

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Probate No. P52197 of 2012

IN THE ESTATE of MUNI CHAND
lately of 77 Ratu Mara Road,
Samabula, Suva in the Republic of
Fiji Islands, Businessman,
Deceased.

BETWEEN : **URMILA VERMA** of 384 The Esplanade, Speers Point
Newcastle, New South Wales, Australia but presently at 77
Ratu Mara Road, Samabula, Suva in the Republic of Fiji,
Clinic Manager as the sole Executrix and Trustee of the
Estate of Muni Chand, Deceased.

APPLICANT

AND : **PHUL MATI** c/- Parshotam & Co. Solicitors, Suva but
presently at 8 Sasha Street, Wynnum West, Queensland
4178, Australia, Domestic Duties.

RESPONDENT

COUNSELS : **Mr H Nagin** of **Sherani & Co.** for the Plaintiff
Mr S Parshotam of **Parshotam Lawyers** for the Defendants

JUDGMENT

1. Notice of motion was filed by Urmila Verma, the Applicant on 15th May 2012 and sought the following orders:

- (a) *That the caveat no. 6 of 2012 lodged by the respondent be removed;*
- (b) *That probate be granted in favour of the applicant in terms of the Last Will and Testament of the Deceased dated 16th December 2011.*
- 2.** The Learned Master of the High Court had made directions and matter was listed before me.
- 3.** The Summons for Directions filed by the Respondent being the Caveator on 28th March 2012 and sought the following orders in Probate No. HPP 52197 of :
- (i) *That the Applicant will not take any steps to sell any property comprised in Crown Lease No. 3420 being a lease of land located at 77 Ratu Mara Road, Samabula, Suva;*
- (ii) *That she will upon grant of Probate of the Will dated 16th December 2011 transfer and convey the estate of the beneficiaries named in the said Will upon the Caveator renouncing her interest in the estate;*
- (iii) *That no probate be sealed in respect of the Estate of Muni Chand deceased until undertaking is given to the court and the Caveator.*

The said orders were made under Order 1 Rule 11 of the High Court Rules and Rule 44(10) of the Non-Contentious Probate Rules.

- 4.** Affidavit in support dated 30th April 2012 filed on 1st May 2012 was sworn by the applicant deposing:
- 4.1 The applicant is the Executrix and Trustee in the Estate of Muni Chand named in his Last Will and Testament dated 16th December 2011 and the Last Will and the letter were marked as "A" and annexed to the affidavit.

- 4.2 The said Last Will dated 16th December 2011 was filed in the High Court at the Probate Registry for Grant of Probate in the Estate of Muni Chand.
- 4.3 The applicant discovered on 20th February 2012, the Respondent (mother of the applicant) had lodged Caveat No. 6 of 2012 to prohibit the grant of probate being processed and released to the Applicant.
- 4.4 On 26th March 2012, the Solicitor's for the Applicant filed a warning to the Caveator and served on the Respondent's Solicitors.
- 4.5 On 28th March 2012, the Respondent's Solicitors filed summons for directions wishing to show cause against the grant.
- 4.6 The applicant further stated:
- i) The Respondent does not appear to be challenging the Last Will;*
 - ii) No contrary interest was shown by the Respondent;*
 - iii) The Respondent is a beneficiary named in the Last Will;*
 - iv) The Respondent had executed a Deed of Renunciation on 2nd March 2012 (Annexure B to the Affidavit) of her interest under the Will being renounced.*
- 5.** The Affidavit of Law Clerk deposed inter alia that the Respondent presently living in Australia had sworn the affidavit verifying the affidavit in response dated 29/9/2012 before Rajesh Gopal, Solicitors practicing in Queensland who are also admitted in Fiji. The scan copy of the affidavit was annexed to the affidavit of the Law Clerk marked as Annexure "A".

- 6.** By the said affidavit of the Respondent, she pleaded:
- (a) *That the Respondent resides in Brisbane, Australia and she is 85 years old;*
 - (b) *The Respondent had authorized Avinash Chand, a son of hers to serve the affidavit by letter dated 2nd August 2012;*
 - (c) *She had authorized her son Avinash Chand to make the affidavit marked as Annexure "A" to her affidavit and facts and deeds deposed in it are true and to treat as the Respondent had sworn the said affidavit of Avinash Chand.*
- 7.** Accordingly, I consider the averments in the affidavit of Avinash Chand dated 22nd August 2012 as the Affidavit in Response by the Respondent.

The said affidavit it was deposed:

- (a) *The Respondent is the widow of the deceased Muni Chand;*
- (b) *The applicant is the eldest daughter of the Respondent;*
- (c) *The Respondent is 85 years of age and in very poor health condition;*
- (d) *At the time of the death of Muni Chand on 10th February 2012, left a Last Will and Testament dated 16th December 2011. (Annexure "A" to the Affidavit). The following were provided in the Last Will:*
 - (i) Applicant was appointed as the Executrix and Trustee;
 - (ii) Provided annually of \$1,000.00 per month for the life of the Respondent for her maintenance and up keep;

- (iii) Balance of the Estate was given to 5 out of the 7 children of the deceased including the Applicant and the affirmant also as beneficiaries;
 - (iv) Will is not clear as to whether when distribution to the said beneficiaries should take place i.e. whether it is to take place after the death of the Respondent or whether during the life time of the Respondent and raised an issue if distribution to take place during the life time of the Respondent then how the beneficiaries are to be paid.
- (e) *The only assets owned by the deceased at the time of his death were:*
- (i) The property comprised in Crown Lease No. 3402 (Annexure “C”) one large 3 level commercial/residential building and a small two level residential/commercial building;
 - (ii) The top floor of the larger building is used by the family as the residence other units are rented out;
 - (iii) Rental of \$9000 is receivable on the units. Some rent is collected by the Applicant and some tenants pay into the Bank account, Muni Chand & Sons Limited;
 - (iv) Out of the shares 1/9th shareholding interest of Muni Chand and Sons Ltd is owned by the Applicant;

- (v) The other shares of the company are held by the Respondent and other seven children;
 - (vi) The company owns a motor vehicle and maintains a Bank Account at ANZ Banking Corporation.
- (f) *The Respondent had annexed correspondence between the Solicitors for the Applicant and the Solicitors for the Respondent marked D, E, F, G, H and I;*
- (g) *A Deed of Renunciation dated 2nd March 2012 was annexed to the Affidavit of the Applicant marked "B";*
- (h) *The Respondent's and the children's representation to the applicant was that:*
- (i) Subject to the comments made by the Respondent in the affidavit she did not oppose to the application for the grant for probate of the said Will to the Applicant;
 - (ii) Respondent will renounce any interest that she may have in the estate of the deceased being the annuity provided to her by the deceased;
 - (iii) The applicant upon a grant being issued to her, transfers the estate to the beneficiaries stated in the Will (Property comprised in Crown Lease No. 3402).
- (i) *The Respondent had required Applicant to give an undertaking upon grant of the probate to her. Applicant will convey the estate to the beneficiaries. Since there had been no liability over the estate, the Applicant*

didn't had any difficulty of transferring the property to the beneficiaries;

- (j) The concern of the Respondent and her children are that the Applicant may sell the estate property without reference to other beneficiaries when there is no need for a sale. The property should be conveyed to the beneficiaries including the Respondent and they (including the Applicant) will become owners of the property and any ownership issue could be sorted out among them and sale could be effected among themselves;*
- (k) The concern of the Respondent and other beneficiaries is that the Applicant had not shown any agreement on her part that she will convey the estate property to the said beneficiaries;*
- (l) Further, it was stated in response to the Applicant's affidavit:*
 - 1. Admitted paragraph 1 to 4;
 - 2. Admitted the facts in paragraph 6(i) to (iii);
 - 3. Deed of Renunciation is admitted but stated it was conditional upon the Applicant agreeing to transfer the estate property to the beneficiaries [Paragraph 6(iv)];
 - 4. Paragraph 6(v) was not admitted and deposed that the Respondent opposes the Applicant's application for the removal of the caveat until such time as the Respondent's concerns relating to transfer of the estate property to the beneficiaries is addressed.

8. In reply to the Respondent's affidavit sworn by Avinash Chand the Applicant by affidavit dated 26th September 2012 filed on 28th September 2012 deposed.

8.1 (a) *The Applicant denied that the Respondent gave any instructions to the deponent in regard to the Estate of Muni Chand. No authority had been attached by the Deponent;*

(b) *The deponent lodged the caveat and affidavit was filed without the instructions of the Respondent;*

(c) *The Applicant denied that the Respondent is looked after by her sons and daughters in Australia and further deposed Respondent is living with her sister;*

(d) *None of the brothers and sisters are looking after the Respondent and none of them live with her;*

(e) *The deponent falsely deposed in paragraph 5 of the affidavit on 5th April 2012 in Domestic Violence Application No. 78 of 2012, that the Respondent resides with Applicant's brother Ashok Chand.*

8.2 Replying to para 4 to 10 of the affidavit, the Applicant deposed:

(i) *The caveat lodged on behalf of the Respondent on 20th February 2012 prohibiting the grant of probate was lodged without the consent of the Respondent;*

(ii) *The Applicant and her husband were not allowed to visit the Respondent on 28th June 2012 in Brisbane since Respondent's sister did not open the door on instructions of the Applicant's brother;*

- (iii) *During the conversation with the Respondent through the screen door, she stated the children are after the deceased's property and none of them looked after the deceased when he was ill except the Applicant and her husband;*
- (iv) *Further, Applicant deposed she had not given any instructions to anyone to file caveat or legal proceedings in the court as she was not mentally capable and she had no interest on deceased's property and the Applicant to do the right thing;*
- (v) *The contents of the Applicant's affidavit filed on 30/4/2012 never explained to the Respondent and she did not give any instructions to respond to the same;*
- (vi) *Further, it was deposed as stated in paragraph 10 of the affidavit of Avinash Chand it was clear that only he had read the Applicant's affidavit and he himself responding to the affidavit not the Respondent.*

8.3 Replying to the paragraph 11 to 16, Respondent deposed:

- (i) *Denied the Respondent in poor health at the time of the death of the deceased;*
- (ii) *When Respondent was contacted, she informed she cannot come to Fiji because no one is there to accompany her;*
- (iii) *The Applicant deposed she had explained the Will to her mother;*
- (iv) *In the Domestic Violence Case No. 78 of 2012 in the Magistrates Court, the Deponent Ashok Chand deposed in his affidavit referring to Muni Chand's Will:*

“for present purposes, I am accepting this Will as being valid Will”.

8.4 Replying to paragraph 17 and 18, the Applicant stated:

- (i) *The property owned by the deceased on Crown Lease No. 3402 is occupied by several tenants;*
- (ii) *Some rents were collected by the Applicant and some wrongly deposited to Muni Chand and Sons Ltd Bank Account;*
- (iii) *Muni Chand and Sons Ltd was incorporated by the deceased in 1981 and it did not operate the business intended;*
- (iv) *Motor vehicle was purchased in the name of the company from rental money which was wrongly registered in the company name and the company holds the vehicle in trust for the estate;*
- (v) *There are prior liabilities of the estate in relation to maintenance and repairs to the property and legal fees and other charges are due by the estate for the administration of the estate.*

8.5 Replying to paragraphs 19 to 25 of the Affidavit the Applicant deposed:

- (i) *Denied that the Respondent engaged any Solicitor in Fiji and she has no knowledge of any one at Parshotam & Co.;*
- (ii) *Respondent does not appear to be challenging the Last Will and Testament dated 16th December 2011;*

- (iii) *The Respondent executed a Deed of Renunciation on 2nd March 2012 of her interest under the Will;*
- (iv) *The Applicant undertake to this Court she will properly administer the Estate as per the deceased's wish as stated in the Will.*

8.6 The Applicant alleged that Avinash Chand the deponent and the other brother of Ashok Chand used violence caused false allegations and threatened her and her husband and annexed a letter dated 9th June 2012.

Analysis and Conclusions

9. The following issues were agreed and admitted by the parties:

- (a) *The Last Will and Testament dated 16th December 2011;*
- (b) *The Deed of Renunciation by the applicant dated 2nd March 2012 executed by the Respondent;*
- (c) *The main asset of the estate is the Crown Lease No. 3402.*

10. Prior to analyzing the issues to be decided the following conclusions are arrived:

- (i) *The Applicant had deposed that the Avinash Chand's affidavit did not carry the authorization from the Respondent.*

I am not accepting this position for the following reasons:

- (a) *Proper authorization was given by the Respondent to Avinash Chand by the Respondent by the affidavit marked "A" annexed to the affidavit of Evelyn Hing, Law Clerk of Parshotam deposed on 2nd October, 2012.*

Paragraph 4 of the affidavit of the Respondent marked “A” stated:

“4. I authorized my son to make this affidavit on my behalf”.

(b) It is noted that the Respondent had read the affidavit of Avinash Chand and further stated in paragraph 5 of the affidavit marked “A”:

“5. I have read the said affidavit and state that such of the facts deposed in it as relate to any acts and deed on my part are true and such of the facts deposed in it as relate to the acts and deeds of any other persons I believe to be true”.

Accordingly, I conclude that the affidavit of Avinash Chand dated 22nd August 2012 filed on the same day together with Annexures marked “A” to “I” is accepted and further conclude that the said affidavit carries due authorization from the Respondent and the court accepts this affidavit as the affidavit in Response to the affidavit in Support filed by the applicant.

11. Considering the Notice of Motion filed by the Applicant and the Summons for Directions filed by the Respondent the issues to be decided are:

(i) As to whether the Respondent’s Caveat No. 6 of 2012 lodged by the Respondent be renewed or removed?

(ii) As to whether the Probate be granted in favour of the applicant in terms of the Last Will and Testament dated 16th December 2011?

(iii) Whether the Deed of Renunciation dated 16th December 2011 is conditional if so as to whether the Applicant should give an undertaking to transfer and convey the Estate to the beneficiaries named in the Will?

12. The provisions applicable to the application for removal of caveat the contentious rule Order 1 Rule 11 of the High Court Rules. Order 1 Rule 11 states:

“11. The Rules for the time being in force in Her Majesty’s High Court of Justice in England, and the practice and procedure of that Court with respect of non-contentious probate business shall apply so far as they are applicable, with such modifications as may be necessary, to grants of probate and administration issued in common form from the Registry of the High Court”.

The other provisions in Section 47 of the Succession, Probate and Administration Act is dealt in paragraph 16.1 of this Judgment.

13. The warning to the Caveator was filed by the applicant through her Solicitors.
14. On 28th March 2012, the Respondent’s solicitors on behalf of the Respondent, filed Summons for Directions under Rule 44(10) of the Non-Contentious Probate rules that no probate be granted until the applicant gives undertaking as per preceding paragraph 3 of the this Judgment. The applicant’s counsel submitted that the Respondent had renounced her rights of the Estate and the Orders sought are contrary to the wishes of the Testator.
15. Now, I deal with the Deed of Renunciation dated 2nd day of March 2012. Under Clause 9 it is stated:

“It is my intention as follows:

- (a) *That the said Urmila Verma proceeds to apply for probate of the said Will;*
- (b) *That there is no opposition to the grant of the probate as aforesaid by any of the beneficiaries named in the said Will;*

- (c) *That I will renounce any interest I may have in the estate of the said deceased;*
- (d) *That the said Urmila Wati will immediately upon grant of probate in her name convey all estate property including the lease comprised in Crown Lease No. 3402 to the beneficiaries named in the said Will in accordance with the terms of the said Will.”*

15.1 What did Last Will and Testament stated with regard to the Respondent? There was Clause No. 4 which stated:

“Clause 4. I direct my Trustee to pay my wife Phul Mati Chand the sum of \$1000 per month for her life as her maintenance and for her up keep”.

15.2 Apart from the benefit stated in Clause 4 of the Last Will and Testament, the Respondent had not been given any beneficial interest over the assets of the Deceased.

15.3 It is evident the Respondent was not given any right to obtain an undertaking from the Applicant as stated in the Deed of Renunciation. The only renunciation the Respondent would have made was renouncing the right to have the payment of \$1000 per month for life for her maintenance and up keep. As such, I conclude that the Deed of Renunciation has no effect and it’s an obsolete document, for the reason that the Respondent do not have any contrary interest over the estate except for the monthly payment of \$1000 by the Trustee.

16. I further agree with the submission made by the applicant’s counsel that Respondent had not shown any contrary interest for the Respondent to maintain a caveat.

16.1 Having concluded that the Respondent do not have any contrary interest, I draw attention o Section 47 of the Succession and Probate and Administration Act:

“(1) In every case which a caveat is lodged, he court may, upon application by the person applying for probate or administration or for the sealing of any probate or letter 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 on the caveat;

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

16.2 In the case of ***Reddy v Manchama Webb and Lawrence Webb*** Civil Appeal No. ABU 00014 of 1994S, the Court of Appeal stated:

“The application before the Trial Judge was to remove the Caveat under Section 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 in this regard is Rule 44(7). **“For the purposes of 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 removal of a caveat”. (Emphasis mine)

The submissions made by the Respondents with regard to Rule 44(7) did not carry any merits. As I concluded in the preceding paragraphs, the Respondent do not have contrary interest but also failed to establish any beneficial interest over the Crown Lease No. 3407. As such I conclude, Respondent’s Caveat No. 6 of 2012 should be removed.

17. Further, the Last Will and Testament was not in dispute and the Respondent was contesting over an interest which was not provided in the Last Will and I conclude, the Probate should be granted to the Applicant.
18. The other issues in this matter I have already concluded that as per wishes of the Testator in the Last Will and Testament, the Applicant is not obliged to give any undertaking to the Respondent and the Respondent has no *locus standi* to claim for such undertaking with regard to Transfer of the Property. However, I take into account the undertaking given by the Applicant in the paragraph 8(v) of her affidavit in reply (referred in paragraph 8.5(iv) in this Judgment stated:

“I undertake to this Honourable Court that I will properly administer and distribute the Estate as per my father’s wish as stated in his Will”.

This is an adequate and reasonable undertaking given by the Applicant and the Respondent or any other beneficiary cannot claim redress at this stage prior to grant of the probate. If the Applicant makes any breach, her duty as the Executor and Trustee of the Last Will at that stage, the Respondent and/or any other beneficiary could sought orders in that regard. Further, I conclude even if there is *locus standi* for the Respondent to file summons, it should have been filed after grant of the probate.

19. Accordingly, I make the following Orders:

- (a) *Caveat No. 6 of 2012 lodged by the Respondent removed;*
- (b) *Ordered to grant probate in favour of the Applicant in terms of the Last Will and Testament of the deceased dated 16th December 2011;*
- (c) *Summons for Directions filed by the Respondent on 28th March 2012 dismissed;*
- (d) *No order made for costs and parties should bear their own costs.*

Delivered at Suva this 9th Day of April 2013.

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C. KOTIGALAGE
JUDGE