

IN THE HIGH COURT OF FIJI

AT SUVA

PROBATE JURISDICTION

Probate Action No.: 32 of 1992

IN ESTATE OF MOHAN DEI late of
Nasea, Labasa, Fiji, Landlord, Decease,
Testate

BETWEEN : **SUKHMA WATI SAMUJH** of Nasea, Labasa

FIRST PLAINTIFF

AND : **BIJMA WATI SAMUJH** of Nasea, Labasa

SECOND PLAINTIFF

AND : **PURAN SAMUJH** formerly of Nasea, Labasa

THIRD PLAINTIFF

AND : **RAM SHANKAR** of Nasea, Labasa

DEFENDANT

Counsel : **Mr. A. Sen for the 1st and 2nd Plaintiffs**

3rd Plaintiff appeared in Person

Mr. A. Kohli for the Defendant

Date of Hearing : **15th and 16th September, 2016**

Date of Judgment : **30th September, 2016**

JUDGMENT

INTRODUCTION

1. The Plaintiff seeks a declaration as to the validity of the Last Will made on the 26th October, 1989. The testator of the Last Will was the mother of the parties to the action and she died on 6th November, 1989. There was evidence that she was in a state of coma from 30th October, 1989 till her death. The funeral had taken on the following day of her death. The Plaintiffs are the executors and also beneficiaries of the deceased. Though there were 8 children at the time of her death only 3 children were

made beneficiaries of the estate. The Defendant who was conducting a mechanical workshop on the premises at the time of death, was not given any share of the estate and had lodged a caveat against the grant of the probate. His contention is that the deceased was not in a proper state of mind on 26th October, 1989 in order to execute a Last Will. Neither side called any medical evidence to assess the status of mind of the testator at the time of the making of the Last Will.

FACTS

2. The Plaintiffs are the executors and sole beneficiaries of the Last Will made on 26th October, 1989 (the Last Will). 1st and 2nd Defendants are represented by a legal practitioner, but the 3rd Plaintiff appeared *in person*. Though the 3rd Plaintiff is also a beneficiary under the Last Will he did not associate himself with the other two Plaintiffs. At the last minute before the trial 3rd Plaintiff through a lawyer sought to file an application to add him as a third party and to postpone the hearing, which I did not allow as it appeared a delaying a Probate Action filed in 1992 is unjustified. The 3rd Plaintiff was a teacher from New Zealand and presently he is engaged in ADR in NZ. The 3rd Plaintiff had ample time for such an application. This matter was listed before me in Suva for mention to fix hearing in April, 2016 and since there was already an order made by a former judge on 29th January, 1993, to transfer the matter to Labasa for hearing it was transferred to Labasa High Court. Since the transfer to the High Court of Labasa, some efforts were made for mediation and the 3rd Plaintiff cannot on the day before trial seek to adjourn the hearing by filing an application to make him a third party. For the 1st and 2nd Plaintiffs two witnesses were called. The third Plaintiff gave evidence for himself and for the Defendant two witnesses gave evidence including himself.

THE LAW

3. The proponents of the will, the Plaintiffs bore the burden of proof to establish that the testatrix was of sound mind, memory and understanding.
4. The law on Testamentary Capacity is well settled. The Fiji Court of Appeal in Ho v Ho ABU06 of 96S (decided 16th May, 1997) (unreported) referred to O'Leary CJ in the New Zealand Court of Appeal in *Re White* [1951] NZLR 393, 409 –

*"If a will rational on the fact of it is shown to have been executed and attested in the normal manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But, if there are circumstances in evidence which counter-balance that presumption, the decree of the court must be against its validity under the evidence on the whole is sufficient to establish affirmatively that the testator was not of sound mind when he executed it: (per Cresswell, J in **Symes v Green** (1859) 1 Sw&Tr 401; 164 ER 785). In the end the Tribunal must be able affirmatively, on a review of the whole evidence, to declare itself satisfied of the testator's competence at the time of the execution of the will; (**Smith v Tebitt** (1867) LR 1 P & D 398, 436 and **Sutton v Sadler** (1857) 3 CB (NS) 87, 97; (1857) Eng R 738; 140 ER 671, 675)"*

Further, quoted the High Court of Australia in **Worth v Claohm** [1952] HCA 67; (1953). 86 CLR 439. 453 as follows

"A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the Plaintiff the burden of satisfying the conscience of the Court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt of proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the Court; but, that examination is having been made, a residual doubt is not enough to defeat the Plaintiff's claim for probate unless it is felt by the Court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution." (Emphasis added)

EVIDENCE AND ANALYSIS

5. The Last Will dated 26th October, 1989 was executed before a solicitor and also a witness. This witness was not called to give evidence, but the solicitor who prepared the said Last Will gave evidence. He said that he was instructed to prepare the Last Will by the deceased. He admitted that at the time of the execution of the Last Will she was not in a state where she could walk from her house to his office as his office and her place of residence were on upper floors. The distance between the two was less than 400m, and he was informed to come to her home and take instructions regarding the Last Will. So it is safe to assume that the deceased had difficulty in

ascending and descending the steps, and the solicitor went to the residence to obtain instructions and also for execution of the same.

6. The solicitor said that he visited the house three times within a short space of time and the first time it was to obtain the instructions and next was to get the approval for the Last Will and then some amendments were made to the Last Will and those amendments were incorporate in his office and finally it was brought and it was executed by placing her thumb print in appropriate places including the places where the amendments were made.
7. He also stated that after amendments were suggested, he took it to his office and brought it back for execution but this was done after about few days. He was cross examined and in his cross-examination he said that when he visited the deceased she could instruct him and also understand things, so there was no doubt about the testamentary capacity in the mind of the solicitor. He also said there was no need for obtaining medical report. The difficulty of walking and climbing the steps would not show that the deceased did not possess testamentary capacity. The testamentary capacity is a mental status and physical disabilities and frailties would not necessarily presume lack of testamentary capacity.
8. In this action there was no medical report produced to prove the condition of the Plaintiff at the time of the preparation of the Last Will. This is not done as a practice (see *Ho v Ho* (supra). So the condition of the deceased has to be ascertained from the oral evidence of the witnesses. There are conflicting evidence and the credibility and evaluation of the evidence is needed for determination of the issue before the court.
9. The solicitor said that he explained the contents of the Will in Hindi as the deceased and the witness to the Last Will understood Hindi. He said he took the left thumb print of the testator. He said the execution of the Last Will would have taken about 20 minutes. He also said that testatrix called him over the telephone before the execution of the Last Will. He was the family lawyer and did not observe any unusual behaviour or status when he went for the attestation or during the two previous visits for obtaining instructions to prepare the Last Will. When he went after the preparation of the Last Will where amendments were suggested again the testatrix remained in her

usual manner. There were minor alterations and that alterations were done in the office upon the instructions of the deceased. Where alterations were made the left thumb mark of the deceased was placed.

10. If the alterations were done at the instigation of the testatrix, she could not have been unconscious. The 2nd Plaintiff, BijmaWati, also gave evidence and in her evidence she said that she was not present at the place where the Last Will was made but was in the house at that time. She remembered the day and said she did not ask the solicitor to come but maybe it was her late brother Chandrika Prasad who requested the solicitor to come.
11. The third Plaintiff also said that late Chandrika Prasad, also came to visit him in New Zealand (NZ) and stayed with him in New Zealand, sometime after the incident and had confirmed that he requested the solicitor to come home on request of the mother. According to him the reason for execution of the Last Will was requests by her daughters who looked after her during her old age.
12. So on the analysis of evidence the 3rd Plaintiff and the BijmaWati and the Solicitor, the deceased was able to give instructions, and if there was any doubts as to her status of mind late Chandrika Prasad would not have requested the solicitor to come home for preparation of a Last Will. The solicitor said he was requested by testatrix. According to the evidence of 3rd Plaintiff late Chandrika Prasad had even discussed the instructions that the testatrix had in her mind, and had even shown some concern about 3rd Plaintiff being left out from the Last Will, and to change her mind to include 3rd Plaintiff as a beneficiary. Though the circumstances that resulted 3rd Plaintiff being a beneficiary is hearsay, the fact that was stated to the witness by late Chandrika Prasad, was not hearsay. According to the Plaintiff late Chandirka Prasad had told that the deceased desired to bequeath her estate to the two daughters who were looking after her as they were left with the burden of taking care of her in her advanced age. This may be probable under the circumstances. The two daughters of the deceased are the 1st and 2nd Plaintiffs and they remained unmarried and stayed with the mother till her demise taking care of her. As a mother, she would have concerned about their welfare as they remained spinsters and had obviously devoted their lives to welfare of the mother. In the circumstances the last Will is rational.

13. The 3rd Plaintiff's evidence was that he talked with the late mother over the phone even as late as 20th October, 1989. He did not state how he remembered this date, but said that she could talk rationally over the phone. So, the condition of the testatrix of the last Will was that she could talk over the phone with another person at that time. If her condition was deteriorated to a position where she could not talk and understand, at least 3rd Plaintiff would have been informed about it prior to 26th October, 1989. According to the Defendant his mother was in a coma two weeks prior to her death. On analysis of evidence this cannot be accepted.
14. After few days from the attestation of the last will her condition deteriorated and by 30th October, 1989 she could not talk and it was 2nd Plaintiff who requested the 3rd Plaintiff regarding the deterioration of the health condition of the late mother and he had come immediately on 1st November, 1989. According to the 3rd Plaintiff, by the time 3rd Plaintiff came from NZ, the late mother's condition was that she could not even talk or recognize him or even open her eyes, but he had whispered his name to the mother and mother responded with a 'tight grip' of his hand.
15. So, about 4 days after the attestation of the Last Will the condition of the testator had deteriorated to a position that she could not even talk or recognize a person. A person who is of sound mental condition can deteriorate within days and this does not prove the status of mind prior to such deterioration. When this happened to an old person it may be difficult to assume the status of mind few days prior to death. In this case there is conflicting evidence about her condition.
16. The 3rd Plaintiff's evidence was that on 20th October, 1989 when he talked to the late mother he had inquired about the health of the mother and she had replied and said that she would get better. So, it cannot be said that even as late as 5 days prior to the attestation of the Last Will she was conscious about things and could make a rational decision and reply to a person, though she was weak and old and perhaps may be deteriorating in her health that resulted her being unconscious about 10 days later by 30th October. This proves that evidence of Hari Charan that late mother was in a coma two months prior to her death was incorrect.

17. The 3rd Plaintiff's evidence was that late Chandrika Prasad had told him that he was the person, who arranged the attestation of the Last Will on 26th October, 1989. Late Chandrika Prasad had arranged even the witness Mr S. Fong to be present when the attestation was performed. He had known that he would not be made a beneficiary of the Last Will, but despite that he arranged the preparation of the Last Will.
18. Late Chandrika Prasad would not have done all these if late mother was not in a condition to make a Last Will. All this was done when he was not made a beneficiary. He had known that he would not be a beneficiary even prior to execution of Last Will. At the same time he had known that two sisters would be beneficiaries in the Last Will. He did not even lodge a caveat or even contested the Last Will. It is strange when there were 5 other children who were left out from the Last Will, only one child lodged the caveat and became Defendant in this case.
19. Late Chandirka Prasad according to the 3rd Plaintiff had admitted that he had discussed about the beneficiaries of the Last Will with late mother. According to him he had reminded late mother that 3rd Plaintiff should also be a beneficiary and she had done so. If there was any doubt as to mother's mental status late Chandrika Prasad would not have arranged and or discuss such matters with his mother. This is more significant as he knew that he was not a beneficiary, yet did everything to arrange the instructions, preparation and finally attestation of the Last Will. Had he requested anything or discussed anything with a late mother if she had not understood it.
20. The evidence of the Defendant cannot be considered as truth. He was a person who would be directly benefited if the estate is declared intestate. In his evidence he said that he had visited mother every half an hour, but had not seen solicitor's previous two visits. He said when the attestation was over he had seen the solicitor and Mr. Fong going out and met them at the gate. He could not see when instructions were obtained or when the amendments were suggested. The late mother had not been close to himself and she had not discussed anything with him. The evidence was that he used to live in the same house, but the mother did not like his behaviour, specially 'drinking'.

21. The Defendant said he immediately queried as to why they had come to their house. This is a strange behaviour if he was unaware of the execution of the Last Will and if the late mother was very ill. If the late mother was not in a condition to understand things, why should the Defendant get panic seeing a family lawyer and another person as they might have come to visit them or for some family matter.
22. When he encountered them at the gate, Mr. Fong had said that they did what his mother always wanted. If they wanted to execute the Last Will secretly, such a thing would not have been uttered. This again indicates that the late mother's wish and her condition had deteriorated after execution of Last Will. She could understand the contents of the will when it was attested and it was prepared upon her request and it was what the late mother wanted for some time.
23. The 3rd Plaintiff in his evidence said that the Last Will in question was prepared by the instigation of the two sisters who were taking care of the mother. This may be true considering the circumstances of the case. Both the sisters were unmarried and had lived with the mother till her death and they were the persons who had taken care of the mother. Taking care of a parent by a child or children is not a strange thing in the Eastern culture and in such instances sometimes they may think that they were not adequately compensated in the distribution of estate. So they may have inquired this aspect from the mother. In this case there were 8 children but only two daughters who did everything for the late mother when she fell sickly. The other children had moved out and were not responsible for taking care of the sickly mother.
24. There is uncontroverted evidence that the testatrix of the Last Will encountered a 'stroke' in 1987. She had recovered from this but there was a subsequent minor stroke that further deteriorated her condition, but she was able to live till the end of 1989. During this period she was able to talk to others over the phone and make rational judgments. She had talked with the 3rd Plaintiff on 20th October, 1989 and had told that her health condition would improve. This evidence was given by the 3rd Plaintiff, who was acting independently of the other two Plaintiffs. If this is true the late mother not only could talk over the phone even as late as 20th October, (i.e. 5 days before the attestation) but also had high hopes that she would recover from her deteriorating health. So, this would indicate that she was stronger in her mind, than the body and

was not easily giving up, though her body was deteriorating due to advanced age and the two strokes that she suffered since 1987. If she ever thought of failing in her health condition, she would have requested the 3rd Plaintiff to come and see her.

25. If her condition deteriorated to an extent that she could not talk, prior to 30th October, 1989 there was no reason for not to inform such condition to the 3rd Plaintiff by the other members of the family specially the two sisters who looked after the late mother. It is not disputed that the Plaintiff came immediately after he received the news of the condition of the late mother. It is also admitted that the 3rd Plaintiff had cordial relationship with his sisters at that time and he was received at the Airport by the 2nd Plaintiff.
26. The evidence of the Defendant was that the late mother was sick and lived like a vegetable in the house during the time of the attestation of the Last Will. He said she was like that for two weeks prior to her death. This cannot be accepted. If so 3rd Plaintiff would have been informed much earlier as there was cordial relationship between the 3rd Plaintiff and rest of the family members.
27. In the analysis of evidence it was not proved that the deceased was bedridden at the time of the attestation of the Last Will or before that. There was evidence that the Defendant and his behaviour were not helpful for an aging mother, and she did not bequeath estate to him. Though he used to engage in a garage on the ground floor of the premises where deceased lived the late mother did not trust him and his dissatisfaction is mainly due to his behaviour. So, the Defendant being left out from the Last Will cannot be considered as an unusual thing, or irrational thing.
28. The person who gave evidence for the Defendant, was another brother (Hari Charan) who lived in Fiji, but had not visited mother when she was in such a serious state on the date she passed away or even prior to that when she was taken to the hospital. He said that he was informed after her death on the day she passed away in the evening. There was no evidence even on receipt of the news that he came to hospital or to home. He was not part of the decision to cremate the deceased on the following day. This indicates that he was somewhat distant from family affairs, though he said that he visited the deceased 'everyday'.

29. Hari Charan, who gave evidence for the Defendant further said that prior to two months of her death, the mother was bed-ridden and said that every day he had visited mother for the said two months till she died. This cannot be correct as he had failed to visit her on the date of her death. Even after her death was conveyed he had not come that day. The 2nd Plaintiff said that he told that he had work to do when informed about the mother's death. So the evidence of Hari Charan, that the testator was bedridden for 2 months where she could not even do her basic things cannot be accepted. In fact the Defendant did not state such a situation prevailing 2 months prior to the death. Both the Defendant and Hari Charan who did not obtain a share from the estate of late mother would benefit if the Last Will is not accepted. So their evidence has to weigh accordingly. Even the 2nd Plaintiff is an interested party. The only person who would not benefit from the decision was the solicitor. He was the person who attested the Last Will.
30. Few days after the execution of the Last Will the condition of the late mother had deteriorated irreversibly, but this does not prove the condition of the mind on 26th October, 1989. Considering the circumstances it would not be irrational to bequeath the estate to the two daughters and 3rd Plaintiff. The inclusion of the 3rd Plaintiff may be because he is living abroad, and thought that some property should be available in Fiji for him to return at a later stage.
31. The Defendant had raised the issue of not obtaining the probate promptly after the death, but 3rd Plaintiff explained their Hindu rituals as not to deal with the issues of dead person's estate for at least one year.
32. The application for probate was done in 1991 and an affidavit for that application was made in June, 1990. The 3rd Plaintiff had placed his signature in NZ and had sworn that the Last Will annexed to the said affidavit was the proper Last Will.
33. So the issue of delay cannot be considered in favour of Defendant's position. Apart from that he also stated that the execution of the Last Will was informed to another brother immediately and he had indicated to look in to it, but this brother did not even gave evidence. So, apart from the Defendant and Hari Charan no other sibling did not

come to give evidence for the Defendant. This proves that they do not dispute the Last Will, despite not being made beneficiaries.

CONCLUSION


34. Considering the evidence in totality it is not established on the balance of probability that the testatrix lacked the capacity to make a last will on 26th October, 1989. The Last Will is rational under circumstances. Few days after the execution of the Last Will the condition of the testatrix deteriorating, may raise a '*residual doubt*' about her condition, but this is not sufficient to declare the Last Will invalid. (see Worth v Clasohm [1952] HCA 67; (1953). 86 CLR 439. 453. On 30th October, 1989 and afterwards her condition had deteriorated, this cannot be used to prove the mental status of the mother 4 days prior. On the balance of probability there is no proof that on 26th October, 1989 when the Last Will was executed the testatrix lacked testamentary capacity. On the balance of probability the will is proved as a Last Will of the testatrix made in accordance with the provisions of the law. The cost of this action is assessed summarily at \$4000. Cost to be paid by the Defendant to the Plaintiffs.

FINAL ORDERS

- a. The last will made on 26th October, 1989 is the last will of the testatrix in accordance with the law.
- b. Cost of this action is assessed summarily at \$4,000.

Dated at Suva this 30th day of September, 2016




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