

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

CIVIL ACTION NO: HPP 31 of 2008

BETWEEN : Amit Amitesh Chaudhary

PLAINTIFF

AND : Rajnil Kumar

DEFENDANT

COUNSEL : Mr. Samad R for the Plaintiff
Mr R. P. Singh for the Defendant

Date of Judgment : 27 September 2013

JUDGMENT

1. On 17 October 2008, Amit Amitesh Chaudhary (the Plaintiff) issued a Writ of Summons against Rajnil Kumar (the Defendant) disputing the validity of the alleged Will dated 17 July 2007 of his father Ram Satyendra who died on 20 January 2008.
2. In the Statement of Claim filed in this case, Plaintiff states he is the only son of the testator and the Defendant exercised undue influence and coerced his father to execute the Will in favour of the Defendant and the execution was not done under the provisions of the Wills Act and is fraudulent in nature.
3. The Statement of Claim proceeds to state that execution and drawing up of the will was done in somewhat suspicious circumstances as the Plaintiff was the

lawful son of the deceased and the executor named in the purported Will was only a care taker and a distant relative.

4. The Plaintiff also alleges that the making of the Will in favour of the Defendant was unjustified and the purported Will was signed by the solicitor's clerk and witnessed by the solicitor at a later time which invalidates the purported Will pursuant to the Wills Act.
5. The Plaintiff also alleges that the said purported Will was made in order to deprive the Plaintiff of his rightful dues and for unjust enrichment. The deceased was the owner of the real property and cash at Bank in the sum of \$27,000.00.
6. The Defendant in his Statement of Defence denies the claim and states that the deceased was divorced on 13 December 1993, and the decree nisi was granted on 13 December 1993 which became absolute on 4 January 1994. He further states that the deceased approached him to look after deceased in 2007 as nobody was looking after him for the last thirteen years.
7. He further states that he never exercised undue influence and coerced the deceased to execute the Will and the Will was signed by the deceased on his own free will.
8. The Plaintiff seeks in his Statement of Claim a declaration from the purported Will dated 17 July 2007 is void and has no effect and an order that letter of administration be issued in the name of the Plaintiff.

The Disputed Will of 7 July 2007

9. For ease of understanding the real dispute between parties. I give below the full text of the Will:

This is the las Will and testament of me, Ram Satyendra (f/n Ram Millian) of Sawani, Nausori, in the Republic of Fiji, Retired.

- 1. I hereby revoke all former wills and testamentary dispositions heretofore made by me and declare this to be my last will and testament.*
- 2. I appoint my nephew Rajnil Kumar (f/n Jai Raj) to be the sole executor and trustee of this my will.*
- 3. I give devise and bequeath unto my trustee all the real and personal property of whatsoever nature and wheresoever situate over which I shall have any disposing power at the time of my death upon trust.*
 - a.) To pay there out just debts and funeral expenses.*
 - b.) To pay all the testamentary expenses and all duty payable to the state, if any, upon the whole of my estate.*
- 4. I give devise and bequeath the rest and residue of all my real and personal property of whatsoever nature, kind and wheresoever situate and over which I may have any disposing power at the time of my death unto my nephew Rajnil Kumar and his wife Renu Renuka Kumar in equal shares, share and share alike absolutely for their own use and benefit.*

In the witness whereof I have hereunto set my hands this 17 day of July, Two Thousand and Seven.

SGD. Ram Satyendra.

Signed by the Ram Satyendra the testator as and for his last Will and Testament after the contents had been first read over and explained to him in the Hindustani

Language and in the presence of us both being present at the same time who at his request in his sight and presence and in the sight and presence of each other have hereunto subscribed our names as attesting witnesses.

*SGD. Raman Pratap Singh
Solicitor, Suva*

*SGD. Premila Swamy
Law Clerk, Suva.*

10. In the minutes of the pre-trial conference dated 3 September 2010, the following were stated to be agreed facts:

[1]. The Plaintiff together with one Sangita Devi Chaudhary (f/n Ram Satyendra were the only children of the deceased hereinafter referred to as the said deceased Ram Satyendra (f/n Ram Milan aka Ram Millian).

[2] The said deceased was divorced on 13 December 1993 Nisi was granted on 13 December 1993 which became absolute on 14 January 1994.

[3] The Plaintiff is the only son of the said deceased.”

11. The issues for courts determination are:

“[1]. Whether the Will was drawn up and executed in a suspicious manner?

[2]. Whether the Plaintiff had been looking after, caring and maintaining the deceased from that time.

[3]. Whether during this period the Plaintiff approached the Defendant to look after his father (deceased) for a fixed wages of \$100.00 per week.

[4]. Whether unknown to the Plaintiff the Defendant exercised undue influence and coerced the deceased to execute a Will dated 17 July, 2007.

- [5]. *Whether the Plaintiff alleges that the Will executed by the deceased was done under the provision of the Wills Act and is fraudulent in nature.*
- [6]. *Whether the Will made infavour of the Defendant was justified.*
- [7]. *Whether the purported Will was signed by the solicitor's clerk and witnessed by the solicitor at a later time which invalidates the purported Will pursuant to the Wills Act.*
- [8]. *Whether the purported Will was made in order to deprive the Plaintiff of his rightful dues and for unjust enrichment.*
- [9]. *Whether the deceased was the owner of a real property and cash at bank in the sum of \$27,000.00 (Twenty Seven Thousand Dollars).*

Evidence at the Hearing

The Plaintiff's Evidence

12. Mr Amit Amitesh Chaudhary, the Plaintiff in this case gave evidence and tendered three exhibits in examination in chief namely Death Certificate of the deceased father, Birth Certificate of the Plaintiff and the purported Will as Exhibit 1, 2 and 3 respectively. In the cross examination, Plaintiff admitted the documents relating to the dissolution of the marriage of his parents and tendered as Exhibit 4.
13. The Plaintiff testified that he was living with the mother after the dissolution of the marriage of the parents but visited father during weekends. He stated that he was working in Cicia Island and Levuka in the entire year of 2007. His father made arrangement with Plaintiff's cousin brother to look after him subject to the payment of \$100.00 per week.

14. He stated that he was aware about the withdrawal of money from ATM and thereafter through withdrawal slips. With regard to the health condition of his father, his evidence was that he was diabetic patient and his right thumb was amputated.
15. Although his right thumb was amputated he was in a condition to walk and condition deteriorated only in last few weeks before the death. He testified that his father never mentioned to him about the purported Will but told him that everything will be for him. He also stated that he performed all rituals with the financial assistance of deceased's sister who came from England.
16. He also stated that he saw the article in the Fiji Sun in relation to father's estate and made arrangement to lodge a caveat on the property.
17. In the cross examination, the Plaintiff admitted the date of dissolution of the marriage of the parents was in year 1993. He also admitted that the Defendant's family did cooking, washing clothes and all other house hold work for the Plaintiff. It was suggested that the Defendant and his family was never paid any money for the assistance provided to the deceased. The following questions and answers are vital for the court to ascertain the health condition of the deceased in year 2007 and prior to death.

Mr. Singh: From April onwards leading to his death in January, your father's health deteriorated?

Mr. Amitesh: Because of diabetes.

Mr. Singh: So in the end he became bedridden before his death?

Mr. Amitesh: Only maybe two weeks.

Mr. Singh: Prior to his death?

Mr. Amitesh: Yes sir.

18. The Plaintiff also admitted in the cross examination that Defendant's wife was feeding and looking after the deceased when the deceased was hospitalized prior to his death.

19. The Plaintiff was also cross examined on the allegation of undue influences used by the Defendant for the deceased to execute a Will in favour of him.

Mr Singh: And you did not know about the Will that was executed by the Deceased?

Mr. Amitesh: Yes sir.

Mr. Singh: The only reason that you are saying that undue influence may have been used on the deceased was because the deceased said he was giving everything to you. Sorry I will try again, the only reason he was saying that undue influence was exercised on your father to make the will is because your father said that he was giving everything to you?

Mr. Amitesh: Yes and also because of the signature.

20. In View of the above evidence adduced by the Plaintiff to invalidate the purported Will, the only evidence available to court is what the deceased has told him prior to his death.

21. However in the cross examination, in relation to the signature he testified that he could not access to relevant documents of deceased. One month prior to the hearing, he got the pass port of the deceased and observed the signature in the Pass Port and the signature in the purported Will are found to be not similar.
22. The following questions and answers are relevant for the court to assess the new allegation which was not provided in the Statement of Claim.

Mr. Singh: And I am saying you did not tell your lawyer in regards to the signature, you did not tell your lawyer about the discrepancies of the signature?

Mr. Amitesh: Yes I did not have any evidence.

His Lordship: You did not have any evidence?

Mr Singh: I am saying that you are saying that as an afterthought during this trial.

Mr Amitesh: No.

His Lordship: He is denying.

Mr. Singh: You have not pleaded the issue of faulty signature in your claim.

Mr. Amitesh: I did tell my lawyer.

Mr. Singh: I put to you the signature on the Will is the signature of your father, the copy of the signature of your father of the deceased.

Mr. Amitesh: I don't believe because my father's signature was different.

The Defendant's Evidence

23. Mr. Rajnil Kumar, the Defendant and Ms. Premila Swamy, legal typist of Kohli & Singh Solicitors, Suva gave evidence on behalf of the Defendant. Mr Rajnil Kumar testified that the deceased Ram Styendra is mother's brother, brought him to his house together with his wife and three children to live with him on the understanding that the deceased will make a Will in his name. He further testified that the deceased was very happy after his family came to his home. He stated that he, on the request of the deceased took him to Kohli & Singh Solicitors in Cumming Street, Suva for him to make a Will. He also stated that he never exerted any pressure or influence on the deceased to make a Will. Witness tendered letters issued by Ramayan Mandir, a Hindi organization and the District Advisory Council to establish that he looked after the deceased and took care of the cremation of the deceased.
24. In the cross-examination he stated that he and his wife accompanied the deceased to Kohli & Singh Solicitors but did not go inside but stayed at the reception area. He further stated that it was him who spent for the funeral rituals. It was suggested that all expenses of his funeral were borne by the deceased's sister who came from England. The witness was cross examined on the Exhibit 5 and 6. It was suggested that two documents were issued on his request and certain statements of the two letters are inaccurate.
25. Ms Premila Swamy, the legal typist of Kohli and Singh in Suva testified that on instructions of Mr. Singh prepared the Will marked as Exhibit 3. She stated that she has been working for the Law Firm for the last twenty eight years and has experience in preparation of Wills. She also stated that Will was signed by

deceased Ram Satyendra in front of her and Mr. Raman Pratap Singh. The contents of the Will was explained by Mr. Singh to the deceased and it was signed by him on his own without any force by anybody. The names of the trustee and beneficiaries were also provided by the deceased.

26. In the cross examination, she was questioned on whether written instruction were obtained prior to preparation of the Will. She stated that she is unable to provide written instruction received by her at this time although she obtained.

The Determination

27. The issues for determination can be reduced to the following issues as most of the issues stated at the pre-trial conference are repetitive and overlap with the other issues.

1. Is the Will dated 17 July 2007 is a valid Will and made in accordance with Wills Act?
2. Did the testator execute the Will on his own free will without any undue influence on him?
3. Did the testator know and approve the contents of the Will at the time of Execution of the Will?

Was This a Valid Will?

28. Provision of Section 6 of the Wills Act provides what constitutes a valid Will.
- “Execution generally
6. Subject to the provisions of Part V, a Will is not valid unless it is in writing and executed in the following manner:

- (a) *it is signed by the testator or by some person in his presence and by his direction in such place on the documents as to be apparent on the face of the will that the testator intended by such signature to give effect to the writing as his will;*
- (b) *such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and*
- (c) *the witnesses attest and subscribe the will in the presence of the testator.*

- 29. The clerk, Premila Swamy typed the Will according to instructions received from his solicitor and the Will was read over and explained by the solicitor Mr Raman P Singh in the Hindustani language and the testator had an option of rejecting the contents of the Will after the explanation.
- 30. It was revealed in the evidence that the testator having agreed with the contents of the Will, executed the Will before Solicitor and the law clerk who drafted the Will, Premila Swamy after which both the witnesses signed in the presence of the testator.
- 31. The Plaintiff in the examination in Chief and under cross examination categorically admitted that the deceased was in proper mental condition until his death. He admitted that he was bedridden only in last few weeks before the death. The date of execution of the Will is not disputed. The time period between the date of the will and the death of the testator is almost six months. The Law clerk Pramila Swamy was never cross examined on the physical or mental condition of the deceased. No medical evidence was tendered in court by the Plaintiff to suggest that the testator was suffering from mental impairment.

32. The New Zealand Court of Appeal in **J.J. Bishop v. P.J. Odea & Another –** (1999) NZCA 239 considered the legal principles applicable in cases of testamentary capacity. It summarized the legal principles as follows:

“(1) *In probate proceedings those propounding the will do not have to establish that the maker of the Will had testamentary capacity, unless there is some evidence raising lack of capacity as a tenable issue. In the absence of such evidence, the maker of a will apparently rational on its face, will be presumed to have testamentary capacity* Re White [1951] NZLR 393 (CA) and **Peters v. Morris** (CA 99/85 : judgment 19 May 1987).”

(2) *Whenever it is necessary for an executor to establish due execution of a will, he is required at common law, to call one of the attesting witnesses, if any was available* (**Bowman v Hodgson** (1867) 1L.R.P and D 362).

(3) *The burden imposed on a party who seeks to propound a will was stated clearly by Lord Hanworth MR* **in the Estate of Lavinia Musgrove, Davit v Mayhew** [1927] P264 at page 276:

“It is clear that the onus of proving a will lies upon the party propounding it, and secondly, that he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. To develop this rule little further – he must show that the testator knew and approved of the instrument as his testament and intended it to be such.

Parke B in the courtesy of his judgment in **Barry v Butlin** (1) *says: The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden is cast, the*

issue must be found against him. In all cases the onus is imposed on the party propounding a will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed.”

33. The Court will usually pronounce for a will if one of the attesting witnesses deposes to the due execution of the will. However the Court will not exclude further relevant evidence for the purpose of avoiding fraud. **Vere – Wardale v Johnson and Others** [1949] P 395 is authority for the proposition that “the evidence of the attesting witness to a will is not necessarily conclusive, and the court is competent to receive evidence in rebuttal.” Willmer LJ at page 397 stated:

“ It appears to me that the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, was to prevent fraud. My duty here is to do that I can to see that no fraud is perpetuated; and if I exclude further evidence such a ruling can only assist the possibility of the perpetration of fraud.

In the circumstances it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regard to the attesting of this will as may be available.”

34. In examination of the Will, evidence adduced before the court and, above authorities, I conclude that all requirements necessary to constitute a valid Will pursuant to Wills Act has been adhered to. No evidence adduced to demonstrate that the testator had any mental impairment.
35. In dealing with the issue of whether the testator executed the said Will on his own free will or subjected to undue influence, needs to be considered carefully.

36. In this case, the suspicious circumstances alleged were that the Plaintiff, is the lawful son of the deceased was disinherited by his father in the Will and executed a Will in the name of the caretaker and a distant relative.
37. In the Statement of Claim and the evidence in examination in Chief, the Plaintiff testified that his parent's marriage was dissolved in 2000 and the Defendant is a distant relative. However, it was revealed in the evidence in totality that the marriage of the parents was dissolved in year 1993 and the Plaintiff was brought up by the mother and most importantly the Defendant is not a distant relative as stated in the Statement of Claim, but the deceased's sister's son.
38. It was also clear that the deceased was living all by himself in his house, and needed assistance due to his medical condition. It was also evident that deceased approached the Defendant and his family to live with him. The position of the Plaintiff in this regard was that assistances was provided subject to payment of \$100 per week. No evidence was adduced to support this position other than the oral testimony of the Plaintiff. The Defendant categorically denied any payments for the assistance provided by him and his wife and infact his evidence was that the deceased invited him to live with him on the condition that deceased will execute a Will in his favour.
39. The grounds upon which the Plaintiff claims to invalidate the Will is that the deceased has told that everything he has is for him and he is the lawful son of the deceased.
40. The deceased has inherited his son from the Will, executed by him and upon civil standard of proof the Will was properly executed in the presence of two witnesses after the contents were read over and explained to the testator before he placed his signature on the Will.
41. I do not see any suspicious circumstances as alleged by the Plaintiff according to the evidence placed before the court, which excite the vigilance and

suspicion of the court which requires a very high degree of proof to dispel the belief that the testator did not have the testamentary capacity, was subjected to undue influence or did not understand what he was doing when he instructed the solicitor Mr Raman P Singh to prepare his Will.

42. The court is unable and not inclined to consider the allegation of forgery at this stage as the Statement of Claim of the Plaintiff was only to invalidate the purported Will was the ground of undue influence. The forgery has not been pleaded. On perusal of case record it is clear that Plaintiff has not sought leave of the court to amend the pleading. The Plaintiff asserts that he managed to access the passport only a month before the trial. The Plaintiff's oral testimony was that the signature in the pass port is not similar to the signature in the Will and therefore the purported will to be declared as void. In my view such explanation is not suffice for the court to now changes the nature of his case and proceed on another basis after pleadings for the Defendant has been closed.
43. After analyzing all the evidence, I find that deceased was capable of making the Will and was capable of understanding and he knew what he was doing.,
44. Therefore the answers to all issues are infavour of the Defendant and hold that will is a valid Will.
45. In the outcome the Plaintiff's action is dismissed with costs summarily assessed in the sum of \$2,000.00 to be paid by the Plaintiff within 28 days from this judgment.

Susantha N. Balapatabendi

JUDGE