

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HPP 52 of 2014

BETWEEN : BADRUN NISHA  
Plaintiff

AND : MOHAMMED SHAMEER KHAN  
First Defendant

AND : SHANA KHAN  
Second Defendant

AND : FOZIA ASIFUN NISHA  
Third Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr Suresh Chandra for the Plaintiff  
Ms R. Naidu for the First and Second Defendants  
The Third Defendant appeared in person

Dates of Hearing : 21 August, 8 and 11 September and 17 October 2017

Date of Judgment : 11 May 2018

**JUDGMENT**

1. The Plaintiff in the Statement of Claims contends as follows:
- (1) She was at all material times a de-facto wife of the deceased, Mohammed Shameem Khan who died on 6 May 2014 (the deceased).
  - (2) The First and Second Defendants are the children of the deceased by his legal wife, Lila Wati, who died on 23 August 2003.
  - (3) The Third Defendant is the widow of Mohammed Faizal Khan, the third child of the deceased.
  - (4) On 14 May 2014, the First Defendant called the Plaintiff to attend at his solicitors, Messrs Naidu Law who pre-arranged and prepared a deed for execution (deed), in respect of the deceased's estate, and the Plaintiff signed it under duress and undue influence.

### **PARTICULARS**

Include, inter alia, the following:

- (i) The Plaintiff was deprived of independent legal advice.
  - (ii) She signed the deed without its consequences and implications being explained to her and without understanding its effect.
- (5) The Plaintiff claims the deceased on or about 30 April 2014 instructed his solicitors, Jamnadas and Associates (Jamnadas) to prepare his last will and testament which was ready for execution on the day he died. The Plaintiff claims that the deceased died testate by virtue of the aforesaid instructions on the "will".

(6) Wherefore the Plaintiff claims:

(a) An order to declare the deed to be null and void.

(b) The Court pronounce in solemn form a grant on the basis of the will (sic) prepared on 30 April 2014 by Jamnadas on the instructions of the deceased.

(c) Alternatively the Plaintiff be granted an equitable and fair share of the estate of the deceased.

2. The First and Second Defendants in their Defence say as follows:

(1) It is admitted that the Plaintiff and the First, Second and Third Defendants executed a deed of settlement on 14 May 2014 (deed) in respect of the estate of the deceased, which was prepared by Naidu Law (Naidu).

(2) The First Defendant instructed Naidu after consulting and discussing the distribution of the estate of the deceased with the Plaintiff.

(3) The Plaintiff obtained legal advice from Jamnadass before signing the deed at their (office) voluntarily and on her free will.

3. In the Counter-Claim, the Defendants say:

(1) By a deed signed between the Plaintiff and the First, Second and Third Defendants, it was agreed, amongst other matters, that the First Defendant would obtain probate (sic) to the Estate of the deceased; sell Khan's Restaurant and use the proceeds to pay all rental arrears for the restaurant and pay off the loan to the brother of the Plaintiff and the remainder would go to the Plaintiff.



- (2) However, the Plaintiff sold Khan's Restaurant and retained all the proceeds for herself.
  - (3) On 26 September 2014 Letters of Administration of the Estate of the deceased were granted by the High Court to the First Defendant.
  - (4) The deceased never gave any instructions to Jamnadass to prepare the will alleged in the Statement of Claim and did not know of and approve the contents of the same. The will is a fraud as it was caused to be prepared by the Plaintiff for her to benefit under the will and without the deceased's instructions and authority.
  - (5) And the Defendants Counter-Claim, inter-alia, that:
    - (i) The Court pronounce against the validity of the draft will prepared by Jamnadass.
    - (ii) The Plaintiff make good and return to the estate of the deceased all assets and money taken by her.
    - (iii) An order that the deed be declared valid.
    - (iv) An order that the estate of the deceased be distributed in accordance with the deed.
    - (v) General damage against the Plaintiff for fraud.
4. The Plaintiff in her Reply to Defence and Defence to Counter-Claim says as follows:
- (i) The Plaintiff did not receive any independent legal advice from Jamnadas.
  - (ii) The Plaintiff signed the deed.

- (iii) The Defendants exerted pressure and persuaded the Plaintiff to execute the documents which she did not understand properly.
  - (iv) The Defendants Counter-Claim be struck out.
5. The Minutes of the Pre-Trial Conference held on 26 August 2016 record, inter alia, the following:

**Agreed Facts**

- (i) The deceased died on 6 May 2014 and the First and Second Defendants and Mohammed Faizal Khan (deceased) are his children from the deceased's marriage with Lila Wati.
- (ii) After the death of Lila Wati, the deceased was living in a de facto relationship with the Plaintiff since August 2008 till his death and there are no children from this relationship.
- (iii) The Third Defendant is the widow of Mohammed Faizal Khan (deceased).
- (iv) The Plaintiff signed the Deed at Jamnadas.
- (v) On 26 September 2014 Letters of Administration (L.A) of the Estate of the deceased (Estate) was granted by the High Court to the First Defendant.

**Issues to be Determined**

- (1) Did the deceased give instructions to Jamnadas or to anyone to prepare a will.
- (2) Whether the deed is valid or null and void, and if it is null and void, who are the legitimate beneficiaries of the estate.
- (3) What is the fair share of the Plaintiff from the estate.



6. The hearing commenced with the Plaintiff (PW1) giving evidence. She said she was educated to Form 5. The deceased married her according to Muslim rites on 11 August 2008. She is his de facto wife but has no children by him. The deed was entered into on 14 May 2014.
7. At this juncture, Mr Naidu, the first Counsel for the First and Second Defendants stated he agreed to all the documents except the unsigned will.
8. PW1 continued that the solicitor, Mr Naidu, said that she as a de facto wife had no rights to the estate. She and her son then moved to her husband's lawyer, Jamnadass. Mr Naidu explained the contents of the deed to her but she did not understand much. She signed in the presence of Mr Sokimi. He told her she was getting 10%, take it or she will getting nothing.
9. Under cross-examination PW1 said she did not refuse to sign at Jamnadas and that Sokimi never advised her on the deed.
10. At this juncture Mr. R.K. Naidu said he is aware of a conflict here in light of what PW1 is saying from the witness box against him. He then left the court room and returned to inform me that his clients consented to his withdrawal as he is in a difficult position.
11. On the 8<sup>th</sup> September 2017, Ms R Naidu appeared as Counsel for the First and Second Defendants.
12. The cross-examination of PW1 resumed. She said she is the de facto wife of the deceased whose wife has passed away. She had gone to Jamnadas to take advice from the clerk, Dinesh. She and the Third Defendant signed the Deed in the presence of Mr Sokimi. She initiated every page. She has sold the restaurant since the agreement and

withdrawn \$7,000 from the deceased's account since his death. She has sold the restaurant and the First Defendant has obtained the L.A.

13. During the re-examination, PW1 said she sold the restaurant on her own. Mr Naidu sent them to Jamnadas to sign the agreement.
14. The next witness was Dinesh Gounden. As he had been subpoenaed first by the Defendants' solicitors he was their witness. I therefore expunged his evidence and Ms Naidu confirmed she would call him as their witness.
15. The next witness was Ms Sainiana Qera (PW2). She said she knew the Plaintiff since 2008 as she is her (PW2) landlady. She was looking after the deceased when he was sick. He told her his children never came to see her.
16. The next witness was Zibran Aiyum Mohammed Ali (PW3). He said the Plaintiff is his mother. He, the deceased and the Plaintiff went to Jamnadas's office with the intention to make a will. The deceased said all the property was to go to the Plaintiff. Dinesh made a draft. The will was never signed as the deceased died on the day it was supposed to be signed.
17. Under cross-examination, PW3 said when the agreement was signed he was outside and did not know what transpired inside.
18. The next witness was Mohammed Binsad (PW4) who said he is the brother of the Plaintiff. The deceased asked him to arrange a solicitor to prepare his will in May 2014. He spoke to Dinesh who said it could be done. He picked up Dinesh and took him to the deceased's house. The deceased gave verbal instructions. PW4 did not know the contents of the will. The deceased died on the day he was supposed to sign the will.
19. During cross-examination PW4 said he made all the arrangements with Dinesh but did not give him instructions on the will. The deceased needed assistance to move. DW4



did not know Dinesh is not a lawyer. The deceased asked for a lawyer to prepare a will. PW4 did not know a lawyer prepares the will.

20. With that the Plaintiff closed her case and the Defendants opened theirs.
21. The Defendants' first witness was Mohammed Shameer Khan (DW1) the First Defendant. He said he is the biological son of the deceased and Lila Wati and produced his parents' marriage certificate as Exhibit D1. The Plaintiff was his father's de facto partner. He said the deed of settlement – Exhibit P1 – is the mutual agreement between the himself (DW1), the Plaintiff and the Second and Third Defendants. There was a family agreement on 13 May 2014. It was agreed that he take out L.A. He had asked and the Plaintiff had said she was not aware of a will. They had all attended at the office of Mr R Naidu on 14 May 2014. The deed was typed in Naidu Law's office and Mr Naidu explained the terms in Hindi and English. The Plaintiff and the Third Plaintiff went to sign in Jamnadas's office and he and the Second Defendant signed the deed in Naidu Law.
22. DW1 said under no circumstances was there any duress for the Plaintiff to sign the deed. He applied for and was granted LA – Exhibit D4. A caveat was lodged on the grant of LA by the Plaintiff 5 days before the deed was executed. He was not aware of any will. He and the Second Defendant went to the ANZ Bank and was informed that \$1,000 was withdrawn per day from 6 May 2014, totaling in all \$7,000. He informed the Plaintiff who said her son Zibran was using the card and withdrawing cash. As per the deed, the Second Defendant was running the kava shop and the Plaintiff was running the restaurant. The Plaintiff had the car in accordance with the deed.
23. Under cross-examination, DW1 said Naidu Law drew up the deed. The rush was because everyone should get their share before he returned to Australia. He said it is not true that he exerted pressure through the Second Defendant on the Plaintiff.



24. The next witness was Dinesh Gounder (DW2). He said he works in Jamnadas as a conveyancing executive for the last 10 years. The deceased died before he signed a will.
25. Under cross-examination he said the deceased did not sign any instructions. He confirmed the instruction sheet was not signed by the deceased. The deceased gave instructions orally and he wrote it down. He drafted the will. On the day he was supposed to get the will signed, he was informed on the telephone that the deceased had just passed away. The Plaintiff, the First Defendant and another woman came to get the deed witnessed. They brought the deed and Mr Solanki explained in English and he translated into Hindi.
26. In re-examination DW2 said he never told the Plaintiff that if she did not sign the deed, she would not get anything. He never told her to accept it. He only told her if she agrees she signs. They had come with the agreement.
27. The next witness was Mr Augustine Sokimi (DW3). He said he signed as the Commissioner for Oaths on the deed of settlement. He explained it to the Plaintiff and the Third Defendant in English and Dinesh translated into Hindi. Both of them understood and then signed the deed in DW3's presence.
28. Under cross-examination DW3 said he did not act for them. They came for a full understanding of the document.
29. The next witness was R. K. Naidu (DW4). He said the First Defendant came to his office on 12 May 2014 seeking advice on obtaining probate of his deceased father's estate and the costs. The urgency was because he had to return to Australia. He came back on 14 May 2014 with the Second and Third Defendants and the Plaintiff and her son. The First Defendant instructed him that those present had resolved how the estate is to be distributed and had agreed the First Defendant would become the administrator.

30. DW4 was informed that the Plaintiff was the de-facto partner of the deceased. He was given details of the assets orally by the First Defendant in the presence of all parties. He confirmed these from the Plaintiff and the Second and Third Defendants. He then drafted the deed of settlement. He discussed the draft with all parties and explained in Hindi to all of them. He asked them to get independent legal advice. The Plaintiff said she wanted to get the advice of Jamnadas.
31. The Plaintiff and the 3 Defendants went to Jamnadas, the Plaintiff taking the deed with her. Later the parties returned with the deed signed by the Plaintiff and the Third Defendant. The First and Second Defendants signed in his presence. The Plaintiff and the Third Defendant received stamped copies of the deed on 19 August 2014 and 11 November 2014 respectively. The Plaintiff did not sign the deed in his presence but in the presence of a solicitor of her choice. The Plaintiff wanted the estate resolved quickly so that the estate could be distributed.
32. Under cross-examination DW4 said the Plaintiff is not the wife of the deceased. (Mr Chandra confirmed the Plaintiff is not the wife of the deceased). She is interested in selling the property.
33. With that the Defendants closed their case and both Counsel made their submissions.
34. Mr Chandra said the Plaintiff was not happy with the deed so a writ was filed. He had no evidence of the nikad of the deceased and the Plaintiff. There is no legal status in law in Fiji. They were not legally married. The Plaintiff says the deed is unfair and there was undue influence by the First Defendant. The Plaintiff is not disputing the contents of the deed. The contents were explained to her. She did not receive legal advice on her entitlement under the estate. Counsel said he was not submitting on an alleged will. The Plaintiff was pressured by the Defendants. There is no written law on what she is entitled to under the will. . The Defendants' witnesses say the Plaintiff did not manage the property. The Plaintiff asks for a fair share of the estate.



35. Ms Naidu then submitted. She said the Plaintiff gave evidence in English and the deed is in English. Language is therefore not an issue in this case. The deed was done 7 days after the death and the Plaintiff lodged a caveat against probate of 9 May 2014, 3 days after the demise. This contradicts the allegation that she was forced to sign the deed during the mourning period. The Plaintiff took out money on the day of the demise (Mr Chandra confirmed the Plaintiff never returned the \$7,000).
36. Ms Naidu said the First Defendant testified the Plaintiff is performing the deed as she sold the business and kept the proceeds. Dinesh denied he forced the Plaintiff to sign the deed. He said there were no instructions in writing from the deceased to do a will. The deed was not signed under duress, nor was there undue influence as their elements was not established nor was there evidence of either. Constructive trust was not raised at all.
37. The Third Defendant then submitted. She said she was not complaining against anyone.
38. Mr Chandra in his reply said the Plaintiff sold the restaurant after the deed.
39. At the conclusion of the arguments, I said I would take time for consideration. Having done so I now deliver my decision. I have reproduced the salient evidence led by both sides in extenso for the reason that I consider this case will be decided on the evidence before this court. As the trial judge I am in the best position to decide the value to be placed on the evidence of each witness based on my observation of the witness's demeanour in the witness box to enable me to form a conclusion on their veracity. It also averts the necessity to refer to the evidence at every turn.
40. At the outset I shall deal with the issue of the suppositious will. There is in the Agreed Bundle of Documents a tab 4 which is described as an unsigned will of the deceased. I have examined this document very carefully and have failed to discern any evidence of

its execution by the deceased nor the signatures of any 2 witnesses. Thus it is as clear as daylight that this cannot be considered as even remotely resembling a valid will by it's failure to comply with the requirements of section 6 of the Wills Act. It also follows that there can be no constructive trust.

41. I shall therefore now turn to the Deed of Settlement. I note it is in English. Stamp duty has been paid thereon. It has been executed by the First and Second Defendants in the presence of a Commissioner for Oaths, It has also been executed by the Plaintiff and the Third Defendant in the presence of another Commissioner for Oaths. The evidence of the witnesses in the course of the hearing has established to the satisfaction of the court that the contents were explained to all parties in the English and Hindi languages. The evidence also established there was no duress nor any undue influence emanating from the Defendants.
42. Thus the Plaintiff's claim that the Deed of Settlement is null and void fails and more so when it is noted that the Plaintiff carried out those provisions in the Deed which were to her financial benefit. The Plaintiff cannot approbate and reprobate.
43. Therefore in holding the deed to be valid and binding it must follow as the night the day that the Plaintiff cannot be allowed her alternative prayer. This is because the Deed states at "E" that the parties wish to settle matters relating to the Estate of the deceased; at para 7 that all parties agree that the settlement shall operate as a bar to any future claim against the other; at para 8 that each party is entering into this agreement freely, voluntarily and without coercion, pressure or undue influence of any kind from the other party or anyone else; at para 14 that if any party defaults in their obligation or performance or observance, the party who is not in default will be entitled to the remedies for breach of contract against the defaulting party. Yet it is to be observed the Plaintiff has not framed her claim in contract.



44. Further in holding as I have done above, it also follows that the First and Second Defendants have succeeded in item 1 (the Court has pronounced against the validity of the draft will) and item (4) (the Court has confirmed the validity of the deed) of their counter-claim. I do not consider the other items in the counter claim are the fit subject of a counter claim where as here the claim only related to the deed and the draft will. They are therefore not allowed.
45. The Third Defendant has really played no part in these proceedings at all from start to finish and has not filed any Defence.
46. In the result I make the following orders:
- (1) The Plaintiff's claims against all the Defendants are dismissed with costs.
  - (2) The Defendant's Counter Claim items 1 and 4 are allowed with costs.
  - (3) The Plaintiff is to pay the First and Second Defendants the costs of this action summarily assessed in the sum of \$3,000.

Delivered at Suva this 11<sup>th</sup> day of May 2018.



David Alfred  
**JUDGE** of the  
High Court of Fiji