IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

PROBATE JURISDICTION

Probate Action No. HBC 74 OF 2013

BETWEEN : **RAMA DEVI** of Lot 58 Gibson Place, Natabua Housing, Lautoka.

PLAINTIFF

A N D : **SHIRO MANI** of Labasa. Lab Technician.

1ST DEFENDANT

A N D : **SUMAN LATA** of 5 Balram Dass Street, Kermode Road, Lautoka.

2ND DEFENDANT

A N D : **JAI LAL** of 5 Balram Dass Street, Kermode Road, Lautoka.

3RD DEFENDANT

Appearance	:	**Mr Eroni Maopa for the plaintiff.**
	:	**Mr Rajendra Chaudhary for the defendants.**
Trial	:	**Wednesday, 03rd, Thursday 04th, October, 2018.**
	:	**Friday, 23rd November, 2018.**
Written Submissions:		**29th October, 2019 (Plaintiff's)**
	:	**11th September, 2019 (Defendant's)**
Judgment	:	**Friday, 06th December, 2019**

J UD G M E N T

[A] INTRODUCTION

(01) In the statement of claim filed on 30th April, 2013, the plaintiff sought relief from this Court in the form of a pronouncement against the Will purported to have been executed on 27th August, 2009 by Narend Chand deceased (the testator). In this action, the

plaintiff challenged the Will dated 27th August, 2009 propounded by the second defendant on the grounds that;

(i) Narend Chand deceased (testator) was not in a sound and disposing state of mind and memory at the time when the Will was made.

(ii) Any signature on the purported Will dated 27th August, 2009 is not that of Narend Chand (the alleged testator) and it was never signed by him. The plaintiff contended that the Will was forged by the defendants. **[The deceased's signature was forged]**

(02) The plaintiff was the lawful wife of the deceased (the alleged testator). The first defendant is the executor and trustee of the Will dated 27th August, 2009. The second defendant was the de facto wife of the deceased (the alleged testator). The third defendant is one of the attesting witnesses to the Will and also the father of the second defendant.

(03) The Will propounded by the second defendant was dated just seven (07) days before the testator died.

[B] THE FACTUAL BACKGROUND

(01) The statement of claim which is as follows sets out sufficiently the facts surrounding this case from the plaintiff's point of view as well as the prayers sought by the plaintiff.

1. AT all material times the Plaintiff is the legal wife of the late Mr. Narend Chand also known as Narend Chandra (deceased).

2. THAT the first Defendant was the purported sole executor of the

Estate of the deceased pursuant to the Last Will and Testament of the deceased dated 27th August 2009 (the said Will).

3. THAT the second Defendant was the de facto wife and sole beneficiary of the said Will.

4. THAT the third Defendant is the father of the second defendant and a witness to the said WILL.

5. THAT the Plaintiff and the deceased entered into a Deed of Agreement dated 8th April, 2007. Pursuant to the said agreement the plaintiff is named the sole beneficiary to the matrimonial property particulars are as follows;

a) That I Narend Chand son of Enkanna of House 3, Lot 58 on DP 4810 Gibson Place, Natabua Housing Stage 1, Lautoka in the Republic of Fiji Islands GIVE and Bequeath the following legacies free from all duties of every kind:-

i. To my said wife RAMA DEVI all the jewelleries, trinkets and articles of personal use or ornaments belonging to me;

ii. To my said wife RAMA DEVI all or any motor vehicles belonging to me;

iii. To my said wife RAMA DEVI land and building (House 3, Lot 58 on DP 4810 Gibson Place, Natabua Housing Stage 1, Lautoka).

6. *THAT there has been no other agreement or a WILL made with the prior consent and knowledge respectively of the Plaintiff and the deceased.*

7. *THAT on the 20th of August 2009 the deceased was admitted to Lautoka Hospital, diagnosed with Acute Coronary Syndrome.*

8. *THAT on 24th of August 2009, on doctors' orders no visitors were allowed to visit the deceased in hospital due to the seriousness of the deceased illness.*

9. *THAT the plaintiff was looking after the deceased at home and in the hospital during his admission until his death.*

CAUSE OF ACTION

10. *THAT on or around the time the WILL was executed the testator was not in a right state of mind to give any instruction and or to sign a WILL or anything else in that matter.*

11. *THAT the WILL executed on the 27th of August 2009 by the Defendants was without the knowledge of the plaintiff.*

12. *THAT the first defendant was the lab technician at Lautoka Hospital at the time the deceased was admitted.*

13. *THAT the making of the said WILL was fraudulent and the signature of the testator forged by the defendants.*

Particulars of fraud

a) *the signature on the WILL is not that of the deceased.*
b) *the purported signature of the testator on the similar WILL produced to FNPF by the second defendant differs from the signature on the purported said Will.*
c) *the signature of the deceased and the font size used on a similar WILL produced to FNPF by the second defendant differ from the purported said WILL.*
d) *lack of written instruction by the deceased as required under the WILLS Act (Section 6 (a and (b)*
e) *the solicitor's stamp on the bottom of the WILL is without a signature*
f) *the two witnesses do not include their names or occupations and with a solicitor's stamp without her signature.*
g) *font size on the solicitor's stamp appeared on the WILL produced to FNPF differs from the purported said WILL.*
h) *the father (3rd defendant) of the 2nd defendant's signature appeared on the WILL as witness.*
i) *the signature appeared on the cover page of the WILL produced to FNPF differs from the purported said WILL*
j) *the signature appeared on the cover page of the WILL differs from the signature of the testator.*

14. *THAT the High Court o Fiji on the 02nd of February 2012 issued Grant of Probate number 49408 to the first defendant as the sole executor of the Estate of Narend Chand.*

15. *AS consequences of the matters aforesaid the second defendant withdrew funds from the account of the deceased estate as follows:*

a) *Fund held at Fiji Teachers Union,*
b) *Fund held at Life Insurance Corporation of Indian (LICI); and*
c) *Shares held at Amalgamated Telecommunication Limited*

16. *AS consequences of the matters aforesaid the plaintiff suffers and continues to suffer financial loss, mental distress and damages.*

Particulars of Loss

a)	*Legal Fees*	-	*$14,700.00*
b)	*Travel Expenses*	-	*$ 1,500.00*
	Total	-	*$16,200.00*

(02) The plaintiff claims from the defendants;

1. *A Declaratory Order that the purported Last Will and Testament of Narend Chand dated 27th August 2009 is null and void;*

2. *An Order that the Grant of Probate No. 49408 to the first defendant is cancelled forthwith.*

3. *An order that there be Grant of Probate to the plaintiff to administer the Estate of Narend Chand.*

4. *An Order that the second defendant return all funds or pay to the plaintiff all funds withdrawn from the accounts held for the late Narend Chand with:*

   a) *Fiji Teachers Union*
   b) *Life Insurance Corporation of India*
   c) *Amalgamated Telecom Limited; and*
   d) *Any other account*

5. *Special damages as per paragraph 15.*

6. *General damages*

7. *Interest*

8. *Cost*

9. *Further or any other relief this Honourable Court deems just*

(03) The defendants in their amended statement of defence pleaded inter alia that;

(1) *<u>THAT</u> as to paragraph 1 of the Statement of Claim the First and the Second Defendants state as follows:-*

i) *The Plaintiff was the legal wife of the deceased Narend Chand when the deceased died on 3rd September 2009.*

ii) *The deceased had stopped living together with the Plaintiff as husband and wife in or about 2005.*

iii) *The deceased had started living with the Second Defendant in a De facto relationship as husband and wife.*

iv) *The deceased had instituted divorce proceedings against the Plaintiff in the Family Court at Lautoka file number 06/LTK/0335.The deceased's death curt short the divorce proceedings.*

v) *The deceased was the second husband of the Plaintiff who already had seven children from her previous marriage. The Plaintiff and the deceased and had no issues.*

(2) *THAT as to paragraph 2 of the Statement of Claim the First and the Second Defendants state that the First Defendant was named as the sole Executor and trustee in the Last Will and testament of the deceased dated 27th August 2009.*

(3) *THE First and the Second Defendants admit paragraph 3 of the Statement of Claim.*

(4) *THE First and the Second Defendants admit paragraph 4 of the Statement of Claim.*

(5) *THE First and the Second Defendants are not aware of the allegations in paragraph 5 of the Statement of Claim and require strict proof of the same. The First and the Second Defendants further state as follows:-*

i) *The Plaintiff put a Caveat against the grant of Probate in the Estate of the deceased in Suva being Caveat number 36 of 2009.*

ii) *That on the application of the Trustee the Caveat was removed and a Ruling was delivered by the Master of the High Court Deepthi Amaratunga on 8th August 2011.*

iii) *That following the above ruling Probate was granted to the Trustee named in the will on 2nd February 2012 being Probate number 49408.*

iv) *The alleged Deed was never mentioned in the action before the Master.*

v) *The First and the Second Defendants further state that the said Deed, which is denied, is null and void and of no effect and contrary to public policy and in no way prevents the deceased from making a subsequent Will or Wills.*

(6) *THAT as to paragraph 6 of the Statement of Claim the First and the Second Defendants repeat paragraph 5 herein and further state that the deceased did not need the prior consent of the Plaintiff to make the said will.*

(7) *THAT as to paragraph 7 of the Statement of Claim the First and the Second Defendants only admit that the deceased was admitted to Lautoka Hospital.*

(8) *THE First and the Second Defendants deny the allegation in paragraph 8 of the Statement of Claim. That only the Plaintiff and her children were not allowed as visitors as the deceased did not wish to see them.*

(9) *THE First and the Second Defendants deny the allegations in paragraph 9 of the Statement of Claim and further states as follows:-*

i) The deceased was not staying with the Plaintiff prior to and at the time of the admission to the hospital.

ii) The deceased did not want to see or have anything to do with the Plaintiff. The Plaintiff was not allowed into the deceased's hospital room.

iii) The deceased was being looked after by his defacto wife, the Second Defendant at her house in Kermode Road, Lautoka and when he was admitted to hospital.

(10) *THE First and the Second Defendants deny the allegations in paragraph 10 of the Statement of Claim.*

(11) *THAT as to paragraph 11 of the Statement of Claim the First and the Second Defendants state that there was no need or requirement that the Plaintiff have knowledge of the Will or the execution thereof.*

(12) *THE First and the Second Defendants admit paragraph 12 of the Statement of Claim.*

(13) *THE First and the Second Defendants deny the allegations of fraud in paragraph 13 of the Statement of Claim. The First and the Second Defendants further state as follows:-*

i) The will dated 27th August 2009 was prepared by Ms Jostishna Nair, Barrister and Solicitor on the instructions of the deceased.

ii) The contents of the Will was explained to the Deceased who fully understood the same in the presence of the witnesses before executing the same. The witnesses were Jai Lal and Sat Narayan.

iii) The deceased signed one original and three identical copies of the will. Hence his signatures could be slightly different in the copies. The position of the solicitors rubber stamp could also change.

iv) *The original and all copies were signed in the presence of Ms Jostishna Nair Barrister and Solicitor and the two witnesses Jai Lal father's name Ram Jiawan and Sat Narayan father's name Buturu. Sat Narayan has not been made a Defendant in this action.*

14) *THE First and the Second Defendants admit paragraph 14 of the Statement of Claim. The First and the Second Defendants further state as follows:-*

i) *THAT on 22nd March 2012 the First Defendant retired as the trustee of the Estate of Narend Chand by executing a DEED of RETIREMENT OF TRUSTEE.*

ii) *That on 22nd March 2012 the First Defendant and the Second Defendant executed a DEED of APPOINTMENT OF NEW TRUSTEE whereby the Second Defendant is now the trustee of the Estate of Narend Chand.*

(15) *THE Second Defendant states that she is the beneficiary as to one undivided half share of Housing Authority Lease number 366781 situated at 3 Gibson Place Natabua, Lautoka with all improvement thereon. The house on the said lease is fully occupied by the Plaintiff and her children and also partly rented out. The Second Defendant reserves her right to claim her share in the property in due course.*

(16) *THAT as to paragraph 15 of the Statement of Claim the Second Defendant states she was fully entitled to the said funds and shares as the sole beneficiary of the deceased.*

(17) *THE First and the Second Defendants deny the allegations in paragraph 16 (wrongly labeled paragraph 15) of the Statement of Claim. The First and the Second Defendants are not responsible for the Plaintiff's mental condition, legal fees and travel expenses of which no particulars are given.*

(18) *THE said deceased Narend Chand also known as Narend Chandra had also executed an earlier Will on 26th August 2009 which reads as follows:-*

THIS IS THE LAST WILL AND TESTAMENT of NAREND CHAND also known as NAREND CHANDRA father's name Enkanna of Balram Dass Street, Tavakubu, Lautoka, School Teacher.

1. *I REVOKE all wills and other testamentary dispositions at any time hereto before made by me and declare this to be my last will and testament.*

2. *I APPOINT SHIRO MANI son of Subaiya of Hospital compound, Lab Technician respectively to be my Executors and Trustees of this my will.*

3. *I GIVE DEVISE unto my defacto wife SUMAN LATA daughter of Jai Lal my half share of the property situated at Lot 51, Gibson Place, Natabua, Lautoka, absolutely.*

4. *I GIVE DEVISE unto my defacto wife SUMAN LATA daughter of Jai Lal my shares at Amalgamated Telecom Holdings Limited absolutely.*

5. *I wish to give the residue and remainder of my estate wheresoever it may be or situated to my defector wife SUMAN LATA absolutely.*

DATED this 26th day of August, 2009.

SIGNED by the testator the said NAREND CHAND] aka NAREND CHANDRA as and for the last will] and testament in the presence of us both being] present at the same who at their request and their] presence and the sight and presence of each other] have hereunto subscribed our names as attesting] ..... witnesses and we certify that the contents hereof] NAREND CHAND were read over and explained to the testator in the] aka NARENDRA Hindi language and they appeared to fully under] CHAND stand and approve the same before signing their] names in our presence.]

.....	.....
WITNESS:	*WITNESS:*
Sat Narayan aka Sutha Naraian	*Jai Lal*
f/n Buturu	*f/n Ram Jiawan*

The aforesaid will was also prepared by Ms Jotishna Nair, Barrister and Solicitor and was signed in her presence.

(19) *THE deceased wanted changes to his aforesaid Will in that he wanted a specific clause to state that his legal wife, the Plaintiff herein, should not in any way interfere with his funeral arrangement and ceremonies. That as a consequence the Second Will was prepared by Ms Jotishna Nair which was executed on 27th August 2009 adding clause 6 and which reads as follows:-*

THIS IS THE LAST WILL AND TESTAMENT of NAREND CHAND also known as NAREND CHANDRA father's name Enkanna of Balram Dass Street, Tavakubu, Lautoka, School Teacher.

1. *I REVOKE all Wills and other testamentary dispositions at any time hereto before made by me and declare this to be my last will and testament.*

2. *I APPOINT SHIRO MANI son of Subaiya of Hospital compound, Lab Technician respectively to be my Executors and Trustees of this my Will.*

3. *I GIVE DEVISE unto my defacto wife SUMAN LATA daughter of Jai Lal my half share of the property situated at Lot 51, Gibson Place, Natabua, Lautoka, absolutely.*

4. *I GIVE DEVISE unto my defacto wife SUMAN LATA daughter of Jai Lal my shares at Amalgamated Telecom Holdings Limited absolutely.*

5. *I wish to give the residue and remainder of my estate wheresoever it maybe or situated to my defacto wife SUMAN LATA absolutely.*

6. *I hereby instruct my Executor SHIROMANI son of Subaiya to carry out my burial services together with my defacto wife SUMAN LATA daughter of Jai Lal without any interference from my legal wife.*

DATED this 27th day of August, 2009.

SIGNED by the testator the said NAREND CHAND]
aka NAREND CHANDRA as and for the last will]
and testament in the presence of us both being]
present at the same time who at their request and]
their presence and the sight and presence of each]
other have hereunto subscribed our names as] .....
attesting witnesses and we certify that the contents] Narend Chand
hereof were read over and explained to the testator]
in the Hindi language and they appeared to fully]
understand and approve the same before signing]
their names in our presence.]

....
WITNESS *WITNESS*
(STAMP)
Jotishna Nair
Barrister and Solicitor
Commissioner for Oaths

(20) *THAT neither the Will dated 26th August 2009 nor the Will dated 27th August 2009 was forged or obtained by fraud in any way whatsoever.*

(21) *THE Second Defendant further state that her address has always been 5 Balram Das Street, Kermode Road, Lautoka and not Lot 51, Gibson Place, Natabua as endorsed on the Writ of Summons.*

(04) The plaintiff's reply to amended statement of defence is as follows:

(1) As to paragraph 1 of the Amended Statement of Defence;

i. The Plaintiff agree with the Defendants;

ii. The Plaintiff denies and says that the late Narend Chand stopped living with her from the 22nd of April, 2006 as stipulated in his application of dissolution of marriage, and further as states that in July 2005, the Plaintiff took the deceased to India for medical treatment.

iii. The Plaintiff agrees with the Defendants

iv. The Plaintiff admits to that, there was an application for divorce filed by the late Narend Chand, however, denies that the deceased's death curt short the divorce proceedings. Plaintiff further states that the deceased was under a Judgment Debtor Summons Order owing maintenance to the Plaintiff and was pending, hence the court did not proceed with the divorce application.

v. The Plaintiff joins issues with the Defendants.

(2) As to paragraph 2 of the Amended Statement of Defence, the Plaintiff joins issues with the Defendant.

(3) The Plaintiff denies paragraphs 3 & 4 of the Amended Statement of Defence and maintains her claim under her Statement of Claim.

(4) As to paragraph 5 of the Amended Statement of Defence is denied and the Plaintiff maintains her claim, however, further states the following;

i. The Plaintiff agrees with the defendants;

ii. The Plaintiff has no knowledge of the Claim;

iii. The Plaintiff has no knowledge of the claim, and further

states that she only came to know of the Probate and purported Will on the 19th of April, 2012.

iv. The Plaintiff agrees and further states that, she had given the Deed of agreement between her and the late Narend Chand to her former solicitor, however, he failed to mention it to the Master.

v. The Plaintiff denies such a defence by the defendants.

(5) As to paragraphs 6 & 7 of the Amended Statement of Defence are denied and, the Plaintiff repeats and maintains her claim under her Statement of Claim.

(6) As to paragraph 8 of the Amended Statement of Defence is denied and, the Plaintiff reiterates and maintains her Claim and further states that the Deceased was in a serious state and not of sound mind to make reasonable and sound decisions on his own. Also, not only was the Plaintiff and her children not allowed to visit her late husband in the hospital, but also other people too.

(7) As to paragraph 9 of the Amended Statement of Defence is denied and the Plaintiff maintains her claim and further states as follows;

i. The Plaintiff denies the defense, and further states that the late Narend Chandra was with her until the 22nd of April, 2006 and that even after separation, the deceased was still in touch with the Plaintiff and at the time the deceased was admitted to hospital, the Plaintiff still visited him;

ii. The Plaintiff disagrees with the Defendants; and

iii. The Plaintiff agrees with the Defendants.

(8) As to paragraph 10, 11 and 12 of the Amended Statement of Defence, the Plaintiff denies its content and maintains and repeats her claim in her statement of claim.

(9) As to paragraph 13 of the Amended Statement of Defence is denied and, the Plaintiff maintains her claim in her statement of claim and further states the following;

i. The Plaintiff has no knowledge of the purported Will dated 28th August 2009, and was only made aware of such when the probate was issues by the High Court;

ii. *The Plaintiff denies and has no knowledge of the same and further states that if the deceased fully understood the purported Will, then why was the lot number of the property on the Will wrong, which should not have been the case since the deceased had lived on the property from 1997 – 2006;*

iii. *The Plaintiff denies and has no knowledge of the same; and*

iv. *The Plaintiff denies and repeats her claim in the statement of claim.*

(10) *As to paragraph 14 of the Amended Statement of Defence is denied, the Plaintiff has no knowledge and puts the Defendants to strict proof of the same.*

(11) *As to paragraph 15 of the Amended Statement of Defence, the Plaintiff denies, and further states that the house situated at 3 Gibson Place is not rented out, however the Plaintiff and her children are only residing in the said property. Also, the Plaintiff has been looking after the house since it was built and even after separation from her late husband, in terms of payment of mortgage, ground rents and city rates.*

(12) *As to paragraph 16 of the Amended Statement of Defence, the Plaintiff agrees with the Defendants in as far as the purported Will was concerned.*

(13) *As to paragraph 17 of the Amended Statement of Defence, the Plaintiff repeats and maintains her claim in the statement of claim.*

(14) *As to paragraph 18 of the Amended Statement of Defence, the Plaintiff states that the earlier Will dated 26th August 2009 was never the last Will and Testamentary of Narend Chand for the following reasons:*

a. *Narend Chand knows Shiro Mani very well as the son of Subaiya. The maker of the Will ought to know Shiro Mani is the son of Subaiya when initially taking the instruction to type the Will (para 2). That the deletion of the word "daughter" and inserted above the word "son" raises suspicion on the said will.*

b. *It is denied that Ms. Jotishna Nair, Barrister & Solicitor prepared the will and was signed in her presence as she was a sitting Magistrate in 2009 who also presided in the Maintenance matter between the plaintiff and Narend Chand.*

c. *That on 23rd August 2009, the Plaintiff visited the said Narend Chand at Lautoka Hospital and she saw the deceased was in pain and was breathing through tubes inserted through his nose trills and mouth.*

d. *On the 24th August 2009 when the Plaintiff and others went to visit Narend Chand again, was stopped sign says "no visitors allowed."*

e. *The Plaintiff was called to the hospital on 28th August 2009 to see Mr. Chand but his conditions remains as her last visit on 23rd August 2009.*

(15) *As to paragraph 19 of the Amended Statement of Defence, the Plaintiff denies the said Will was made by Narend Chand for the following reasons:*

a. *The Testator was in pain and unable to utter a word due to his health conditions.*

b. *The Plaintiff and her children were visiting the testator and an argument between the Plaintiff and the 2nd Defendant arose regarding the Testator.*

c. *Ms. Jotishna Nair's stamp without her signatories appears on the Will.*

d. *That one of the witness Jai Lal to the said Will is the father of the beneficiary, Suman Lata hence colluded with each other in making the Will of Naresh Chand.*

e. *The Plaintiff reiterates the grounds contain in paragraph 14 above.*

(16) *As to paragraph 20 of the Amended Statement of Defence, the plaintiff denies the contents and further state that both Wills were forged, obtained by fraud and/or being colluded to by the Defendants.*

[C] <u>The Minutes of the Pre-Trial Conference Record, inter-alia the following</u>

<u>AGREED FACTS</u>

1. *The Plaintiff was the legal wife of the late Narend Chand also known as Narend Chandra (deceased).*

2. *The first Defendant is the sole executor of the Estate of the deceased as per Probate number 49408 granted on 2nd February 2012.*

3. *The second Defendant was the defacto wife and sole beneficiary of the said Will.*

4. *The third Defendant is the father of the second Defendant and a witness to the said Will. The other witness is one Sat Narayan. The rubber stamp of Jotishna Nair, Barrister and Solicitor is also on the Will.*

5. *The Deceased died on 3rd September 2009.*

6. *The first Defendant was the lab technician at Lautoka Hospital at the time the deceased was admitted.*

7. *The High Court of Fiji on the 2nd February 2012 issued grant of Probate to the first Defendant as the sole executor of the Estate of Narend Chand.*

8. *The deceased had stopped living together with the Plaintiff as husband and wife in or about June 2005.*

9. *The deceased had instituted divorce proceedings against the Plaintiff in the Family Court at Lautoka being file number 06/LTK/0335. The deceased was the 2nd husband of the Plaintiff who already had seven children from her previous marriage. The Plaintiff and the deceased had no issues.*

10. *The deceased and the Plaintiff are registered as the proprietors of Housing Authority Lease no. 366781 situated at 3 Gibson Place, Natabua, Lautoka.*

ISSUES TO BE DETERMINED

1. *Whether the Plaintiff and the deceased entered into a Deed of Agreement on 8th April 2007? Where was the alleged deed signed and at what time?*

2. *Whether the Plaintiff is the sole beneficiary to the matrimonial property pursuant to the agreement dated 8th April 2007? Whether the alleged deed overrides the will dated 27th August 2009?*

3. *Whether the Deed of Agreement is null and void? Whether it legally prevented the deceased from making a will?*

4. *Whether there were no visitors allowed visiting deceased in the hospital? Whether the deceased had visitors when he was sick and which visitors?*

5. *Whether the testator was in a right state of mind to give instruction and/or sign a WILL or anything else in that matter when he was admitted in the hospital and in particular on 27th August 2009?*

6. *Whether the said WILLS dated 26th & 27th August, 2009 are fraudulent and*

the signature of the testator was forged by the Defendants? Who forged the Testators signature? Where and when was his signature or signatures forged?

7. *Was the rubber stamp of Ms. Jostishna Nair, Barrister & Solicitor forged? If so, by whom?*

8. *Where and where did the 3 defendants (Shiro Mani, Suman Lata and Jai Lal) forge the said Will?*

[D] ORAL EVIDENCE

The Plaintiff's case:

P.W. (1) (Ms) Limaima Bulou
(2) (Ms) Harimand Bibi
(3) Mr Ravindra Singh
(4) The Plaintiff (Mrs Rama Devi)

The Defendants' case:

D.W. (1) (Ms) Suman Lata (the second defendant)
D.W. (2) (Ms) Jotishna Nair (Barrister and Solicitor)
D.W. (3) Mr Shiro Mani (the first defendant)
D.W. (4) Dr Arun Murai, Consultant Surgeon, Lautoka Hospital.

[E] CONSIDERATION AND THE DETERMINATION

(01). Counsel for the plaintiff and the defendants have tendered extensive written submissions in support of their respective cases.

I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected, which have made my task less difficult than it otherwise might have been.

If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that that submission is not relevant, it is simply that, in the time available, I am not able to cover in this decision every point that has been made before me.

(02). The plaintiff, Rama Devi (Devi) married Narend Chand (the alleged testator) on 21st November, 1991 at Lautoka. Narend Chand was a School Master. He was teaching. Devi lived with Narend as husband and wife at No.05, Kermode Road, Lautoka. Devi was an Instructor at the Salvation Army. There are no children of Devi's marriage to Narend. Devi was twice married. Narend was the second husband of Devi. Devi already

had seven children from her previous marriage. On 29th August, 1994 Devi and Narend bought a piece of land from Housing Authority and built a house on the property. Devi and Narend are the registered lessees of the Housing Authority, Sub-lease No. 366781 (PEX-1). They lived in the house at Lot 58, Gibson Place, Natabua Housing at Lautoka. The piece of property (home) at Lot- 58, Gibson Place, Natabua Housing, (Housing Authority Sub- Lease No- 366781, DP- 4810) is a **community property** (property Naren and Devi owned together). Both spouses' names are on the title. Each owns a one- half interest. The house was acquired after marriage. Narend was ill because he had cancer. In the year 2005, Devi took Narend to India for medical treatment. In the year 2006, Devi's relations with Narend were not of the best because Narend was in a de facto relationship with the second defendant Suman Lata (Lata). Lata used to call Narend on his cell phone late night. An argument ensued between Devi and Narend over this late night calls from Lata and as a result, on 22nd April 2006, Narend left Devi to live with Lata at No. 51, Balram Dass Street, Kermode Road, Lautoka. **But he used to make casual visits to Devi and there was indeed contact between the two**. Narend was not teaching and stayed home because of his ill-health. He was again taken to India for medical treatment in 2008 by his brother as his condition was getting worse.

Narend became sick again and he was admitted to the Lautoka hospital on 20th August, 2009 for an 'acute coronary syndrome and he died at the Lautoka Hospital on 03rd September, 2009 due to acute coronary syndrome. About five months before his death namely on 20/03/2008, Narend had instituted an action in the Magistrate Court of Lautoka applying for dissolution of his marriage to Devi. Devi also had instituted a case in the Magistrate's Court of Lautoka against Narend applying for spousal maintenance. Narend was not consistent with the payments of spousal maintenance to Devi since he was not working and as a result arrears of spousal maintenance accumulated and Devi had obtained a Judgment Debtor Summons and a bench warrant against Narend for non-payment of arrears of maintenance. The Court proceedings were concluded due to the death of Narend.

(03). The plaintiff claims that on 08th April, 2007, late Narend executed a deed of agreement (PEX-4) in favour of Devi by which late Narend gave the entire property (House) to Devi. The deed of settlement reads as follows:

> *b) That I Narend Chand son of Enkanna of House 3, Lot 58 on DP 4810 Gibson Place, Natabua Housing Stage 1, Lautoka in the Republic of Fiji Islands GIVE and Bequeath the following legacies free from all duties of every kind:-*
>
> *(i) To my said wife RAMA DEVI all the jewelleries, trinkets and articles of personal use or ornaments belonging to me;*
>
> *(ii) To my said wife RAMA DEVI all or any motor vehicles belonging to me;*

(iii) *To my said wife RAMA DEVI land and building (House 3, Lot 58 on DP 4810 Gibson Place, Natabua Housing Stage 1, Lautoka).*

(04). During this period (in the year 2007) Narend was living with his de facto partner, Lata, because the relations between Narend and Devi were not healed. I gather from the evidence that there was no normal loving relationship between Narend and Devi after 22nd April 2006. It is true that Narend used to make casual visits to Devi and there was indeed contact between the two after the separation. **The contents or as to expression, of the deed of agreement is irrational on its face. Narend has given the entire house to Devi. Narend owns only a one-half interest in the property.** ***Nemo dat quod habet – One cannot transfer to another more rights than he has.*** **You cannot give what you do not have.** The contents of the deed of agreement are surprising in that nothing is left to the Narend's de facto partner Lata from Narend's inheritance. The legal wife, Devi, received the entire portion of Narend's inheritance. The poor relationship between Narend and Devi would be a reason for suspicion. The contents of the deed of agreement are irrational because Narend had left behind his de-facto wife Lata who is much near to him than Devi. Lata ought to receive a part of Narend's share of inheritance in recognition of her relationship with him and the support and comfort she gave him. This is a sufficient reason for the Court's suspicion to be excited in relation to the deed of agreement. Devi got the sole benefit of Narend's inheritance under the deed of agreement. I find this hard to accept. How can it be credible? This excites the suspicion of the Court.

The purported deed of agreement was executed before John Dass, a Justice of the Peace, at Lautoka and attested by Ajay Sen, an Accountant of Mr Dass. Ajay Sen is the only attesting witness and he is a close relative of Devi and therefore he is an interested witness. He is partisan. Both Dass and Sen are deceased.

I have some reservations about the circumstances surrounding the execution of the deed of agreement.

It was signed on Easter Sunday at the office of Dass, a justice of Peace. When Devi was returning after attending Easter Sunday Mass, she was asked to sign the deed of agreement by Narend. Out of the blue, it was intimated by Narend that the three (Devi, Narend and witness Ajay) should go to the Office of Dass and sign the agreement. The question that concerns the Court is whether this narration of events took place on Easter Sunday was merely a coincidence or too good to be true.

The following exchanges took place in the course of the cross-examination of Devi by Mr Chaudhary. (Reference is made to page 54, 55 and 56 of the transcript of evidence).

Q: You don't ask them. Now, this Deed of Agreement has been shown to you?

A: Yeah.

Q: *Dated 8th April, 2007?*
A: *Yeah.*

Q: *Do you know what day was 8th April, 2007? What day?*
A: *It was a holiday, I can remember but*

Q: *Easter. Was it Easter?*
A: *Yes Sir.*

Crt: *Easter Sunday?*

Q: *Easter Sunday?*
A: *Yeah, I think Sunday but it was a holiday.*

Q: *It was Easter Sunday. So where did you get all these witnesses from?*
A: *The witness that Accountant is my brother in law. He was at home. My Husband called him to witness and we went to one JP Sir, and he prepared the documents.*

Q: *JP prepared the documents?*
A: *Yeah, he was a Court Clerk before.*

Q: ***So he typed all these?***
A: ***Yeah.***

Q: *Deed of Agreement?*
A: *I don't know who typed it but we went there to get it signed.*

Q: *Was it already typed?*
A: *Yeah, already typed.*

Crt: *You Catholic or*
A: *Yeah.*

Crt: *Are you Catholic?*
A: *Yeah.*

Q: *Was it already*

Crt: *What's your religion?*

Q: *Sorry.*

Crt: *What's your religion? What's your religion?*

Q: *What religion?*

A: *My religion, I'm Hindu but I'm Christian. Hindu Christian. I'm Christian Sir. Hindu Christian.*

Crt: ***You executed this document on Easter Sunday?***
A: ***Yes Sir. When we came after church.***

Crt: ***After attending Mass?***
A: ***Yes Sir.***

Crt: ***Easter Sunday Mass?***
A: ***Yeah.***

Q: ***So, you went to the house of the***
A: ***John Dass.***

Q: *John Dass. Is he coming to give evidence?*
A: *He died.*

Q: *What about the Ajay Sen?*
A: *He also died.*

Q: *Both of them?*
A: *Yes.*

Q: ***And the document was prepared by the JP?***
A: ***The document was already prepared.***

Q: *By whom?*
A: *I don't know by whom but we sign in front of the JP, he witnessed and the Accountant.*

Crt: *Where did you sign this document?*
A: *At John Dass place, Sir. At his home.*

Crt: *Was he also aware?*
Q: *Yes Sir.*

What is even more striking is that it was Devi who had requested for the deed of agreement and was the sole beneficiary under it. (Page 62 of the transcript of evidence contains this)

Q: *Yeah not available for signing but for preparation you could have gone earlier during the week.*
A: *I didn't know anything about judiciary, Sir but what I knew that I was just extending the house in 2007 so* ***I asked him to make one document. That is what he did to me.***

The plaintiff has failed to satisfy the Court and dispel the suspicious circumstances which were undoubtedly present in this case. The plaintiff must remove all legitimate suspicions before the deed of agreement can be accepted as testamentary intentions of Narend Chand.

(05). During the course of the evidence of Devi, Mr. Chaudhary, raised objection that the "deed of agreement" marked as PEX-4 is not stamped and as such not admissible under **Section 41 of the Stamp Duties Act [Cap 205]** which reads as follows;

> Instruments not duly stamped inadmissible
>
> *41. Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situated or to any matter or thing done or to be done in any part of Fiji shall, except in Criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.*

(06). As I understand Section 41, no instrument executed in Fiji shall be given in evidence or admitted to be good unless it is duly stamped in accordance with the law in force at the time when it was first executed.

(07). I invited Mr. Maopa to respond to the challenge mounted by Mr. Chaudhary based on Section 41. Mr. Maopa frankly admitted that the "deed of agreement" (PEX – 4) is not stamped under the Stamp Duties Act, [Cap 205]. He did not explain why Section 41 is not compiled with.

(08). Section 41 of the Stamp Duties Act is a **mandatory provision** which a Court is bound to take Notice of. In other words, the court cannot use its discretion when a provision is mandatory. There can be no uncertainty about that.

(09). It is true that Mr. Chaudhary's legal objection [to the deed of agreement] based on Section 41 was not raised at the stage of pleadings. Besides, there was no issue to that effect raised at the pre-trial conference minutes. I am mindful of the fact that at the stage of pleadings the defendants do not have the opportunity to verify whether the plaintiff's documents are duly stamped or not, and as such cannot be expected to raise such a defence. In fact in practice the objection is taken at the time the document is produced in evidence unless it is a document that parties have examined (the original document) at a pre-trial stage.

(10). There can be no uncertainty. The "**deed of agreement**" (PEX-4) is not stamped and as such is not admissible under section 41 of the Stamp Duties Act [Cap 205]. Section 39 (1) of the Stamp Duties Act requires a Judge to take notice of any insufficiency in the stamping of any instrument chargeable with duty which is produced in evidence before

him. It goes on to provide that it may be received in evidence on payment of the amount of the unpaid duty and certain penalties.

(11). The powers of the Court appear to be sufficiently wide to enable the omission to be rectified without the necessity of rejecting the document which was not duly stamped. No doubt, it is of importance that the proper duty should be paid on all instruments which are to be given in evidence but where the matter is open to remedy it is preferable that the duty be paid with any due penalty so as to enable the ends of justice to be served than that the courts should be deprived of evidence which might be material to a proper resolution of the case which is being tried[1].

(12). The plaintiff's exhibit – (4), had been admitted in evidence in contravention of the Stamp Duties Act. The document is invalid until properly stamped. Section 100 (1) of the Stamp Duties Act provides;

> *100 (1) Any document which ought to bear a stamp under the provisions of this part shall not be of any validity unless and until it is properly stamped nor shall any Judge, Magistrate or Officer of any Court allow such document to be used, although no exceptions be raised thereto, until such document has been first duly stamped.*

(13). The court has discretion to order document to be stamped **(late stamping)** under Section 100 (2) of the Stamp Duties Act which provides;

Court may order document to be stamped

> *(2) But if any such document is through mistake or inadvertence received, filed or used without being properly stamped, the court in which the same is so received, filed or used may, if it thinks fit, order that the same be stamped, and thereupon such document shall be as valid as if it had properly stamped in the first instance.*

A late stamping under the eye or Order of the Court could give a retrospective validation. Unfortunately, the plaintiff did not seek leave of the court to rectify the omissions (a late stamping) which could have given a retrospective validation. There was no application by the plaintiff for late stamping.

I have no discretion. I do not take PEX – 4, "deed of agreement" into consideration.

(14). Acknowledging the difficulty faced by the plaintiff in this court in light of the provisions of the Stamp Duties Act [Cap 205), Mr. Maopa, Counsel for the plaintiff, however, submitted that the deed of agreement embodies the testamentary intentions of late Narend and it constitutes the Will of late Narend.

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[1] **Njie and Others v Amadou Cora (The Gambia) 1997, UKPC 41 (28th July , 1997)**

(15). Counsel for the plaintiff, Mr. Maopa elaborated on above in paragraph 36, 37, 38, 39, 40 and 41 of the written submissions filed on 29th October 2019 as follows;

> *(36) The context of PEX4 seems to be the purported last Will and Testament of Narend Chandra, although not strictly complied with section 6 of the Wills Act as the wording and its execution resemble a Will thus it is prepared by a former court clerk and a Justice of the Peace at that time. According to PW4 the JP and another witness are now deceased who was an accountant and her brother in law. They went together with the testator to the JP's house to sign the so called Deed.*
>
> *(37) According to PW 4 the Deed was prepared by the JP upon instruction of the testator after they had separated, and at times still visiting her. They signed in front of the JP and witnessed by the accountant their signatures. The content of PEX4 was read in Hindi to Mr. Chandra and he fully understood the content. Hence, such Deed of Agreement is the purported Last Will and Testament of Narend Chandra hence it is valid.*
>
> ***Wills (Amendment) Act 2004***
>
> *(38) In this regard section 6A of the Wills (Amendment) Act 2004 provides:*
>
> > *6A.(1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements under Section 6, constitutes a will of the deceased person if the Court is satisfied that the deceased person intended the document to constitute his or her will.*
> >
> > *(2) The Court may, in forming its view, have regard, in addition to the document, to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence, whether admissible before or after the commencement of this section, of statements made by the deceased person.*
>
> *(39) Therefore the strict requirement of executing a Will has been relaxed under the above amendment. It is submitted that such PE4 is valid and contain the last will and testamentary intention of the late Mr. Chandra.*
>
> *(40) Thereafter having had that intention to give his share in the property away, by PEX4, Mr. Chandra solely arranged for the JP to prepare such document without telling anyone or in front of others including PW4 or the witnesses about the content of such document prior to executing it. He told PW4 to accompanied him with his brother in law to the JP to sign a document which they did. That PEX4 does not require strict compliance under section 6 of the Wills Act, nor attract stamp duty.*

Further section 11 of the Wills (Amendment) Act 2004 provides for the disposition;

> *2) A disposition made by Will is not made void by this section, if –*
>
> *(a) at least two persons who witness the execution of the will are not persons to whom any such disposition is so made or the spouse of any such person;*
>
> *(b) .....; or*
>
> *(c) The Court is satisfied –*
>
> > *i) The testator knew and approved of the disposition; and*
> > *ii) The disposition was made by the testator freely and voluntarily".*

(41) Therefore it is submitted that PEX4 is the valid Last Will and Testament of Narend Chandra and the Court ought to so declare and pronounce in favor of it.

(16). Let me assume for a moment that the deed of agreement embodies the testamentary intentions of late Narend. If the Court pronounces for the Will propounded by the 2nd defendant then it will be the last Will and testament of the testator thereby revoking all previous Wills. On the other hand, if the court pronounces against the Will propounded by the second defendant, then the question arises whether the deed of agreement dated 08th April 2007 should be granted probate. I have some reservations about the circumstances surrounding the execution of the deed of agreement. (See, paragraph (04), above). What is more damaging is that in the relief claimed by the plaintiff in her statement of claim, the Court is not requested to pronounce in favour of the deed of agreement dated 08th April 2007. Normally, the Court will grant only those reliefs specifically prayed for by the plaintiff. No Court is entitled to or has jurisdiction to grant relief to a party which is not prayed for in the prayer of the plaintiff.

(17). Then comes the Will of 27th August 2009. In the statement of claim filed on 30th April 2013, the plaintiff sought relief from this Court in the form of a pronouncement against the Will purported to have been executed on 27th August 2009, by Narend (the testator).

(18). The grounds on which the said Will is disputed are stated below (as stated in the statement of claim).

> *10. <u>THAT</u> on or around the time the WILL was executed the testator was not in a right state of mind to give any instruction and or to sign a WILL or anything else in that manner.*

13. *THAT the making of the said WILL was fraudulent and the signature of the testator forged by the defendants.*

Particulars of fraud

a) *the signature on the WILL is not that of the deceased.*

b) *the purported signature of the testator on the similar WILL produced to FNPF by the second defendant differs from the signature on the purported said Will.*

c) *the signature of the deceased and the font size used on similar WILL produced to FNPF by the second defendant differ from the purported said WILL.*

d) *lack of written instruction by the deceased as required under the WILLS Act (Section 6 (a and (b)*

e) *the solicitor's stamp on the bottom of the WILL is without a signature*

f) *the two witnesses do not include their names or occupation and with a solicitor's stamp without her signature.*

g) *font size on the solicitor's stamp appeared on the WILL produced to FNPF differs from the purported said WILL.*

h) *the father (3rd defendant) of the 2nd defendant's signature appeared on the WILL as witness.*

i) *the signature appeared on the cover page of the WILL produced to FNPF differs from the purported said WILL*

j) *the signature appeared on the cover page of the WILL differs from the signature of the testator.*

(19). The contents of the Will are as follows;

THIS IS THE LAST WILL AND TESTAMENT of NAREND CHAND also known as NAREND CHANDRA father's name Enkanna of Balram Dass Street, Tavakubu, Lautoka, School Teacher.

1. *I REVOKE all wills and other testamentary dispositions at any time herefore made by me and declare this to be my Last Will and Testament.*

2. *I APPOINT SHIRO MANI son of Subaiya of Hospital Compound, Lab Technician respectively to be my Executors and Trustees of this my will.*

3. *I GIVE DEVISE unto my de facto wife SUMAN LATA daughter of Jai Lal* ***my half share of the property situated at Lot 51, Gibson Place, Natabua, Lautoka,*** *absolutely.*

4. *I GIVE DEVISE unto my defacto wife SUMAN LATA daughter of Jai Lal my shares at Amalgamated Telecom Holdings Limited absolutely.*

5. *I wish to give the residue and remainder of my estate wheresoever it may be or situated to my defacto wife SUMAN LATA absolutely.*

6. *I hereby instruct my Executor SHIROMANI son of Subaiya to carry out my burial services together with my defacto wife SUMAN LATA daughter of Jai Lal without any interference from my legal wife.*

DATED this 27th day of August, 2009]
SIGNED by the testator the said NAREND]
CHAND aka NAREND CHANDRA as and for]
the last will and testament in the presence of]
us both being present at the same time who at]
their request and their presence and the sight]
and presence of each other have hereunto] .....
subscribed our names as attesting witnesses]
and we certify that the contents hereof were]
read over and explained to the ***Testators*** *in the]*
Hindi language and ***they*** *appeared to fully]*
Understand and approve the same before]
Signing their names in our presence.]

....
WITNESS *WITNESS*

(Emphasis added)

(20). The above Will propounded by the second defendant was executed seven days (07) before the testator Narend died in Lautoka Hospital. The above Will gave Narend's half share of the property to Narend's de facto partner 'Lata', the second defendant. The Will was professionally drawn. The Will was prepared by (Ms) Jotishna Nair, a Lautoka Barrister and Solicitor. The first defendant is the executor and trustee of the Will. The third defendant is one of the attesting witnesses to the Will. He is also the father of Lata. Lata was named in the Will as the sole beneficiary of the estate of Narend. At present,

Lata is the trustee of the estate of Narend Chand because the trustee, first defendant, Shiro Mani retired as a trustee in March 2012. Lata has been appointed as the new trustee. Therefore, at present, Lata is the sole trustee and the sole beneficiary under the Will of the deceased Narend Chand.

(21). As noted above, the third defendant is the father of Lata and an attesting witness to the Will. The other attesting Witness is Sat Narayan. **Both attesting witnesses are dead**.

(22). The onus *probandi* lies in every case upon the party propounding [Lata in this case] a Will; and he must satisfy the conscience of the court that the instrument so propounded is the last Will of a free and capable testator.

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.

See;
- **Belbin v Skeates**[2]
- **Bowman v Hodgson**[3]

The burden imposed on a party who seeks to propound a will was stated clearly by Lord Hanworth MR in **In the Estate of Lavinia Musgrove, Davis v Mayhew**[4]

> ***"It is clear first, 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 a 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 course 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."***

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**[5]

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[2] 164 ER 669
[3] (1867) 1 L.R.P. and D 362
[4] [1927] AC 264 at part 276
[5] [1949] 2 ALL.E.R 250, at 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 all that I can 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 circumstance it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regards to the attesting of this will as may be available."***

Before other evidence is admissible, it must be shown that all the attesting witnesses are dead, insane, beyond the jurisdiction or that none of them can be traced.

If none of the attesting witnesses can be called for the reasons indicated in the previous paragraph, steps must be taken to prove at least one of them. This constitutes secondary evidence of attestation.

See;
- **In the Will of Hutchins**[6]
- **In the Will of Hobbs**[7]

If evidence of handwriting is unobtainable, evidence of those who saw the Will executed, or any other evidence from which an inference of due execution can be drawn becomes admissible, but it seems that every effort first be made prove the handwriting of one of the attesting witnesses.

See; **Clarke v Clarke**[8]

(23). **In the plaintiff's pleadings, the plaintiff, Devi had not put the defendants to strict proof of due and legal execution and attestation of the Will. As I understand the pleadings, this is not a case where the due and legal execution and attestation of the Will was contested.** The only disputes were that;

(A) "That on or around the time the Will was executed the testator was not in a right state of mind to give any instruction and or to sign a Will…" [Paragraph 10 of the statement of claim]

(B) That the making of the said Will was fraudulent and the

[6] (1893) 14 ALT 223
[7] (1931) 48 WN (NSW) 166.
[8] (1879) 5 LR Ir 47.

signature of the testator forged by the defendants. [Paragraph 13 of the statement of claim]

Particulars of fraud

(a) *the signature on the WILL is not that of the deceased.*

(b) *the purported signature of the testator on the similar WILL produced to FNPF by the second defendant differs from the signature on the purported said Will.*

(c) *the signature of the deceased and the font size used on similar WILL produced to FNPF by the second defendant differ from the purported said WILL.*

(d) *lack of written instruction by the deceased as required under the WILLS Act (Section 6 (a and (b)*

(e) *the solicitor's stamp on the bottom of the WILL is without a signature*

(f) *the two witnesses do not include their names or occupation and with a solicitor's stamp without her signature.*

(g) *font size on the solicitor's stamp appeared on the WILL produced to FNPF differs from the purported said WILL.*

(h) *the father (3rd defendant) of the 2nd defendant's signature appeared on the WILL as witness.*

(i) *the signature appeared on the cover page of the WILL produced to FNPF differs from the purported said WILL*

(j) *the signature appeared on the cover page of the WILL differs from the signature of the testator.*

(24). The formal requirements of executing a Will under section 6 of the **Wills Act, 1972** was not an issue in the case before me. It was **not** specifically pleaded by the plaintiff in her statement of claim that the Will was not executed in accordance with the provisions of

Section 6 of the Wills Act 1972. There was **no** allegation in the statement of claim relating to non-compliance with the Wills Act, 1972. As far as the formalities of the Wills Act 1972 are concerned the Will is all right.

(25). Besides, a Court in **proper circumstances** will uphold a Will which had **not** been executed in accordance with the relevant statutory requirements.

It is instructive to consider a statement at paragraph 7.61 on page 532 Volume 1 of **English Private Law** by Peter Birks which was published in the year 2000 where the following statement is made under the heading **Interpretation of Section 9 of the Wills Act 1837.**

Until recently there was a tendency for Judges to interpret Section 9 very strictly. This meant that some authentic wills which questionably represented the true intention of the Testator failed for non-compliance with the prescribed formalities. English Law knows no doctrine of "Substantial Compliance", so the Court has no power to admit to probate an authentic will which is invalid under Section 9. Having said this, the courts have recently shown a tendency to be slightly more relaxed about the formalities then were formally the case. In ***Weatherhill v Peers [1995] 1 WLR 592*** *there was a doubt as to whether the testatrix had acknowledged her signature in the presence of both witnesses present at the same time and in* ***Couser v. Couser [1996] 1 WLR 1301*** *there was a question as to whether one of the witnesses had acknowledged her signature in this case.* ***In each case the validity of the Will was upheld. This relaxation is to be welcomed.***

(Emphasis added)

Section 6 of the Wills Act 1972 is in similar to Section 9 of the English Act.

(26). What is more, the last Will and Testament of Narend Chand was proved and registered in the Probate Registry of the High Court of Fiji on 02nd February 2012 and probate was granted to the first defendant. If a person put forward a Will for probate he must satisfy the Court not only that it was duly executed but also that the testator knew and approved its contents[9]. **Thus, I assume both**. Therefore, the defendants have proven the Will in "Common form" and it would seem logical that the onus should rest initially with the plaintiff who seeks to disturb the Will on the ground of fraud and the testator's incapacity. **The plaintiff's pleadings contained no allegation that there was undue influence, or coercion exercised on the testator by the defendants in connection with the execution of the Will.**

(27). Therefore, in the present case, I assume that;

(*) the formalities for executing the Will were carried out by the defendants **because the Will was proved and registered in the probate registry.** The Court has no

[9] Wintle v Nye (1959) (1) WLR 284
(1959) (1) ALL.E.R. 352

jurisdiction to admit to probate a Will which is invalid under Section 6 of the Wills Act.

(28). When the formalities for executing a Will are carried out, the presumption is that the Will is validly executed and cogent and strong evidence is needed to rebut the presumption[10]. **But**, the presumption is nevertheless rebuttable when there are surrounding suspicious circumstances.

In **Purnima Devi v. Kumar Khagendra Narayan Devi**[11] it was held by the Supreme Court of India that:

> *"The **onus of proving the will was on the propounder** and in the absence of suspicious circumstances surround the execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. **Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine.** If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. **Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court."***
>
> [Emphasis added]

Sherrington v Sherrington was a case in which the validity of a Will was under question. Reference was made to the view expressed by Lord Penzance in **Wright v Rogers**[12] to the following effect:

> *"The Court ought to have in all cases the strongest evidence before it believes that a Will, with a perfect attestation clause, and signed by the testator, was not duly executed. The presumption of law is largely in favour of the due execution of a Will, and in that light a perfect attestation clause is a most important element of proof."*

Reference was also made to the two principles laid down in **Barry v Butlin**[13] , that is:

> *"[T]he first (is), that the onus probandi lies in every case upon the party propunding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator. The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support*

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[10] **Sherrington v Sherrington (2005) EWCA CIV 326;**
Channon & Channon v Perkin & Others (2005) EWCA CIV 1808

[11] [1962] 3 SCR 195

[12] [1869]LR 1 PD 678

[13] [1938] 2 Moo. P.C. 480

of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."

(29). **Channon & Channon**[14] followed **Sherrington** and the reasons (practical and principled) for having the **"strongest evidence"** was explained in the following words:

> *"There is good reason for the requirement that one must have "the strongest evidence" to the effect that a Will has not been executed in accordance with Section 9 [of the Wills Act 1837] when, as in this case, it appears from the face of the Will that it has been properly executed in all such respects and where there is no suggestion but that the contents of the Will represented the testator's intention. Where a Will, on its face, has been executed in accordance with Section 9, and where there is no reason to doubt that it represented completely the wishes of the testator, there are two reasons, one practical and one of principle, why the court should be slow, on the basis of extraneous evidence, to hold that the Will was not properly executed.*
>
> *The practical reason is that oral testimony as to the way in which a document was executed many years ago is likely to be inherently particularly reliable on, one suspects, most occasions. As anyone who has been involved in contested factual disputes will know, people can, entirely honestly and doing their very best, completely misremember or wholly forget facts and events that took place not very long ago, and the longer ago something may have taken place the less accurate their recollection is likely to be. Wills often are executed many years before they come into their own.*
>
> ....
>
> *The principled reason for being reluctant to hold that a Will, properly executed on its face, representing the apparent wishes of the testator, should be set aside on extraneous evidence, is that one is thereby declining to implement the wishes of the testator following his death. That would be unfortunate, especially in a case he has taken care to ensure, as far as he can, that his wishes are given effect in a way which complies with the law."*

What is the "**strongest evidence** was discussed by Lady Justice Arden in the following words:

> *Lord Penzance refers to the need for the "strongest evidence" before the Court will hold that such a Will was not duly executed. I accept that, as Mr Robert Arnfield, for the respondent, submits, the requirement for the strongest evidence does not mean that there could be no other evidence that could be stronger. If that were the meaning of the phrase used by Lord Penzance, there would be no*

[14] (2005) EWCA Civ 1808

case in which anything less than perfect recollection of execution in accordance of the attestation clause could satisfy Section 9 of the Wills Act.

So the question of what constitutes the "strongest evidence" for the purposes of this kind of case remains to be explored. As I see it, there is a sliding scale according to which evidence will constitute the strongest evidence in one case but not in another. What constitutes the "strongest evidence" in any particular case will depend on totality of the relevant facts of that case, and the court's evaluation of the probabilities. The Court must look at all the circumstances of the case relevant to attestation. The more probable it is, from those circumstances, that the Will was properly attested, the greater Will be the burden on those seeking to displace the presumption as to due execution to which the execution of the Will and the attestation clause give rise. Accordingly the higher Will be the hurdle to be crossed to meet the requirement of showing the "strongest evidence", and the stronger that evidence will need to be.

Likewise, if the evidence of due attestation is weak, the burden of displacing the presumption as to due execution may be more easily discharged and the requirement to show the strongest evidence satisfied. Allegations that were not made, or were not pursued, and mere suspicion, have to be put on one side."

Wintle v Nye[15] dealt with one species of suspicious circumstances relating to the genuineness of a Will. In that case, the testatrix was not versed in business. She signed a Will and subsequently a Codicil prepared by her Solicitor who was not an intimate friend. Through this process, the Solicitor was named as the sole executor of the Will and after making provision for various legacies and gifts, the residue of her large estate was bequeathed to him. The validity of the Will and codicil was challenged on the ground that the testatrix did not know or approve of the contents of the Will and the Codicil. In this context, the House of Lords held:

"It is not the law that in no circumstances can a Solicitor or other person who has prepared a Will for a testator take a benefit under it. But the fact creates a suspicion that must be removed by the person propounding the Will. In all cases the Court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed. In the present case the circumstances were such as to impose on the respondent as heavy a burden as can well be imagined. Here was an elderly lady who might be called old, unversed in business, having no one upon whom to rely except the Solicitor who had acted for her and her family; a Will made by him under which he takes the bulk of her large estate; a Will made, it is true, after a number of interviews extending over a considerable time, during which the details of her property and of her proposed legacies and annuities were said to have been put before her, but in the end of a complexity which demanded for its comprehension no common understanding .....All these facts and others that I do not pause to

[15] 1959 (1) WLR 284

enumerate demanded a vigilant and jealous scrutiny by the judge in his summing-up and by the jury in the consideration of their verdict."

H.Venkatachala Iyengar v B.N. Thimmajamma and Others[16] is a leading case decided by the Supreme Court of India on the validity of Wills. The principles laid down in Venkatachala have been summarized in **Mahesh Kumar v Vinod Kumar**[17] as follows;

Unlike other documents, the Will speaks from the death of the testator and therefore the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

It is in connection with Wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasizes that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the Court has to be satisfied dully that the Will has been validly executed by the testator.

If a caveator alleges fraud, undue influence, coercion etc, in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding th3e execution of the Will may raise a doubt as to whether the testator was acting of his own free will.

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[16] AIR 1959 SC 443
[17] 2012 4 SCC 387

And then it is a part of the initial onus of the profounder to removal all reasonable doubts in the matter."

(30). If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased[18].

In the case before me, the Will was drawn by (Ms) Jotishna Nair, a Lautoka Barrister and Solicitor. The testator has not made provision for her. She has not derived any personal benefit under the Will. It is true that Lata, (Narendra's de facto partner) was made sole beneficiary under the Will to the exclusion of Devi (Narend's legal wife). The result of the Will is that the legal wife is completely inherited with regards to Narend's share in the property. According to the evidence led before this Court, the propounder of the Will, Lata has not taken a prominent part in the execution of the Will which conferred on her substantial benefits. The evidence, does show that the Will was prepared by Solicitor (Ms) Nair on the instructions of the testator. The transcript of (Ms) Nair's evidence in chief contains this: (page 106 of the transcript of evidence)

Q: *Now, can you tell the Court how come you prepared that Will under what?*

A: *Yes, I recall, I believe it would have been 24th or the 25th of August when I received a phone call from Mr Chandra. And I was quite surprised that he called me because I wasn't sure how he got hold, he managed to get hold of my number. And he asked if I could visit him at the hospital as he wanted me to do a Will for him which I did. I went and visited him and I spoke to him for about a few minutes. The reason why I visited because I was also interested in finding out how he managed to get hold of my number. And then he told me that he had found out from a friend of his or with the firm that was representing him then, Haroon Ali Shah's firm. And that's how he managed to get hold of my number and that's how he called me. And he said that he remembers me as Magistrate. According to him I dealt with one of his matters for Mention. Though I could not recall that particular Mention but that's what he said to me. And then I asked him who was his Solicitor, and he said it was Mr Haroon Ali Shah and I also recall asking why he didn't go back to Mr Shah for the Will. And he said that Mr Shah is busy. And he needed somebody to just to draft it for him. And so that's how he asked me to draft and I took instructions on what he wanted in the Will. Who he wanted appointed and who will be signing the document and he gave me all the*

[18] Barry v Butlin (1838) 2 Moo P.C.C. 480
see also; Fulton v Andrew (1875), L.R. 7.18.H L.448
Tyrrell v Painton (1894) P 151

information. There's a few that was not included in the Will because I had already advised him since you are still around you can actually transfer it while you are in a position for instances the vehicle. So, I got him to do that. But for the property where he said he had half share I told him that you will have to put that in the Will. That's how I drafted the Will.

Moreover, the testator required certain variations to be made in the first Will. (Ms.) Nair testified that; (Reference is made to page 108 of the Transcript of evidence)

Q: *So, a day earlier you went for instructions and the next day you came with the Will?*

A: *Yes. Yes. And then that same evening of 26th I remember getting a call from him saying that he wanted one thing changed. Not the issue relating to what he wanted to give to whoever but he wanted one thing extra added onto the Will. And that was to do with the burial, his funeral arrangements. And so I had second one done on the 27th which I then brought back to the hospital and had it executed again.*

Lata, has not played a part in the preparation of the Will. She was not the conduit through whom the deceased's instructions and questions and answers on the drafting of the Will were relayed. She has not organized the process of signing the Will by the deceased and witnesses. Lata was not instrumental in drafting the Will. As noted above, the result of the Will is that the legal wife Devi is completely inherited in relation to Narend's share in the property. The Will cut out his legal wife. He decided to leave no part of his substantial estate. This is not a reason for the Court's suspicion to be excited in relation to the Will. The content of the Will or as to expression is not irrational. Irra tionality of a Will on its face, either as to content or as to expression, is often an indication of greater or lesser force that the Will maker lacked capacity. But the rationality of a Will on its face does not necessarily provide much evidence of capacity , especially if the Will is professionally drawn.

There are no children of the deceased's marriage to Devi. So, there are no persons to whom he owed an obligation under family protection. At the time he made the Will, he was living with his de facto wife, Lata.

Therefore, it is not surprising that Narend left everything to his de facto partner by his Will. There is in this case a rational reason for Narend wishing to benefit the de facto wife, Lata. The deceased's relationship with the legal wife, Devi, by the date of the Will was not of the best and the deceased was totally committed to the de facto partner and was concerned to provide for her future in recognition of her close relationship with him and the support and comfort she gave him during the last period of his life. Lot of things had changed between the date of execution of the deed of agreement and the date of execution of the Will which would result in the need for a Will to effect a different testamentary disposition. The relations were not healed and about five months before the date of execution of the testamentary disposition he applied for the dissolution of his

marriage to Devi because he must have realized that the marriage could not last and also he must had developed a deep regard to his de facto wife. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest person the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Thus, the Will dated 27th August , 2009 could not be described as irrational on its face. That the Will was rational on its face was clearly apparent.

There are no sufficient reasons for the Court's suspicion to be excited in relation to the execution of the Will.

(31). In paragraph (10) of the Statement of Claim the plaintiff alleges that;

> *(10) That on or around the time the Will was executed the testator was not in a right state of mind to give any instructions and or to sign a Will or anything else in the matter.*

(32). The deceased Narend was aged 45 when he executed the Will. The Will contained nothing on the face of it to cast doubt upon the mental capacity of the testator. There is no dispute that the conditions of Section 6 of the Wills Act 1972 are complied with. On its face the Will was validly executed. The Will is in proper form. There is an attestation clause and the testator and the witnesses have signed. **Wright v Sanderson**[19] demonstrates the strength of the presumption of the execution when there is an attestation clause and the testator and the witnesses sign.

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**[20] and **Peters v Morris**[21]

If there is evidence which raises lack of capacity as a tenable issue, the onus of satisfying the Court that the maker of the Will did have testamentary capacity rests on those who seek probate of the Will: **Public Trustee v Bick**[22]

That onus must be discharged on the balance of probabilities: **Watkings v Public Trustee**[23]. Whether the onus has been discharged will depend, amongst other things, upon the strength of the evidence suggesting lack of capacity.

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[19] (1884) 9 PD 149
[20] [1951] NZLR 393 (CA)
[21] (CA99/85: judgment 19 May 1987).
[22] [1973] 1 NZLR 301 and Peters v Morris [supra].
[23] [1960] NZLR 326 (CA)

In order to establish capacity, when in issue, those seeking probate must demonstrate the maker of the Will had sufficient understanding of three things:

(a) that he or she was making a Will and the effect of doing so ('the nature of the act and its effects')

(b) the extent of the property being disposed of

(c) the moral claims to which he or she ought to give effect when making the testamentary dispositions.

These three matters derive from the leading authority of **Banks v Goodfellow**[24], **Ranby v Hooker**[25].

If incapacity before the making of the Will has been established, those seeking probate must show the Will was made after recovery or during a lucid interval. In such a case the Will is regarded with particular distrust and there is, in the first instance, a strong presumption against it, particularly if it displays lack of moral responsibility in the nature of the dispositions[26].

No evidence is required to prove a testator's sanity if it is not impeached. That if a Will is shown to have been signed and attested in the normal manner prescribed by law there is a presumption that it was made by a person of competent understanding. That there should be clear evidence of incapacity on the part of the testator at the date of the Will before any onus moves to the party propounding the Will. **If there is no such evidence then the presumption of capacity remains**.

The Solicitor (Ms) Nair said that she had no reason to doubt the testator's testamentary capacity. The testator was, in her view, lucid and clear in his mind. When asked for her opinion as to whether the testator had the understanding of what he was doing she said; (Reference is made to page 108 of the transcript of evidence)

> *Q:* *That's your handwriting. Did you ever feel that Mr Chand did not understand or know what you are doing?*
> *A:* *No, he spoke, he understood what he wanted me to do. He appeared to understand what was going on and what he wanted me to do. He's the one actually told me what to put in the Will. It was him who gave me instructions, nobody else.*

Further down at page 109 of the transcript of evidence;

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[24] (1870) LR 5 QB 549

[25] (Court of Appeal, Wellington, CA 172/96, 16 September 1997) and in Peters v Morris (supra)).

[26] Halsbury's Laws of England , Vol 17 at para 904.

Q: *And on this date, on the 27th did you satisfy yourself that he was capable understanding in what he's doing?*

A: *Yes. With regards to the Clause 6, he told me that over the phone and when I brought the documents back again on the 27th I had read it out again and parties signed. He had no issues with the contents of the Will. Everything else is the same. The only thing that changed was, added on was Clause 6.*

It is the plaintiff who bears the burden of proving the mental incapacity of the testator. There is no question that the testator was in ill-health. A bare allegation that the testator was ill and therefore not sound mind is unhelpful. It does not advance the plaintiff's case.

According to the evidence of defence witness, Solicitor (Ms) Jyotishna Nair, on the 24th August, 2009 she received a call from the deceased and intimated that he would like to make a Will. On the following day, that is 25th August, 2009, (Ms) Nair had visited the deceased at the Paying Ward in Lautoka Hospital and she had received instructions to prepare his Will.

(Ms) Nair said that around 7.00 to 8.00pm on 27/08/2009 she visited the deceased at the Paying Ward at Lautoka Hospital and the deceased signed the Will dated 27/08/2009(**the Second Will**) in front of her.

The events of 24th, 25th, 26th and 27th August are described in the words of (Ms) Nair as follows. (Reference is made to the page 106 to 109 of the transcript of evidence).

Q: *Where was this Will typed?*

A: *Then I was with Puamau law.*

Q: *So it was it was typed there?*

A: *Yes.*

Q: *Now, there's a, you see, I appoint Shiromani, there's a daughter then sign. Whose*

A: *No, that's a typo on our part.*

Q: *Whose writing is that?*

A: *That's my writing. I crossed it off and wrote down son and I had the parties initial.*

Q: *Right. And dated*

A: *In terms of writing that 26th of August is my writing, I recognized that. And the part it was written Hindi, I wrote that.*

Q: *Alright. Now,*

A: *And the names, signed Sat Narayan and J. Lal and Narend Chand, that's all my handwriting. I recognized it.*

Q: *Can you tell the Court the process that you went through to have this Will signed, what did you do?*

A: *Well, I had it read out to Mr Chand and he was okay with whatever was contained in it and then Mr Chand signed, and his Witnesses signed. He had already told me who is his witnesses were going to be.*

Q: *Was it done in your presence?*

A: *Yes. It was at the hospital, the ward that he was in.*

Q: *Was Mr Chand able to communicate with you?*

A: *Oh yes, like I said before, I actually took instructions from the Will, we had a quite a lengthy discussion about the case currently pending in Court. Because he had a matrimonial case pending in Court with his former wife.*

Crt: *In which language did you communicated with him?*

A: *In which language? It was mixed of Hindi and English.*

Crt: *Was he conversing in English?*

A: *He was conversing both to me in Hindi as well as in English.*

Crt: *Yes Mr Chaudhary?*

Q: *Alright. Then you dated it and you changed it to ....., and then the initials; whose initials are there?*

A: *I believe that's Sat Narayan's and J. Lal and NC would be for Mr Narend Chand.*

Q: *And at the cover page at the back, it's also dated 26th August?*

A: *That's my handwriting also.*

Q: *That's your handwriting. Did you ever feel that Mr Chand did not understand or know what you are doing?*

A: *No, he spoke, he understood what he wanted me to do. He appeared to understand what was going on and what he wanted me to do. He's the one actually told me what to put in the Will. It was him who gave me instructions, nobody else.*

Crt: *Excuse me. Now, this Will was executed on the 26th of August, 2009, 26th of August, right? When did you get the instructions from him to prepare the Will?*

A: *When did I get instructions?*

Crt: *Yes.*
A: *When I visited him at the hospital, it could have been on the 25th.*

Crt: *25th?*
A: *Yes.*

Crt: *Yes.*

Q: *So, a day earlier you went for instructions and the next day you came with the Will?*
A: *Yes. Yes. And then that same evening of 26th I remember getting a call from him saying that he wanted one thing changed. Not the issue relating to what he wanted to give to whoever but he wanted one thing extra added onto the Will. And that was to do with the burial, his funeral arrangements. And so I had second one done on the 27th which I then brought back to the hospital and had it executed again.*

Q: *I'll show you the second one, that you talking about. Have a look at this? This one that I'm showing the Witness now Sir, is Defendant's Tab 3 and it's Plaintiff Tab 2. I admitted tendered. This one is dated?*
A: *27th August.*

Q: *Whose writing is that, 27th August?*
A: *Again, that's my handwriting.*

Q: *And what is the difference between the Will dated 26th and Will dated 27th*
A: *The only portion that's different is number 6.*

Q: *Number?*
A: *Clause 6 of the Will.*

Q: *And can you just read that out, please?*
A: *I hereby instruct my Executor Shiromani, son of Subaiya, to carry out my burial services together with my defacto wife, Suman Lata daughter of J Lal without any interference from my legal wife. That's how he wanted me to word it.*

Q: *So, that's the only addition*
A: *That's the only addition. Other than the fact that I actually made the corrections where it says, daughter and then I made sure it's written there son.*

Q: *That's in the previous Will?*
A: *Yes.*

Q: *And in this one also written in Hindi, who wrote Hindi?*
A: *I did. That's my handwriting.*

Q: *And at the back page*
A: *And at the back also, it's my handwriting, 27th of August.*

Q: *And on this date, on the 27th did you satisfy yourself that he was capable understanding in what he's doing?*
A: *Yes. With regards to the Clause 6, he told me that over the phone and when I brought the document back again on the 27th I had it read out again and parties signed. He had no issues with the contents of the Will. Everything else is the same. The only thing that changed was, added on was Clause 6.*

Q: *And the Witnesses are also the same, Sat Narayan and J Lal?*
A: *That's correct.*

Q: *Were you aware at that time that J Lal was Suman Lata's Father?*
A: *Yes.*

(Ms) Nair spoke to the deceased's capacity at the time of taking instructions, in her deposition (reference is made to page 108 of the Transcript of evidence).

Q: *That's your handwriting. Did you ever feel that Mr Chand did not understand or know what you are doing?*
A: *No, he spoke, he understood what he wanted me to do. He appeared to understand what was going on and what he wanted me to do. He's the one actually told me what to put in the Will. It was him who gave me instructions, nobody else.*

Further down at page 109 of the Transcripts of evidence, (Ms) Nair spoke to the deceased's capacity at the time of execution of the Will.

Q: *And on this date, on the 27th did you satisfy yourself that he was capable understanding in what he's doing?*
A: *Yes. With regards to the Clause 6, he told me that over the phone and when I brought the document back again on the 27th I had it read out again and parties signed. He had no issues with the contents of the Will. Everything else is the same. The only thing that changed was, added on was Clause 6.*

The plaintiff (Devi) said that from 15th August, 2009 to 23rd August, 2009 she attended the deceased at Lautoka Hospital and explained her observations as follows; (Reference is made to page 31 and 32 of the transcript of evidence).

Q: *Then what happened in 2009, witness?*

A: *In 2009, he was teaching at Arya Samaj School, last he fell down there then he was brought to hospital. Then he was discharged. After a few days he collapsed at home, at Kermode Road then he was brought to hospital by an Ambulance. That's what I know, Sir.*

Q: *That's what you know?*
A: *Yeah.*

Q: *Okay. Did you do anything?*
A: *Yeah. I went to visit him.*

Q: *Where?*
A: *In hospital, Paying ward.*

Q: *Which hospital?*
A: *Lautoka hospital.*

Q: *You remember the date you went to visit him?*
A: *Yes sir, it was Saturday 15th of August, 2009.*

Q: *So, when you went on the 15th of August, 2009, were you able to see Narend?*
A: *Yes Sir.*

Q: ***Explain to the Court your observation on Narend during your visitation on that day?***
A: ***He was breathing on tubes and he was just sleeping. That's how I saw him. When I asked the Sister in the ward, she said he's very sick because he's at his last stage. That's what Sister told me.***

Q: ***Then how many times did you go and visited him?***
A: ***So many times, till 23rd Sir, I went to visit him until 23rd August, 2009.***

Q: *Until 23rd, okay. So, that means you went on the 16th, 17th*
A: *Not every day, Sir. But I used to go. On 23rd was my last day when I visited him and a day before he died.*

Q: *So, on the 23rd you went to visit him, that's your last visit. Tell the Court your observation on Narend when you went to visit him on that day?*
A: *He was seen he was breathing on tubes. And he was in Paying ward, room number 6. And I did not talk to him because he was not able to talk. He was just sleeping breathing on tubes, oxygen.*

Her evidence as to the state of the testator's health is **not proximate enough** to the time of giving instructions to make the Will and also to the time of execution of the Will. Besides, she did not testify in her evidence seeing Narend's any intellectual deterioration so as to be suffering from memory loss and disorientation and loss of insight into ; (1) the nature and extent of those having claims on his estate (2) the nature and extent of his property. Her evidence as to the state of the testator's health from 15/08/2009 to 23/08/2009 **does not** assist Court to excite the suspicion that ; (1) the testator did not have the testamentary capacity when he signed the Will on 27/08/2009 (2) the testator did not understand what he was doing when he instructed (Ms) Nair on 25/08/2009 to prepare his Will so that he can execute it. To sum up the whole in the most simple and intelligible form, Devi's evidence as to the state of the testator's health from 15-08-2009 to 23-08-2009 is **not proximate enough** to cast a doubt about the testator's competence at the relevant time, namely 27-08-2009. There should be clear evidence of incapacity on the part of the testator at the date of the Will before any onus moves to the party propounding the will.

The plaintiff said in evidence that on **24-08-2009**, when she went to the hospital with others to see the deceased they were refused entry and they saw a sign posted on the hospital ward door "*no visitors allowed*". Generally, these signs are put up for two reasons ; (1) to make sure that the patient does not become too tired (2) to give the patient quiet time and some temporary privacy.

The sign posted on the hospital ward door does **not** mean that; (1) the things could not have been normal by the time he signed the Will on **27-08-2009.** (2) he could not have been normal and rational by the time he signed the Will on **27-08-2009**. The sign posted cannot have any relevance to his testamentary capacity at the time he made the Will.

The defence witness Dr. Arun Murari said relying on the hospital medical folder, that on 27/08/2009 the deceased had complained of chest pain and his E.C.G. had shown some changes suggestive of Ischemia. The deceased had been reviewed by the Physicians and an Order was made to transfer him to the ICU for observations. His evidence in chief contains this; (Reference is made to page 36 to 39 of the transcript of evidence, Vol -2).

Q: *Now, you say here Doctor that this report is continuation of the previous report of Mr Narend Chandra issued on 20th August, so it's a continuation from that report which we have already tendered. Since that day, the patient continued to be admitted in Lautoka Hospital. His main complaints were shortness of breath for which he was receiving oxygen and other medications. Then next paragraph you say, on 27th August he complained of chest pain and his ECG showed some changes suggestive of ischemia. He was reviewed by the physicians and shifted to the High Dependency Unit where he was treated for an acute coronary syndrome. I'll come to that paragraph later Doctor. And then you say, on 1st October, he was seen by the surgical. I believe that 1st October should be 1st September?*

A: *Yes.*

Q: *That's a typing error, Sir. Should be 1st September, that is the correction to this report which is, which I'll also tender later. And on 1st October which we, it's really 1st September he was seen by the surgical and medical teams and its records indicates that he was conscious, oriented and had tolerated his breakfast, lunch and dinner. That is 1st September?*

A: *Yes.*

Q: *From his records, there is no evidence to suggest that he was not in a position to understand and sign documents on 30th August, 2009? That's what you have said. On 3rd September his condition deteriorated and he passed away at 5.30am. I like to tender that Sir, but I'll come back with this report again. That would be D5. And then Doctor you gave another report which is Defendant's Bundle item 1.*

Crt: *Yes.*

DC: *In Defendant's Bundle, another report. And then I'll show you the report. This is dated March 17th, 2010. And this is corrigendum that is correction to the report dated March 17th. Your Lordship is with me?*

Crt: *Yes.*

DC: *Yes. And this report is in continuation of the previous report of Mr Narend Chandra, issued on 15th December. According to his case record, on 1st September, he's recorded to having conscious and oriented, that 1st September. He was conscious and oriented on morning rounds at around 8am. It is also recorded that his breakfast was well tolerated. At 4pm it is recorded that he "had dinner – tolerated a little". This is on 1st September. On that day Mr Narend Chandra's health was deteriorating fast and based on his records he probably would have been in a position to sign documents at 8am, but I cannot certify about his condition after that. This is 1st September you talking about?*

A: *Yes.*

DC: *I tender that Sir. I tender this Defendant exhibit 6. Now, you also want we wait, Sir.*

Crt: *You may go ahead please.*

Q: *Now, I bring you back Doctor Murari report dated December 15th, 1st, 2nd, 3rd paragraph. Starting with on 27th August. Are you with me?*

A: *Yes.*

Q: *Now, you have also brought the hospital folder with you and you have studied the hospital folder?*

A: *Yes I have.*

Q: *Thoroughly?*
A: *Yes.*

Q: *Now here, you have stated that he was shifted to the High Dependency Unit when he was treated to an acute coronary syndrome? Nor was he really shifted on the 27th of August?*
A: *When I look through his Folder again, when I was asked about the actual date of shifting, now what I found in the Folder is that on 27th August, he was ordered to be transferred to the Intensive Care Unit. Usually such Orders are carried out immediately especially in patients with a heart attack. But when I look into the nurses' notes, they were no beds available in the Intensive Care Unit. Then going further into the nurses' notes, on 28th August at 11.00am there's a note that beds available now for transfer to ICU. And on 28th August, 2009 at 12pm there is a note that patient transferred to ICU. So, though the ordering was done on 27th August, according to the notes he was actually transferred on 28th August at 12 noon.*

(33). From the deposition of Dr. Murari, it is clear that the deceased was transferred to ICU at 12 noon on 28th August, 2009.

The defence exhibit 5, the Medical Report dated 15th December, 2009 compiled by Dr. Arun Murari, the Consultant Surgeon of Lautoka Hospital indicates the following:

> *On the 27th of August he complained of chest pain and his ECG showed some changes suggestive of Ischemia. He was reviewed by the Physicians and shifted to the High Dependency Unit where he was treated for an acute coronary syndrome.*
>
> *On the 1st of October he was seen by the surgical and medical teams and his records indicate that he was conscious, oriented and had tolerated his breakfast, lunch and dinner.*
>
> ***From his care records, there is no evidence to suggest that he was not in a position to understand and sign documents on the 30th of August, 2009.***
>
> *On 3rd September his condition deteriorated and he passed away at 5.30am.*
>
> (Emphasis added)

(34). Dr Murari testified in Court that the deceased was actually transferred to ICU on 28/08/2009 at 12.00 noon, even though the Order for transfer was made on 27/08/2009.

The fact that on 27/08/2009, the deceased complained of chest pain and his E.C.G. showed some changes **does not** mean that; (1) the deceased was not in a **proper state of mind** by the time he signed the Will in the evening on the same day (2) his mind and

memory were sufficiently not sound to enable him to know and to understand the business in which he was engaged in the evening on the same day. (3) He was suffering from a significant degree of intellectual decline so as to be suffering from memory loss and disorientation and loss of insight into ; (a) the nature and extent of those having claims on his estate (b) the nature and extent of his property. He could have been normal by the time he signed the Will in the evening on the same day. There should be clear evidence of incapacity on the part of the testator at the date of the Will before any onus moves to the party propounding the Will.

A medical witness can only give his opinion as to the testamentary capacity of the testator on the day of his examination, and express an opinion backwards and forwards as the case may be, **based on his observation and proved facts or the observations of others as to the state of the testator on the date of execution of a challenged Will.**

The defence witness Dr. Arun Murari, the Consultant Surgeon at Lautoka Hospital has not personally examined the testator to see if he had testamentary capacity. He had compiled a medical report based on the observations of the doctors who treated the testator as to the state of the testator's health. Obviously, he has expressed an opinion on Narend's testimonial capacity. (See paragraph 33 above). Dr. Murari's testimony has value in assessing the testator's neurological and mental conditions in relation to the testamentary capacity. I am satisfied on the preponderance of the evidence which has weight and carries conviction that Narend was **not** in a state of intellectual decline when he made the Will which is the subject of the plaintiff's claim. The plaintiff did not call medical or psychological witnesses to establish that the deceased testator did not have testamentary capacity or it was very doubtful whether he had capacity due to his ill-health. In the absence of such evidence, the maker of a Will apparently rational on its face, will be presumed to have testamentary capacity[27].

It was held in **Burrows v Burranel**[28]

> *"Instructions for a Will containing the fixed and final intentions of the deceased are valid if the formal execution is prevented by death; and; if there is no evidence of insanity at the time of giving instructions, the Commission of Suicide, three days afterwards, will not invalidate the paper by raising an inference of previous derangement".*

Sanity must be presumed till the contrary is shown[29].

(35). In paragraph (13) of the Statement of Claim the plaintiff alleges that;

> *THAT the making of the said WILL was fraudulent and the signature of the testator forged by the defendants.*

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[27] Re White (1951) NZLR 393 (CA)
Peters v Morris [CA 99/85], Judgment on 19th May 1987

[28] (1827) 1 Hagg. ECC 524

[29] Burrows, infra

Particulars of Fraud

(a) the signature on the WILL is not that of the deceased.

(b) the purported signature of the testator on the similar WILL produced to FNPF by the second defendant differs from the signature on the purported said WILL.

(c) the signature of the deceased and the font size used on a similar WILL produced to FNPF by the second defendant differ from the purported said WILL.

(d) lack of written instruction by the deceased as required under the WILLS Act (Section 6 (a) and (b).

(e) the solicitor's stamp on the bottom of the WILL is without a signature.

(f) the two witnesses do not included their names or occupations and with a Solicitor's stamp without her signature.

(g) font size on the Solicitor stamp appeared on the WILL produced to FNPF differs from the purported said WILL.

(h) the father (3rd defendant) of the 2nd defendant's signature appeared on the WILL as witness.

(i) the signature appeared on the cover page of the WILL produced to FNPF differs from the purported said WILL.

(j) the signature appeared on the cover page of the WILL differs from the signature of the testator.

(36). As I understand the plaintiff's pleadings, the plaintiff's principal challenge to the Will was based on the allegation of fraud in that the signature of the testator was forged by the defendants.

The burden falls on the plaintiff to establish that fraud was involved in the sense that the signature on the Will dated 27th August, 2009 was not the signature of the deceased and had been forged by the defendants.

The plaintiff did not call handwriting and questioned document examiner.

In a civil cases involving 'fraud' the applicable standard of proof is higher. Denning L.J. said in **"Hornal v Neuberger Products Ltd[30]'** "the more serious the allegation the

higher the degree of probability that is required".

The degree of proof depends on the subject matter, and as Denning L.J. observed in **'Bater v Bater[31]'**

> *"A civil Court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking itself if negligence is established. It does not expect so high a degree as a criminal Court even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion".*

(37). The plaintiff alleges that the signature on the Will dated 27th August, 2009 was not the signature of the deceased Narend and had been forged. The plaintiff is not a handwriting and questioned document examiner.

(38). In the absence of expert evidence produced by the plaintiff on whom the onus lay to prove fraud, the plaintiff did not produce to Court the documents which have been signed by the deceased Narend to compare with the signature on the Will document dated 27th August, 2009. The Court had no opportunity to satisfy its Judicial conscience by examining the similarities and differences between specimens of signature and the questioned signature on the Will dated 27th August, 2009. The plaintiff should have provided to the court documents containing the specimen signatures of the deceased to satisfy the courts judicial conscience and to ascertain; (1) Whether the specimen signatures on the documents are consistent over a number of years (2) Are there any similarities and differences between the specimen signatures and the questioned signature? (3) Are these differences (if any) significant? (4) Do they constitute more than variation?

The Lautoka Solicitor (Ms) Jotishna Nair categorically stated in her evidence before the Court that on the 27th of August, 2009 the Narend's last Will was presented to him and all the parties signed before her in the Lautoka Hospital.

(39). The plaintiff has failed to discharge the burden placed on her by law to establish that the signature on the Will dated 27th August, 2009 was not the signature of the deceased Narend. There is no question that the testator was in ill-health. The alleged difference in the questioned signature could be due to ill-health on the part of the deceased at the time of execution of the document.

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[30] (1957) 1 Q.B. at page 258
[31] (1950) 2 ALL. E.R. 458

(40). The plaintiff further alleges in paragraph (14) of the Clause that;

> **the purported signature of the testator on the similar Will produced to FNPF by the second defendant differs from the signature on the purported Will.*
>
> **the signature of the deceased and the font size used on a similar Will produced to FNPF by the second defendant differ from the purported said Will.*
>
> **the font size on the Solicitor's stamp appeared on the Will produced to FNPF differs from the purported said Will.*
> **the signature appeared on the cover page of the Will produced to FNPF differs from the purported said Will.*

(41). It is unfortunate that in the absence of expert evidence by a handwriting and questioned document examiner, the plaintiff did not produce to Court the Will produced to FNPF by the second defendant to satisfy the judicial conscience by examining the similarities and differences between the Will dated 27th August, 2009 and the Will produced to FNPF by the second defendant.

Therefore, I hold that the plaintiff has failed to discharge the burden placed on her by law to establish fraud.

(42). The plaintiff in paragraph (13) of the Statement of Claim, under the particulars of fraud, alleges the followings in sub paragraph (d) to (f).

(d) lack of written instruction by the deceased as required under the Wills Act Section 6(a) and (b).

(e) The solicitor's stamp on the bottom of the WILL is without a signature.

(f) the two witnesses do not include their names or occupations and with a Solicitor's stamp without her signature.

(43). In the Will dated 27/08/2009, two attesting witnesses have signed the Will thereby intending to verify that the deceased signed in their presence. There is an attestation clause and the testator and the witnesses have signed. The Will is in proper form. **Wright v Sanderson**[32] demonstrates the strength of the presumption of due execution when there is an attestation clause and the testator and witnesses sign. The second defendant has proven the Will in **"common form"** in the Suva High Court, Probate Jurisdiction following which she was granted probate. If a person put forward a Will for probate he must satisfy the court not only that it was duly executed but also that the

[32] (1984) 9 PD 149

testator knew and approved the contents. (**Wintle v Nye , 1959, 1 ALL.E.R 352)** Where there is a Will signed by the deceased at the foot of the Will containing an attestation clause under which the witness have signed, the strongest evidence is needed to reject the presumption of due execution.

To similar effect was Lord Penzance in **Wright v Rogers**[33]. In this case the survivor of the attesting witnesses of a Will, which was signed by the testator and the witnesses at the foot of an attestation clause, gave evidence a year later that the Will was not signed by him in the presence of the testator. Lord Penzanze said at p.682 that the question was whether the Court was able to rely on the witness's memory. His Lordship continued:

> *"The Court ought to have in all cases the strongest evidence before it believes that a Will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of Wills. The presumption of law is largely in favour of the due execution of a Will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however, swear that the Will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the Will was duly executed."*

(44). Although the Will contained imperfections such as ; (1) the Solicitor's stamp on the foot of the Will is without the signature (2) the names and occupations of the attesting witnesses do not contain at the foot of the Will, (3) the attestation clause in the Will in plural, '*testators*', '*they*' and '*their names*', (4) the failure to mention the correct lot number of the property, those infelicities' are immaterial and come nowhere near to the constituting the strongest evidence needed to rebut the presumption of the execution.

The imperfections referred to are sloppy and indicative of the haste in which the Will was prepared and perhaps also of the inexperience of (Ms) Jotishna Nair in drafting it, but they do not seem to me to be particularly significant or nowhere near to constituting the strongest evidence needed to rebut the presumption of due execution.

[F] CONCLUSION

In conclusion, **I pronounce for the Will dated 27th August, 2009**. In the outcome, the plaintiff's case is dismissed. It is a conclusion I reach with regret. No doubt the plaintiff will be disappointed at the decision of this Court. But the decision has been based on the principles of law which apply to the facts as found. In purely, moral terms, the plaintiff ought to receive a part of deceased's share of his inheritance in recognition of her relationship with him and the support and comfort she gave him from 21st November 1991 to 22nd April 2006. But I cannot say that the testator has disinherited his legal wife without cause. I am satisfied that at the time he made his Will he had sufficient capacity

[33] (1869) LR 1 PD 678 at p.682

properly to weigh the interests of his legal wife when deciding to leave her no part of his share in the community property.

This Court cannot however treat the Will as invalid on moral grounds when it is not so in law.

ORDERS

1. The plaintiff's claim is dismissed.

2. In the circumstances of the case, I make no order as to costs.

HIGH COURT OF FIJI
LAUTOKA

06/12/2019.

.....

Jude Nanayakkara
[Judge]

At Lautoka,
Friday, 06th December, 2019