

**IN THE HIGH COURT OF FIJI AT SUVA**  
**PROBATE JURISDICTION**

Civil Action No. HPP 48 of 1996

**IN THE MATTER** of Probate of the Estate of  
Gurnam Singh granted on 19<sup>th</sup> day of  
February 1985.

**AND**

**IN THE MATTER** of the Trustees Act.

**BETWEEN** : **HARBANS KAUR** (father's name Nagina Singh) of 6911524<sup>th</sup> Street  
Apt # A 18 Sacramento, CA 95822, USA.

**PLAINTIFF**

**AND** : **GURMEL SINGH** (father's name Kundan Singh) Businessman of  
Princess Road, Tamavua, Suva, Fiji.

**DEFENDANT**

**COUNSELS**

Mr Kapadia V : For the Plaintiff  
Mr Lateef S : For the Defendant

Date of Hearing : 17<sup>th</sup> – 21<sup>st</sup> September, 2015  
Date of Judgment : 6<sup>th</sup> November, 2015

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**J U D G M E N T**

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**Introduction**

[1] The Plaintiff is the widow of the deceased and also having a life interest for an allowance, and co trustee of the estate, along with the Defendant. Only the Defendant involved in the administration of the estate. The Defendant had not made payments for the maintenance of the Plaintiff and her son, in terms of the last will. According to the last will Defendant remained an executor and trustee of the estate ,till the son of the

deceased attain the age 21, which happened in 1995. This action was filed in 1996, by way of originating summons but it was converted to a writ of summons on 25<sup>th</sup> May, 2012 by consent. The Plaintiff is seeking proper accounts of the estate and also seeks an order of the court to not to release the Defendant as a trustee of the estate until he fulfilled the obligations under the will. The Plaintiff also seeks payments for maintenance of the widow and her son from the Defendant, who was no longer an executor at the time of institution of this action.

### Facts

- [2] The Plaintiff is the widow of the deceased. The Defendant is the brother of the deceased. Both of them were co trustees of the estate of the deceased. In accordance with the last will the Defendant remained a co trustee of the estate till the son of the deceased attain the age of 21.
- [3] In accordance with the last will the Plaintiff was granted a reasonable monthly living allowance and the son of the deceased was also granted a reasonable allowance for maintenance including education.
- [4] Though the Plaintiff and Defendant were co trustees of the estate only the Defendant administered the estate and did not pay the Plaintiff or his son for their maintenance.
- [5] The Plaintiff is seeking following orders:
1. "That the Defendant discloses all accounts pertaining to the administration of the Estate including monies used towards the Estate and assets disposed of and acquired and also details of how the estate was administered without any consultation with the Plaintiff as the co-trustee.
  2. That the Defendant takes immediate steps to comply with the terms of the Will.
  3. That the Plaintiff be paid her living allowance as provided in the Will at the rate of USD\$1,000.00 (ONE THOUSAND DOLLARS) per month backdated to date of granting of the Probate and the Plaintiff's son Davindar Singh be given a reasonable sum towards his cost of living and education in the USA also from the date of granting of the probate.
  4. That the Plaintiff's daughters Manreet Kaur, Mandip Kaur and Manjit Kaur be paid a capital sum of

F\$5,000.00 (FIVE THOUSAND FIJI DOLLARS) each together with compounding interest from the date of granting of the Probate.

5. That the Plaintiff's son Davindar Singh be appointed as the Administrator with the Plaintiff of the Estate of Gurnam Singh.
6. That the Defendant not be released from his responsibilities as the administrator of the Estate of the late Gurnam Singh until such time the Defendant has provided all accounts and details regarding the Estate of this Honourable Court and to the Plaintiff."

[6] At the outset the Plaintiff informed the court that they would not be seeking the order 4 above.

[7] For the Plaintiff the son of the Plaintiff gave evidence and for the Defendant the wife of the Defendant, an accountant who prepared estate accounts, and the Defendant himself gave evidence.

[8] Following facts were admitted as per the minutes of the pre-trial conference filed in court.

1. The Plaintiff is the lawful widow and a Co-Trustee of the Estate of Gurnam Singh (the Estate) late of Samabula in Fiji, Company Director who died on 20 March, 1984.
2. GURNAM SINGH'S last Will is dated 20<sup>th</sup> September, 1978 in which he gave (inter-alia) a life interest to his widow, the Plaintiff and the ultimate beneficiary in his Estate, his son Davindar Singh.
3. PROBATE in the Estate was granted to the Plaintiff and the Defendant in terms of the Will and was appointed Executor by the Supreme Court of Fiji on the 19<sup>th</sup> February, 1985.
4. The Plaintiff has four children from her marriage to the late Gurnam Singh namely, Manreet Kaur, Mandip Kaur, Manjit Kaur and Davindar Singh who are all now over the age of 21.
5. KUNDAN SINGH & SONS LIMITED was established in 1978 by Kundan Singh, father of Gurnam Singh and Gurmel Singh and it carried on a Supermarket business from Princess Road, Suva.

6. At the date of the death of Gurnam Singh in 1984 the shareholders of Kundan Singh & Sons Limited were as follows:
- 20 percent - Kundan Singh (10,000)
  - 40 percent - Gurnam Singh (20,000)
  - 40 percent - Gurmel Singh (20,000)
7. The Defendant and/or the Estate of Gurnam Singh are joint owners directly or indirectly of various properties in Suva and Deuba as follows:

Title	Place	Owner
CT No. 18592	Tamavua	Kundan Singh & Sons Ltd
CT No. 12310	Suva	Gurnam Singh & Gurmel Singh
CT No. 18098	Deuba	Harbans Kaur & Gurmel Singh
CT No. 10172	Suva	Gurnam Singh & Gurmel Singh
CT No. 16392	Deuba	Gurnam Singh & Gurmel Singh
NL No. 20067	Tacirua	Gurmel Singh & Harbans Kaur
CT No. 8810	Suva	Gurmel Singh
CT No. 20552	Suva	Gurmel Singh & Harnek Singh
CT No. 20506	Rewa	Gurmel Singh

8. In 1987 the Plaintiff and her infant son and daughters left for California, USA, and have since resided there.
9. The Defendant has administered the Estate's properties and business after grant of Probate on 19<sup>th</sup> February, 1985.
10. The Defendant and the Plaintiff sold the following properties in 1985 which the Estate had an interest in
- CT No. 12747
  - CL No. 1620

[9] This action was allocated to me for hearing on September, 2013 and hearing was fixed for twice in this year alone and Plaintiff sought vacation of the hearing stating that the Plaintiff was indisposed and could not travel to Fiji from USA. Affidavits were filed for proof of medical condition of the Plaintiff and the matter was accordingly vacated.

[10] Both parties have filed their bundles of documents.

### **Analysis**

[11] In the affidavit in opposition which was converted in to a pleading, the Defendant is not objecting to the order for disclosure of the estate accounts. In the originating summons filed on 22<sup>nd</sup> November, 1996 the abovementioned orders were sought. It sought an order for the disclosure of all the accounts relating to the administration of the estate

and also explanation as to how he could take decisions relating to the estate without consulting the widow of the deceased, who was also a co trustee.

[12] The last will of the deceased marked as P1 in clause 2 states as follows:

*"I appoint my wife Harbans Kaur (Father's name Nagina Singh) and my brother Gurmel Singh(father's name Kundan Singh) both of Suva in the Dominion aforesaid Domestice Duties and Company Director respectively to be called "my Trustees") And I Declare that my son Davindra Singh shall become a Trustee upon his attaining the age of 21(twenty one) years in place of my brother Gurmel Singh(f/n Kundan Singh) aforesaid."(emphasis deleted)*

[13] It is an admitted fact that the upon the death of testator Probate was granted upon the proof of the will to the executors who were Plaintiff and Defendant on 19<sup>th</sup> February, 1985. The probate was obtained in the name of the two co-trustees by the Defendant and it was apparently taken by the Defendant and was in the custody of the Defendant. The Plaintiff's then lawyers had reuested for the probate on 28<sup>th</sup> October,1996. (see the exhibit P2)

[14] It is also an admitted fact that son of the deceased, Davindar Singh attained the age of 21 in 1995. By virtue of his attainment of age 21 the Defendant ceased to become a trustee. Even more than a year before this action was filed , a letter was written by the solicitors for the Defendant informing that their client was no longer a co trustee of the estate. (see the Annexed marked B in affidavit of the Plaintiff which was converted in to statement of claim)

[15] Though the last will provide for allowances to the Plaintiff and her son no such sum was paid by the Defendant who administered the estate. There was no evidence of Defendant seeking any approval or consent in the running of the affairs of the estate of the deceased except when two properties were sold. For the said sale the concurrence of the Plaintiff was sought, but apart from that there was no evidence of any knowledge on the part of the Plaintiff regarding the administration of the estate.

[16] So the estate was administered only by the Defendant. The widow of the deceased was not involved in the business affairs even prior to the death of her husband and she basically attended to household chores. She had in fact cooked for the Defendant's family as well as they were living as an extended family.

[17] The Plaintiff was unable to provide audited accounts of the estate which included 40% of Kundan Singh & Sons Limited (KSSL), a private Company. It was a statutory

requirement to have audited accounts in respect of private Company unless there was a unanimous resolution in terms of Section 162 of the Companies Act (Cap 247), not to appoint an auditor. Every such resolution expires before the next Annual General Meeting(AGM). There was no evidence of any AGM produced before me. How the appointment of Directors happened not clear. The violation of the said provision in the Companies Act, was a separate obligation under said law, but if that obligation was met it would have ascertain the correct financial status of the 40% shareholding of KSSL belonged to the estate.

- [18] The Defendant was legally obliged to provide true and correct accounts for the estate till the Plaintiff's son Davindra attained the age of 21, this obligation was not fulfilled and now Defendant states that estate did not have money for the maintenance of the Plaintiff and her son, when they migrated to USA.
- [19] While this action was pending in the courts, the parties were engaged in finding a solution to the impasse between the parties. Both parties have engaged professional accountants to resolve the issue of accounts of the estate since obtaining probate.
- [20] The Plaintiff has filed their bundle of documents in court 13<sup>th</sup> June, 2014, and it contained a comprehensive report dated 7<sup>th</sup> June, 2007 prepared by KPMG auditors and this was marked as P8.
- [21] According to P8, the estate of the deceased comprised of 40% of Kundan Singh & Sons Limited and 50% of the partnership of the estate of the deceased and Defendant (the Partnership). The remaining 60% of the Kundan Singh & Sons Limited (KSSL) owned by the Defendant. There was no evidence of any interest owned solely by the deceased. So, the Defendant while exercising his duties as an executor and trustee of the deceased, he was also managing his own interests 60% in KSSL and 50% in the Partnership. So, the only two assets owned by the estate were co owned by the Defendant.
- [22] The purposes for engaging KPMG were to ascertain the value of the estate and also to examine the administration of the estate.
- [23] The valuation of the estate was not an issue in this action. This was one of the objectives of the reports prepared by the auditors (eg. KPMG) for an intended settlement between the parties.
- [24] The Exhibit P8 had raised several issues relating to the statements provided to them. The documents provided for the review of KPMG contained in P8 were :

- i. Financial Statements of KSSL from 1994 to 2005.
- ii. The Accounts of the Partnership from 1989 to 2004.

- [25] From the above documents provided for review by KPMG, P8 was not dealing with the estate from the date of death. Any accounts prior to the death were also not produced by either party so that the financial status of the KSSL could be determined. The said report also made certain requests for additional materials. Ideally all these materials should have been provided to KPMG , before the report was prepared. The absence of that also indicate reluctance or inability to provide vital information relating to the administration of the estate.
- [26] The accountant, Mr. Whiteside who gave evidence for the Defendant, said all the requests from the Plaintiff were met by them but he was unable to present the accounts of the estate from the time of death. His position was that he was not the person who prepared the accounts at that time as he was retained later to prepare the accounts. If so what material were available and what was supplied was not clear.
- [27] **In the Exhibit P 8 it was disclosed that there were certain properties owned by the Partnership which were not disclosed to KPMG** and were discovered with the help of the solicitors of the Plaintiff.
- [28] The evidence of the Defendant was to deny the facts that were put in cross examination. When considering the evidence for the Defendant it cannot be considered as a faded memory of old or weak person. If that was the case he could have suffered from same loss of memory when he gave evidence in chief and for facts that supported him. He was even arrogant during the cross examination and when questioned about certain remunerations promptly answered that he could not work for 'free'. There was no working for 'free' in this instance as he was the owner and director of the company (KSSL) and there was no evidence of a single AGM for more than 3 decades!
- [29] The conduct of the Defendant in the administration of the estate cannot be considered as candid. Even properties owned by the Partnership were not disclosed and the reason was given for such failure was death of previous solicitors, cannot be accepted. (See document 27 of Defendant's bundles of document)
- [30] In the affidavit in opposition that was sworn by the Defendant he had admitted going to USA and meeting with the Plaintiff. He also admitted in that affidavit the intervention of Amar Singh and consenting to pay maintenance for the widow and her son while in USA. These facts were denied while giving evidence. This cannot be considered a fading of the memory due to time when he could remember other facts. These facts were

revealed by the son of the Plaintiff, too. The Defendant who remained in the court while the Plaintiff's witness was giving evidence should have recollected such an event.

[31] Document 28 of the Defendant's bundle of document also admits the above facts. It states that Defendants had even consented to pay \$500.00 per month to the Plaintiff in 1993 when he visited USA.

[32] So the evidence of the Defendant had failed the test of consistency per se as well as consistency inter se. The Defendant's evidence in the analysis cannot be considered as correct position of the estate. There was no indication of any adversity in their extended family before the death of Plaintiff's husband. At that time late Kundan Singh who was the founder of the business was also living and he had owned 10% of KSSL. If the business was on the verge of bankruptcy how could the Defendant's family travel to Canada and also stay for some time was not revealed. Even after the death apart from oral evidence that 'business was bad' there was no proof that it could not make a reasonable payment for the widow and the child of the deceased. If the full maintenance could not be met, at least some amount could have been paid with explanation as to the financial status of the estate. The estate owned 40% of Kundan Singh & Sons Ltd. There was no correspondence that 'business was bad'. In fact Defendant's bundle included documents to contrary (See document 28 of Defendant's bundle).

[33] In the affidavit in opposition inter alia stated the following facts:

- a. Did not pay maintenance to widow and her son as there were no monies from the estate.
- b. The return Air fare to Plaintiff and her son to USA was provided and also tickets to return to Fiji while in USA.
- c. Supported the Plaintiff's family while they were in Fiji.
- d. **Defendants son Baljeet , provided money to the Plaintiff in USA when he visited them.**
- e. **Plaintiff's uncle Amar Singh and Defendant had a meeting and gave money for opening of an account in USA so that he could send money.**

[34] When the Defendant gave evidence he refused (d) and (e) above. He said he could not give money as the Plaintiff was not talking to him. He also said he was unaware of the place where the Plaintiff lived in USA. This again fails the test of probability in the analysis of the evidence. If the Defendant was unaware of the place in USA, how could he provide the tickets to return to Fiji.



- [35] Even if the Plaintiff was not talking to the Defendant, he could have arranged some allowance for her maintenance. Though he said that the estate did not have money for payment as the business was in a state of bankruptcy there was no evidence to support such dire state of affairs. All this indicate Defendant's evidence cannot be relied upon.
- [36] Shortly before the death of the deceased, there was a wedding for the eldest daughter of the Plaintiff and for that substantial sum was spent. Even the family of the Plaintiff had visited Canada in order to do shopping for the wedding . According to the evidence of Davindar, his late father had even bought a car just before the wedding. When one considers the conduct of the Defendant and his family after the death of the Plaintiff's husband there was no indication of adversity. So on the balance of probability it is not proved that there was no money to spend on the widow and her son for their maintenance in USA. In fact there is evidence produced by the Defendant to the contrary (See document 28 of Defendants Bundles filed on 8/3/2006).
- [37] In the affidavit in opposition the Defendant had not objected to court granting orders for the disclosure of estate accounts and stated in the said affidavit that he had already provided them. KPMG a multinational auditing firm, had raised issues in the Exhibit P8 relating to the conduct of the Defendant in providing full and frank disclosures relating to the estae.
- [38] At paragraph 1.2.1 of the Exhibit P8 states as follows:  
“  
• .....  
• Based on title searches carried out by Sherani & Co additional properties were identified as being jointly owned by the Estate and Mr. Gurmel Singh. These properties are not reflected in the financial statements of the Partnership. Refer to Chapter 5.1.2 for listing of these properties.”
- [39] The properties that were not disclosed in the financial statements had to be discovered by the solicitors for the Plaintiff and this indicates the nature of the affairs between the parties.
- [40] It is a trite law that the executor or trustee should be able to provide true and correct accounts for the estate. In this case substantial part of the estate was the financial statement of KSSL and the Defendant admitted managing the said entity. According to him it was a huge turn around of the entire business since the death of his brother and all that was due to his business acumen. If so why he failed to comply with mandatory statutory provision contained in Section 162 of the Companies Act was not explained.

- [41] The Plaintiff's son had attained the age of 21 in 1995 and by virtue of that Defendant ceased to be a co-trustee for the estate. So, even at the time of the institution of this action the Defendant's term as co-executor and co-trustee of the estate had expired and this was also communicated to the Plaintiff.
- [42] The Plaintiff seeks an order of the court to compel the Defendant to do certain acts stated in the last will. But the Defendant was no longer a co-trustee even at the time of institution of this action. So he cannot be re-appointed to fulfil the last will.
- [43] I was not presented with any case law or statutory provision that allows court to re-appoint an executor who had not fulfilled the obligations under the will. This is a vital legal issue and I could not find a statutory provision for such an order. The Defendant does not desire to act as executor or trustee and this position he had indicated to the Plaintiff in 1995. (See the annexed B to the affidavit in support that was converted to a pleading).
- [44] A person cannot be compelled to be re-appointed as an executor on the basis that he had not done his duties properly.
- [45] According to the analysis of the evidence before me the estate had sufficient money to pay a reasonable maintenance for the Plaintiff as well as her son, while they were in USA. The Defendant had produced documents in this action (See document 28 of Defendant's Bundle of Documents filed on 8/3/2006) to that effect before the matter was converted to a writ of summons.
- [46] It seemed that relationship between the Plaintiff and the Defendant were strained after the death of Plaintiff's husband. The Plaintiff did not give evidence but her affidavit filed in this case which was converted in to a pleading can be considered as a sworn testimony of the Plaintiff.
- [47] The son of the Plaintiff gave evidence and said that his mother was not in a position to give evidence even from a video link. This can be accepted considering the circumstances of this case where the Plaintiff sought no less than 3 consecutive adjournments and the last adjournment also accompanied medical evidence to that effect.
- [48] The Plaintiff stated that how he was ill treated after the death of his father by the Defendant. He said even for a small expenses necessary for education were denied to him while the Defendant's sons got the best in everything including education in foreign.

- [49] The submissions of the Defendant argue that a Co trustee cannot sue against the other co trustee. This is not the correct position. A co trustee who had not participated in administration of the estate can obtain an order of the court against the other co trustee. The Plaintiff had not participated in the administration of KSSL or the Partnership. The only instance her consent was obtained was to sell two properties owned by the Partnership. So, the estate was administered by the Defendant and if he does some act in accordance with the last will the Plaintiff should not be precluded from seeking legal redress.
- [50] The Plaintiff is seeking an order for payment of money for her maintenance and for her son's maintenance from the Defendant. The son of the Plaintiff is currently the co executor and trustee of the estate with her. Defendant cannot be ordered to pay from estate any money as had ceased to become an executor, in 1995.

### Conclusion

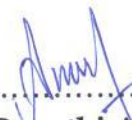
- [51] The Plaintiff and the Defendant were executors and trustees of the estate of the deceased. The period of Defendant's duties as an executor ended with Davidar Singh, the son of the deceased attaining the age of 21 which happened in 1995. This action was filed in 1996 and by that time the Defendant was not an executor in terms of the last will. I have not been provided with any case law or statutory provision that a court can compel an unwilling former executor to function as an executor in order to fulfil the duties that were not performed. In the circumstances I will have to refuse orders that compel the Defendant to comply with the last will. There is no need of special order to appoint Davidar Singh as an executor of the estate as he attained this position when he reached the age of 21, in 1995. I cannot re appoint Defendant to act as administrator of the estate nearly after 20 years after his term ended in accordance with the last will. In the circumstances the said request is refused. The order for disclosure of all accounts from the time of the appointment of co executor and co trustee of the estate is granted. The reasonable allowance for the Plaintiff and her son can be determined by them they are the only executors and trustees of the estate. The sole beneficiary of the residue of the estate is Davindar Singh. The cost of this action is summarily assessed at \$5000.00.

**Final Orders**

- a. The Defendant is ordered to disclose all the accounts pertaining to the administration of the estate till the attainment of age 21 to Davidar Singh. (i.e. 1985 – 1995)
- b. Cost of this action is summarily assessed at \$ 5,000.00.

Dated at Suva this 6<sup>th</sup> day of November, 2015.



  
.....  
Justice Deepthi Amaratunga  
High Court, Suva