IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Probate Action No.: HPP 09 of 2012

BETWEEN : **JAGAN NATH** of Lot 33. Nasilivata Road. Nadera, Nasinu

1ST PLAINTIFF

JAGAN NATH of Nadera, Nasinu and **NOKAIA** of Rakiraki, Ra as the Administrators of the Estate of Ramaiya late of Nasilivata Road, Nadera.

2ND PLAINTIFF

AND : **DENNIS NARAYAN** and **NATHAN RAMA NAIDU** both of 419 Moreland. Pascoevale South. Melbourne Victoria Queensland. Australia 3044.

1ST DEFENDANT

AND : **SARGENT SAMI NAIDU** of Nadera. Nasinu. Student.

2ND DEFENDANT

Counsel : **Mr. Maopa E for the Plaintiff**
Mr. O'Driscoll G for the Defendants
Date of Hearing : **5th and 6th March, 2018**
Date of Judgment : **27th April, 2018**

JUDGMENT

INTRODUCTION

1. This is an application made under Probate Jurisdiction. for revocation of grant (Probate no 48213) of letters of administration dated 3rd March.2009 and also seeking orders to grant Probate in favour of 1st Plaintiff as the executor and trustee in terms of the purported last will dated 19th December. 2005 I used the word purported due to the reason that last will. was found 4 years from the death when the Plaintiff had already obtained letters of administration through non disclosure of 1st Defendants as children of the deceased when that fact was known to the Plaintiff. The 1st Defendants filed an action for a declaration due

to the denial of Plaintiff this known fact, and they were successful. After that the purported will was discovered in the house where Plaintiff lived at that time. The purported will bequeaths entire estate of the deceased to Plaintiff. The Plaintiff failed to call any of the witnesses to the will before the court, at hearing, but had filed an affidavit of one of the witnesses. The burden of proof of the purported will is with the Plaintiff and there is no need for the Defendant to prove that it was a fraud, as claimed by the Plaintiff in the submission. At the hearing the Plaintiff and Reena Devi and the lawyer who attested the affidavit of the attesting witness of the purported will, gave evidence for the Plaintiff. For the Defendants Deceased youngest son who lived with him till until death gave evidence and the 1st Defendant also gave evidence.

FACTS

2. The Plaintiff is 63 years old and he is brother of late Ramaiya who is elder to him. Late Ramaiya was employed in the British Army attached to Signals Division and he was stationed in various locations where British Army, had interests.

3. Late Ramaiya was married twice and had children. From his first marriage he had two children and one child from the subsequent marriage. At the time of the demise he was divorced and was living with the youngest child S.S. Naidu. The other two children from first marriage did not live with him and after divorced lived with mother and had gone overseas for studies and had settled down abroad. They were not informed about the death of their father and they did not attend the funeral.

4. Late Ramaiya passed away on 7th April, 2008 and at the time of his death he lived with his youngest son S.S. Naidu. After the death the Plaintiff and Reena Devi had moved to the house where late Ramaiya lived with S. S. Naidu.

5. 1st Plaintiff and his brother obtained Letters of Administration in respect of late Ramaiya's estate on 3rd March, 2009. The joint administrator is dead at the time of this hearing.

6. 1st Defendants were found to be children of late Ramaiya by High Court in Probate Action HPP No 11 of 2011.

7. The Plaintiff said he visited deceased and his youngest son frequently. After the death of late Ramaiya, S.S Naidu the Plaintiff and Reena Devi lived in same premises. After few years S.S. Naidu had moved out from that house. This is where purported will was found.

8. Reena Devi's evidence was that she found a last will of late Ramaiya inside a cabinet. She could not state the date or even the year she discovered it. When she found it she had told this to the Plaintiff and he had asked her to put it back in the cabinet.

9. The Plaintiff stated that he took the last will to solicitor who had prepared it.

10. Neither the Plaintiff nor S.S. Naidu were told by the deceased that he prepared a will. After his death his belongings were searched but no will was found, though certain vital evidence was found such as his investments in Unit Trusts and also life insurance policy with an overseas insurance company.

11. According to the evidence the will was found in 2012, four years after the death, and success of the HPP No. 11 of 2011 in favour of 1st Defendants.

12. One of the two sons from the first marriage of late Ramaiya gave evidence. He said he heard about his father's death and inquired about the estate from the Plaintiff and he had told him to accept some money and relinquish his rights. The 1st Defendants did not like that idea. The Plaintiff had denied that the 1st Defendants were children of the deceased thereafter and

ANALYSIS

13. This action was filed by the Plaintiff invoking the Probate Jurisdiction of the High Court.

Order 76 rule 1(2) of the High Court Rules of 1988 states as follows

> *"(2) In these Rules "probate action" means an* ***action for the grant of probate of the will, or letters of administration of the estate, of a***

> ***deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will,*** *not being an action which is non-contentious or common form probate business* (emphasis added)

14. So this action will only confine to grant of the probate of the will of the deceased person or for revocation of the grant already made in favour of the 1st Defendant. So any claim or counterclaim needs to be in conformity with the jurisdiction, and needs to be orders in terms of Order 76 rule 1(2) of the High Court Rules of 1988. Since the said High Court Order uses word 'means' the meaning contained in that provision is exclusive.

15. In Chadwick LJ explained in ***Fuller v Strum*** [2001] EWCA Civ 1879 at [59], [2002] 2 All ER 87 at [59], [2002] 1 WLR 1097:[1]

> *It is not, and cannot be, in dispute that, before admitting the document to probate, the* ***judge needed to be satisfied that*** *it did truly* ***represent the testator's testamentary intentions****, or, to use the traditional phrase, that the testator "knew and approved" its contents. Nor is it in dispute that, if satisfied that the testator knew and approved of part only of the contents of the document, the judge was bound, before admitting the document to probate, to require that those parts with respect to which he was not so satisfied be struck out.'*

16. The Plaintiff in the amended writ of summons seeking an order for revocation of grant (Probate No. 48213) letters of administration dated 3rd March, 2009, and this can be granted even if the last will is not proved as this grant was obtained through misrepresentation of all the children of the deceased. The statement of defence also seeks to revocation of the said grant on that basis.

17. The Plaintiff while giving evidence admitted that 1st named Defendants as children of the deceased, 2nd Defendant had also attained the age of majority now and can seek letters of administration, which he could not do at the time of death of late Ramaiya.

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[1] *Marley v Rawlings and another* - [2014] 1 All ER 807 at p814

18. The Plaintiff is seeking an order of the court to grant probate in favour of the 1st Plaintiff in terms of the purported will of late Harold Ramaiya Naidu (deceased) dated 19th December, 2005

19. The burden of proof is with the Plaintiff. The purported will was found four years after the death. It was found by Reena Devi, who had lived with the Plaintiff for a long time in the residence where late Ramaiya and S. S Naidu lived. She had moved to the deceased house after the death of late Ramaiya and had since remained there. According to her work in that house of late Ramaiya was to clean the house.

20. S. S. Naidu who was the only person who lived with deceased at the time of the death, lived in the same house for some time with Plaintiff and also Reena Devi. His evidence was that he had searched the cabinet where the purported last will was discovered by Reena Devi.

21. According to the evidence of Reena Devi she cleaned the house and garden. If so why she could not find the last will for 4 years was not explained. This creates a reasonable suspicion. There was no reason that she could not have examined the cabinet which was in the living room and according to S.S. Naidu it was examined short time after the death of late Ramaiya to find any important documentation of the deceased including a last will.

22. So, it would not have taken 4 years to find a last will if that was available in the house they lived. Since it was not folded the document could be easily identifiable in household documents due to its size of paper. According to Reena Devi it was in an envelope and it would have been a large envelope and rarely such an item will not get identified. in a search for documents.

23. Late Ramaiya was a person who had worked abroad and had also invested in diversified instruments such as unit trusts, foreign personal insurance etc. If he made a last will it is highly unlikely that he would not bequeath a sum of money for his minor son S. S. Naidu at least for his education and or for higher studies. The only provision contained in the purported will was to look after and maintain him, which is subject to good behaviour.

24. Since deceased lived with his child he would have said details about the last will to a reliable person. too. If so it is unlikely that 4 years would take to search such a vital document. when other properties such as bank accounts. unit trusts. real estate. life insurance with foreign company were all found and also dealt before the discovery of the will by the Plaintiff.

25. Undisputed evidence is that S.S. Naidu who was a minor, and late Ramaiya were living in the same premises for a long time and if a last will was prepared in 2005 he would have said that to his son S. S. Naidu, too. It is also suspicious that the solicitor was a lawyer practiced in Rakiraki and there was no evidence of deceased used him as his lawyer. There was no reason for deceased to go to Rakiraki in 2005 to execute a last will.

26. According to the Plaintiff's evidence he visited the residence of late Ramaiya regularly and it is unlikely not to inform about the last will when he was the executor and sole beneficiary under that will. It is also strange not to inform about last will or at least discuss about a last will with Plaintiff.

27. Another suspicious circumstance is the time of the discovery and manner of discovery and also neither the lawyer nor any of the witnesses to the will gave evidence at the hearing so that the truth can be ascertained through cross-examination.

28. One witness to the will had given an affidavit and the lawyer who attested the will gave evidence. The lawyer cannot give evidence as to the facts contained in the affidavit. The contents of the affidavit are solely experiences. of the deponent. The lawyer only stated that it was sworn before him.

29. The circumstances of this case arouse suspicion of the court, specially the time of discovery of the will and the misrepresentation of the Plaintiff in obtaining letters of administration and also his persistent denial of a known fact that 2nd Defendants are children of the deceased, in probate action HPP No. 11 of 2011.

30 In ***Re Cutcliffe (deceased) Le Duc v Veness and Another*** [1958] 3 All ER 642 at 647 held.

'On the other part of the case, the learned judge recognised that this was one of those cases where the ***suspicion*** *of the court was aroused and that the situation was parallel with that which existed in Tyrrell v Painton ([1894] P 151) There the testatrix had made wills in favour of the defendant in 1880 and in 1884, but afterwards became dissatisfied with him and made complaints against him. On 7 November 1892, she made a will leaving her property to the plaintiff On 9 November two days later, the son of the defendant brought the testatrix a will prepared by him, leaving her property to the defendant. The will was executed by her in the presence of and attested by the son of the defendant and a young friend of his* ***The only evidence adduced by the defendant was that of the attesting witnesses,*** *who were examined, and it was held on appeal that the* ***evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the later will was prepared*** *and executed and that the former will must be established The rule in Barry v Butlin was applied by the Court of Appeal which reversed the decision of the trial judge and found for the earlier will. Davey LJ said (ibid., at p 159):*

"It must not be supposed that the principle in Barry v Butlin is confined to cases where the person who prepares the will is the person who takes the benefit under it--that is one state of things which raises a ***suspicion:*** *but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded* ***suspicion*** *that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that* ***suspicion*** *is removed. Here the circumstances were most suspicious, and the question a judge has to ask himself is whether the defendants have discharged themselves of the onus of showing the righteousness of the transaction, and without going again over the circumstances which have been referred to, I am compelled to say that they have not "* (emphasis added)

31. Though affidavit is considered as evidence, in a court of law it is not a complete substitute to oral evidence of a witness. This evidence could not be tested by cross-examination. Considering the suspicious circumstances of this case in my judgment the affidavit of one witness of the purported last will on the balance of probability cannot prove the execution of the last will. The evidence presented through affidavit is subject to one infirmity as it is not subject to cross examination

32. The reason the deponent had given for her failure to attend the court was that she was working in New Zealand. There is sufficient technology available to obtain evidence from

a witness in New Zealand and why such a method was not explored and preferred a testimony which will not be subject to cross examination was not explained.

33. The affidavit evidence of witness of the purported last will cannot be accepted in the circumstances in the analysis. So the last will dated 19th December, 2005 was not proved.

34. So the Plaintiffs claim for the grant of the probate in terms of the said last will is dismissed. The Plaintiff is ordered to submit the grant (Probate no 48213) to the court forthwith if that is not already submitted. I could not find evidence of that in the record.

35. In probate jurisdiction the Defendant can make a counter claim for grant of the probate, the counter claim only seeks probate for 2nd Defendant. This can be granted in the order of priority contained in the Succession Probate and Administration Act as the 1st and 2nd named Defendants had renounced their rights as administrators in favour of 2nd Defendant. in their Statement of Defence.

36. The Plaintiff should also hand over the estate properties to the 2nd Defendant for administration with proper accounts.

37. The counterclaims of the Defendants for money, contained in the statement of defence cannot be determined in a probate action which needs to be confined to Order 76 rule 1(2) of the High Court Rules of 1988 such as claim for money from the Plaintiff. This cannot be granted in the probate jurisdiction of the High Court in terms of Order 76 rule 1(2) of the High Court Rules.

CONCLUSION

38. The purported last will dated 9th December, 2005 which was discovered under suspicious circumstanced by Reena Devi. Apart from that it had bequeathed entire estate to Plaintiff excluding all the children of the deceased including a minor at the time of alleged date of execution. The affidavit of one witness of the purported last will failed to prove the execution. So it is not proved and no probate can be granted in terms of that. The Plaintiff

had obtained a grant though misrepresentation of all the children of the deceased. So the grant of probate No 48213 is revoked. Letters of administration is granted to the 2nd Defendant. The Plaintiff is ordered to take all necessary actions to transfer the administration of Estate of late Ramaiya to 2nd Defendant, including the proper accounts and also transfer of the property obtained thorough grant of Letters of Administration No. 48213. The cost of this action is summarily assessed at $4,000 to be paid by the Plaintiff to the Defendants, within 21 days.

FINAL ORDERS

a. The grant of Letters of Administration No 48213 is revoked.

b. If grant No 48213 is not deposited in the court the Plaintiff is ordered to deposit it forthwith.

c. The Defendant's counterclaim as to the grant of Letters of Administration to 2nd Defendant, is granted.

d. The counter claim of the Defendants, for money is refused.

e. The cost of this action is summarily assessed at $4000 to be paid by the Plaintiff to the Defendants within 21 days.

Dated at Suva this 27th day of April, 2018

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Justice Deepthi Amaratunga
High Court, Suva