to the making of such Will the testator was sickly and admitted at Nadi Hospital.

ii) That the testator was mentally unfit and unsound.

iii) That the testator's signature was forged as it is not the proper one.

iv) That witness to the signatures were not present at the time of the execution."

[10] Thus the first requirement stood satisfied.

The evidence led to sustain the plea of fraud – the second requirement

[11] Before this Court looks at the evidence in that regard in order to see whether there was any serious misdirection and/or non-direction in the learned Judge's finding on fraud if this Court is to reverse that finding, I thought it would be appropriate to first look at the learned Judge's approach to the matter which was before him for determination.

[12] From paragraphs [05] to [19] of his Judgment, the learned Judge:

(i) traced the background history of the dispute
(paragraphs 05 to 14)

(ii) took note of the agreed facts

(paragraphs 15 to 16)

(iii) identified the issues for adjudication
(paragraphs 17 to 18)

(v) referred to the agreed documents
(paragraph 19)

An initial reflection

[13] There not being even a murmur from either Counsel at the hearing before this Court, I take what I have referred to in paragraph [12] above as an accurate record of events forming the backdrop to this appeal without the need to reproduce them here.

[14] Having said that, I now come to the evidence led on the allegation of fraud (with the antecedent aspects leading thereto) which is recounted by the learned Judge from paragraphs [20] to [41] of his Judgment.

[15] At this point I feel obliged to comment on how the learned Judge to the very precise last detail had recounted the said evidence, with neither Counsel raising as much as an eye-brow against that.

[16] Accordingly, I adopt the learned Judge's said recount of the evidence.

Does the learned Judge's analysis of the evidence led on fraud bear scrutiny?

[17] In that regard the learned Judge embarked on a discussion which, for ease of reference I reproduce: *viz* –

> *"[42] To begin with, let me decide the second Will made by the late Chandu Lal (Chandu Lal) on 3 January 2008 (the second Will). The primary issue, in this case, is whether the second Will was executed fraudulently to defeat the interests of the plaintiffs in the property. By*

his second Will, Chandu Lal devises and bequeaths all his property both real and personal unto his wife, Subhag Wati (the first defendant) and appointed the first defendant as the sole executrix and trustee of his Will (PEx7).

[43] Previously, before the second Will, Chandu Lal had executed a Will dated 6 May 2004 (the first Will). The first Will devises and bequeaths all his property both real and personal as follows:

- *four (4) acres of Native Lease No. 25971 Ref. 4/10/3432 to his wife Subhag Wati together with the dwelling house presently occupied by her;*
- *three(3) acres of Native Lease No. 25971 Ref 4/10/3432 to Mohan Lal together with the dwelling house presently occupied by him and;*
- *three (3) acres of Native Lease No. 25971 Ref. 4/10/3432 to Ami Chand together with the dwelling house occupied by him.*
- *The rest and remainder to his wife Subhag Wati absolutely. (emphasis is mine)"*

[44] The property covered by the first and second Will is a Native Lease No. 25971 Ref. 4/10/3432 containing 10 acres of agricultural land together with the dwelling houses (the property in dispute). Initially, the late Ram Adhar was the registered proprietor of the property in dispute. The late Ram Adhar left a Will behind him. His Will dated 20 October 1978 (PEx2) devised and bequeathed all his properties both real and personal (the property in dispute) as follows:

i) Shiu Kumari (wife) of the testator
ii) Lal Chand (son) of the testator
iii) Ami Chand (son) of the testator
iv) Shiri Chand (son) of the testator
v) Bisun Kumari (daughter) of the testator

[45] The Trustees and Executors are Shiu Kumari and Lal Chand, the wife and son respectively of Ram Adhar. The estate of the late Ram Adhar was never administered. In 1999, the lease over the land being Native Lease NL 25971 had expired. As a result, in November 2001, Chandu Lal was issued with a new lease in his name only by the iTLTB, the third defendant being lease No. NL 25971 (PEx3). According to the first plaintiff, that was the arrangement that Chandu Lal would get the new lease in his name and distribute the property as their father's Will (Ram Adhar's Will). Even though the lease was registered under Chandu Lal, he allowed and authorized his brothers, the first plaintiff and Mohan Lal to cultivate their shares of 3 acres of land each with their cane proceeds to be distributed by cane payment from Fiji Sugar

Corporation (FSC). The aforesaid authority dated 6 May 2004 (the same day Chandu Lal executed his last Will, (PE5) was signed by Chandu Lal was witnessed by Shiu Nayaran and Hari Prasad (PEx4).

[46] The late Chandu Lal was sickly and suffered from asthma prior to his death. He passed away on 26 February 2008. The first defendant was granted probate (PEx6) for Chandu Lal's second Will.

[47] The question before the court is that of the two Wills of Chandu Lal, which one is the true and valid Will.

[48] It was not in dispute that the late Chandu Lal executed the first Will devising and bequeathing the property in dispute to his wife (DW1), Ami Chand (PW1) and Mohan Lal (Riteshni's (PW2's) father).

[49] Shiu Narayan (DW3) confirmed that he witnesses the first as well as the second Will of Chandu Lal. It is apparent that at the time when he witnessed the second Will, DW3 knew very well that Chandu Lal's first Will as he is one of the attesting witnesses to that Will. DW3 in evidence he made (drafted) the second Will for Chandu Lal. DW3 had developed a relationship with DW1 after the death of her husband and now she is residing with him (DW3) in his compound."

The Execution of the Second Will by Chandu Lal – the decisive issue

[18] The learned Judge on the basis of his analysis of the evidence held that, "the execution of the second Will by Chandu Lal casts doubts in my mind for the following reasons." (paragraph 50 of his Judgment).

The Reasons given by the learned Judge in summary

[19] (a) The testator's (signature) appears to be different from the first Will.

(b) Chandu Lal's second Will does not say anything about the first Will he made in 2004 having an intention to cancel his last Will.

My comments and reflections on (a) and (b) above

[20] On (a) above, the learned Judge did not take into consideration in the first instance expert evidence on the authenticity of the signatures on the two Wills (although if such evidence had been taken, the final arbiter would no doubt have been the Judge).

[21] On (b) above, this reason is (with respect to the learned Judge) is a failure to read the wording of the said 2nd Will (vide: page 103 of the Copy Record).

Re: Reason (c)

> *"The attesting witness for both the Will (DW3) had a personal interest in the property. This is established by evidence given by the plaintiff as well as defendant witnesses. DW3 himself admitted in his evidence that he visited DW1 in order to assist her, but not too frequently. Now DW1 is residing with DW3 in his house. Moreover, DW3 had involved in the making of the Wills and the agreements and the sale of the property to the second defendant. All of this shows that he had a personal interest in the property."*

[22] The interest the said witness referred to therein may well have been "*a personal interest*" but given the fact that there was "*no beneficial interest*" given to the said witness under the Will in question, I could not see any basis in law to have regarded him as an (incompetent) witness which could have led to the invalidation of the Will in question.

Re: Reason (d)

> *"Chandu Lal was sickly and was hospitalized almost every day. DW3 was fully aware of his (Chandu Lal's) sickness and his health condition. Chandu Lal died on 26 February 2008 (PEx6) some 7 weeks after the second Will was executed on 3 January 2008. The first defendant did not lead evidence to prove that the late Chandu Lal was capable of fully understanding of the contents of the second Will and understood what he was signing for."*

[23] This reason, in my view, stands as a shifting of the burden of proof devolving on a party whose burden was to prove or disprove a document (the plaintiffs in this case) which is trite law ever since the English **House of Lords** decision in **Lee v. Johnstone** (1869) LR1.

[24] Accordingly, I have no hesitation in reversing the learned Judge's findings on the central issue of alleged fraud and consequently the final transfer that stood in the Appellant's hands as being a valid transfer.

[25] I add here that, the learned Judge's finding that, "*on the evidence, it is possible to infer that the DWI's signature has been forged on the SPA*" (paragraph 62 of the High Court Judgment).

[26] With respect, a finding of forgery cannot in my view be drawn as a matter of inference.

[27] That I lay down as a proposition of law.

Extended Discussion on the applicable legal principles

[28] Taking from where I left off at paragraph [24] above, apart from the issue of burden of proof which I reflected therein, there is the adjunct principle of evidence as to the standard of proof required in law to prove fraud.

[29] It is true that fraud vitiates all acts and instruments however solemn, in the present instance, the second last Will where the declarations of intention by the testator are evidence to prove the fraud. If so, declarations of intention by a testator must be taken into consideration as evidence to show absence of fraud. That declaration of intention of the testator in the said second last Will is clear (which I have already addressed in paragraph [21] above).

[30] It is also true that, fraud may be inferred from surrounding circumstances (vide: **R v. Cohen** [1951] 1 KB 505.

[31] But, in the instant case, the learned judge determined fraud by inference on an ocular inspection of the signatures on the two Wills in question, which in his own words had cast doubt in his mind as to whether the signature of the testator was forged. If so, that doubt should not have been resolved against the Appellants (re: the authenticity of the testator's signature).

[32] In my view, merely being cast in doubt and treating the matter as one of inference is not sufficient in law to prove fraud on the basis of a forgery in as much as, the burden of proof to prove the same on the requisite standard of proof was on the plaintiffs-respondents.

[33] The finding on that issue becomes an essential part of the circumstances which the Court had to take into consideration in deciding whether the requisite burden of proof was discharged. For after all, the testator could not have been summoned from his grave to speak to the authenticity of his signature.

[34] The more serious the allegation the more cogent is the evidence required to prove it. (vide: **Phipson on Evidence** 13th ed., at p.67)

The Test as laid down by Denning L.J.

[35] His Lordship said:

> *"The degree depends on the subject matter. A civil Court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking itself if negligence is established (In the instant case when fraud in relation to a last Will being sought to be established)."*

[36] Lord Denning proceeded to say

> *"_ _ _ If (the Civil Court) does not accept so high a degree as a criminal court even when considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion."*

(vide: **Bater v. Bater** [1951] P.35 at p.37.

My conclusion on the aforesaid central issue

[37] I arrive at my conclusion in saying that the plaintiff-respondents had failed to discharge the burden of proof on the required standard of proof requisite in law in challenging the said last Will in question.

[38] If the learned judge's mind was shrouded by some doubt, he should have resolved that doubt in favour of the defendants-appellants and not in favour of the plaintiffs-respondents.

Consequential Reflections

[39] On the basis of my Judgment in reversing the Judgment of the High Court on the central issue of fraud, wherein I have held that there was no fraud in regard to the said last Will, the rest of the grounds of appeal follow in consequence of that reversal.

Re: the Consent of the Director of Lands (ground 3 of the Appeal of the 1st Appellant)

[40] Whether there was consent by the Director of Lands to the transfer between the 1st Appellant and the 2nd Appellant, I found consent on the evidence on record.

Re: Ground 4 of the Grounds of Appeal

[41] I have already dealt with this issue in paragraph [22] of this Judgment.

Resulting Position

[42] I summarise the basis on which I have reversed the judgment of the High Court as follows:

(a) The challenge to the last Will in issue was not sustained having regard to the law and principles relating to the burden of proof and standard of proof.

(b) Consequently, the transfer that followed as between the 1st Appellant and 2nd Appellant was valid upon the Director of Lands consenting to it.

(c) In consequence of (a) and (b) above, there was no need for this Court to go into the grounds of appeal (Nos. 5 and 6) urged by the 1st Appellant.

(d) In regard to the 4 grounds of appeal urged by the 2nd Appellant I extract (i) the ground of appeal based on Section 10 of the limitation Act on the basis of the time lines of the (two) last Wills and the progressive transfers that had taken place.

On the ground based on Section 10 of the Limitation Act

[43] Having gone through the entirety of the evidence on record, I could not find anything on "*collusion*".

Submissions of Learned Counsel for the plaintiffs-respondents

[44] In fairness to the learned Counsel for the plaintiffs-respondents (Mr Maopa) I gave my mind to his submissions which I summarise as follows:-

(i) That, Section 10 stood qualified because of Section 13 for if there was evidence of fraud and consequently the transfer between the 1st Appellant and the 2nd Appellant was devoid of any legality why the learned Judge declared the said transfer to be null and void. Thus (he submitted), indefeasibility of title concept lost its veracity in which context he cited the Supreme Court decision in **Star Amusement Ltd v. Navin Prasad** etal CBV 0005 of 2012, Judgment, 28th August 2013.

[45] Mr Maopa, well known not to throw in the towel easily, submitted in saying that:-

(a) before Chandu Lal died he prepared two last Wills;

(b) the transactions reflected in the said Wills were between brothers of which the plaintiffs- respondents were not aware until when buildings were seen on the land in question when they became aware that the 2nd Appellant had bought the property. (Vide: back page 1 of the supplementary Copy Record – page 103);

(c) It was then that his clients went to their lawyers (vide: page 179 document of the Copy Record and the recitals therein particularly, paragraph (b) therein);

(d) Thus, the 2nd Appellant, being aware of the rights claimed by the plaintiffs respondents went ahead with the purchase;

(e) Prior consent of the Director of Lands also had not been obtained initially, the attempt of the Appellants being to convert an industrial lease to a lease of a commercial nature.

(f) Chandu Lal had never informed that the initial lease 25971 had expired;

(g) Shiu Narayan (witness to the Will in issue) was living on the same compound as Subhag Wati (the 1st Appellant).

[46] In conclusion Mr Maopa concluded that, the aforesaid facts were sufficient to come to a finding of fraud as held by the learned High Court Judge.

Reflections on Mr Maopa's submissions

[47] Taking Mr Maopa's submissions at their highest, on the extrinsic aspects of evidence of fraud, even if that was entitled to some positive and favourable response on the part of

the Court (the High Court) it must be noted that, the learned Judge went on the suspicion that had visited his mind as to the signature of the testator on the said last Will in question.

[48] On that I have already expressed my views earlier in this Judgment.

Mr Charan's Reply submissions on behalf of the Appellants

[49] Mr Charan in his reply took the gauntlet in meeting Mr Maopa's submissions in submitting in his Reply that:

(a) if Court was to look at tab 5 (page 37 of the High Court Record);

(b) then look at the Amended Statement of Claim (page 40 of the Copy Record);

(c) particulars of "*fraud*" pleaded at paragraph (20) of the said Amended Statement of Claim (page 41 of the Copy Record);

(d) the plea of fraud is in re: the last Will (2nd Will) and not in re: the transfer issue (that took place between the 1st and the 2nd Appellant);

(e) on the consent issue (of the 3rd Respondent via the Director of Lands) which the learned Judge dealt with from paragraph [63] onwards, Mr Charan's brief response, in explaining the issue of Chandu Lal's alleged living on the land with the 1st Appellant, was in his reference to "*the Agreement*" contained at page 102 of the Copy Record and (as he submitted) the original lease which was "*a protected lease*", upon its expiry which reverted back to the 3rd Respondent and any alienation and dealing thereafter was thus within the discretion of the 3rd Respondent Board;

(f) in the context of ground 3 of the grounds of appeal, Mr Charan pointed to paragraph 1 read with paragraph 3(b), (c), (d) and (e) of the said last Will in issue (page 103 of the Copy Record), with the additional fact of two witnesses attesting the Will as well as to the testator's instructions.

Determination and Conclusion

[50] I have already dealt with the challenge to one of the said witness's role in the transaction, that, he had no beneficial interest accruing to him in the terms of that Will.

[51] In so far as the low price (as alleged by the Respondents) at which the transfer in issue had taken place (an oblique attempt to bring in consideration based on *laesio enormis*, the Respondents appear to have missed the point that, the transfer was between the 1st and 2nd Appellants (wife and husband with neither putting it as an issue between them).

Some further aspects of evidence at the trial which Mr Charan addressed in his reply

[52] That, Ami Chand (the 1st Respondent/original first plaintiff) very well knew that "the Agreement" (referred to on paragraph [51] above) had been made, the date of it being 6th May, 2004 the Will being made in 2008, with no particulars of fraud being even pleaded in the Statement of Claim.

[53] If so, Mr Charan posed the question, "*where was the fraud?"* In fact, there was acquiescence by all parties on the Appellants cultivation of the land in question, the sole beneficial interest finally accruing to the Appellants (*inter se*) – indeed to the 1st Appellant (from the 2nd Appellant, husband to wife).

[54] In the final analysis, I reject the finding by the learned Judge on the "*issue of fraud*" on account of his finding as regards the proprietary of the signature on the Will that was in issue (based on surmises and conjectures finally drawing an inference of forgery which is bereft of the application of the requisite principles of burden and standard of proof).

[55] On the said principles I hark back to the time tested decision in **Wellingford v. Mutual Society** (1880) 5 App. Case. 685) wherein it was held that:

"In cases where fraud is alleged the burden of proof is heavy, in as much as the charge is a serious one requiring clear and distinct proof."

[56] This follows from the fact that the Civil Law regarded fraud as being in the nature of a crime, and therefore never presumed it but required it to be fully proved. (See: **Wessels, Section 1160; c.2.21.6** cited and approved by **C.G. Weeramantry on the Law of Contracts, at page 319 Section 322**.

[57] Hence a finding of fraud cannot be based on suspicion or conjecture and has been held to require proof beyond reasonable doubt. (See: the Indian decision in **Narayan Chettiar v. Official Assignee, High Court Rangoon** [1941] AIR [P.C] 93.

[58] Indeed, the onus of proving fraud lies upon the person who alleges it. (See: **Monir, Evidence, 4th ed., Vol. 2 p.618** and **Phipson, 10th ed, Sections 95, 100**).

[59] I conclude that, the Respondent failed to discharge the onus of proof on fraud and consequently, the learned High Court Judge had misdirected and/or non-directed himself on the law relating to the principles of burden and standard of proof arising in the context of the present case.

[60] Accordingly, I proceed to propose my final Orders in this Appeal as follows.

Orders of Court

1) *The Appeal is allowed and the Judgment of the High Court dated 3rd July, 2018 is set aside which shall include all the final Orders (1 to 6 made by the learned Judge – contained in pages 35 – 36 of the Copy Record);*

2) *The Appellants shall have the right to take appropriate steps in regard to the moneys said to have been paid by them to a judicial account;*

3) *Applying the principle that, costs follow the event, I order that the plaintiffs-respondents pay as costs of this appeal a sum of FJD$5,000.00 to the Defendants-Appellants within 21 days of notice of this Judgment.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL