

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 41 of 2014

BETWEEN : **SUNIL DUTT** a.k.a **SUNIL DATT** of 11 Darwin Road, Edmondson Park,
2174, Sydney, New South Wales, Australia, Telecom Technician.

1st PLAINTIFF

AND : **DEO CHANDRA DIN** a.k.a **DEO CHANDRA DEAN** of 26233 Mocine
Avenue, Hayward CA, USA, Housekeeping Aide.

2nd PLAINTIFF

AND : **PUBLIC TRUSTEE CORPORATION LIMITED** having its registered
office at Level 1, LICI Building, Butt Street, Suva as the Administrator of
the Estate of Ram Bilas, formerly of 2 Wailea Street, Vatuwaqa, Suva, Fiji,
Deceased.

1st DEFENDANT

AND : **SAVITRI DEVI** of 2 Wailea Street, Vatuwaqa, Suva, Fiji, Domestic Duties.

2nd DEFENDANT

Counsel : **Plaintiff: Mr Sharma. N**

: **Defendant: Mr Kumar. S**

Date of Hearing : **22.08.14**

Date of Judgment : **22.07.19**

JUDGMENT

INTRODUCTION

1. Plaintiff instituted this action through originating summons seeking sale of a property. The said property is described in CT 11143 and area is 32.7 perches land which also has permanent fixtures, namely a dwelling. Memorials of the said title indicate that this property was transferred to late Ram Din and upon his death there was a transmission by death to administrator, widow of late Phul Mati and upon her death there was a transmission by death to first Plaintiff who had obtained letter of

administration *de bonis non* of the estate of late Ram Din. First Plaintiff had transferred the said property in equal shares to three siblings, who are the only beneficiaries of said estate. Two of them are plaintiffs and first defendant who is administrator and Ram Bilas, who was the remaining sibling. Second defendant is the widow of late Ram Bilas who is residing on the property. She had also lodge a caveat to the said property. Second Defendant had also filed an action to remove first Plaintiff as the administrator. Plaintiffs are seeking intervention of court, in terms of Order 31 of High Court Rules 1988, for sale of property comprised in CT 11143. Second Defendant object to the application, but she had admitted last will of late Ram Din. Accordingly, widow of late Ram Din had life interest of property in issue, and upon her death, it is to be bequeathed to three children equally. The property was transferred to all three siblings and they own 1/3 undivided share. Plaintiffs are seeking sale of property, through intervention of court. The Plaintiffs counsel did not produce any cases for scope of Order 31 of High Court Rules, 1988 and written submissions of the parties did not address this issue. In my judgment circumstances of this case warrants the court to make necessary orders for the preservation of an estate property, and or prevent abuse of property by one party.

FACTS

2. In the Originating summons Plaintiff is seeking sale of property in certificate of title No 11143 through supervision of court and distribution of the proceeds of sale be held in court and distributed equally.
3. Memorials on the certificate of title No 11143 indicates that the property was transferred to three children of late Ram Din.
4. According to last will of late Ram Din he had granted life interest of all the properties to his widow and upon her death all the property is bequeathed to his three children. This is an admitted fact see Annexed 'E' to affidavit in opposition.
5. This last will was accepted by all the siblings. There is no dispute as to the death of widow namely late Phul Mati.
6. In the affidavit in opposition second defendant states that late Phul Mati in her last will had appointed second defendant and her son as executors of her estate and had left only one third of estate administered.
7. Second Defendant in the affidavit in opposition state that property in question belongs to her late husband since all other properties were transferred to Plaintiffs by late Phul Mati as the administrator of estate of late Ram Din.

ANALYSIS

8. Order 31 of High Court Rules states as follows:

“1. Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

In this Order, "land" includes any interest in, or right over, land.

Manner of carrying out sale (O.31, r.2)

2.-(1) Where an order is made, whether in court or in chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he thinks fit, or may direct that the land be sold in such manner as the Court may direct for the best price that can be obtained, and all proper parties shall join in the sale and conveyance as the Court shall direct.

(2) The Court may give such directions as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing words, directions-

- (a) appointing the party or person who is to have the conduct of the sale;*
- (b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;*
- (c) fixing a reserve or minimum price;*
- (d) requiring payment of the purchase money into Court or to trustees or other persons;*
- (e) for settling the particulars and conditions of sale;*
- (f) for obtaining evidence of the value of the property;*
- (g) fixing the security (if any) to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him.*

Certifying result of sale (O.31, r.3)

3.-(1) If either the Court has directed payment of the purchase money into Court or the Court so directs, the result of a sale by order of the Court must be certified-

- (a) in the case of a sale by public auction, by the auctioneer who conducted the sale, and*
- (b) in any other case, by the solicitor of the party or person having the conduct of the sale;*

and the Court may require the certificate to be verified by the affidavit of the auctioneer or solicitor, as the case may be.

(2) The solicitor of the party or person having the conduct of the sale must file the certificate and any affidavit in the Registry.

Mortgage, exchange or partition under order of the Court (O.31, r.4)

4. Rules 2 and 3 shall, so far as applicable and with the necessary modifications, apply in relation to the mortgage, exchange or partition of any land under an order of the Court as they apply in relation to the sale of any land under such an order."

9. Order 31 allows the court to take control of sale of property if that is necessary and expedient to do so. Plaintiff in such an action should prove on balance of probability such sale is 'necessary' or 'expedient'. The first requirement is that there should be pending cause or matter.
10. There is no dispute between the parties that second Defendant had instituted an action, against the first Plaintiff in his capacity as administrator, of estate of Ram Din. This was an action by way of writ of summons for removal of first Plaintiff as administrator and other orders, which I would deal later.
11. Supreme Court Practice (UK) 1988 (White Book) (Vol1) p 505 under 31/1/1 dealt with Order 31 which is analogous to Fiji provision under identical provision. Scope of Order 31 in following manner;

"Scope of Order- This Order relates to sale of land including any interest in or right over land, orders for sale or other property being made under O.29,r.4. It is designed to make the procedure more flexible and so enable the Court to retain as much or as little control over a sale as it thinks necessary in the particular case."

12. In UK, analogous provision was utilized for sale by personal representative of real estate, O.85. r.2 (3) (d) and personal representatives and trustees¹.
13. In this action Plaintiffs had adopted originating summons. The facts in this action are not disputed. Plaintiffs are beneficiaries of the estate of late Ram Din. Second Defendant had instituted an action invoking probate jurisdiction under HPP 2/2014 prior to institution of originating summons in this action.(See affidavit in opposition of second Defendant, paragraphs 41-45)

¹Whiter Book(1988) (Vol1) p505 31/1/2

14. There is no dispute as to last will of late Ram Din who owned this property upon a transfer in 1969. There were no encumbrances on the property when he died. The transmissions of death were recorded in the memorials to respective administrators without any objection. At present first Plaintiff is the administrator of the estate of Ram Din, which includes property in issue.
15. In his last will at clause 3 states:
"I hereby give devise and bequest all my property whether real or personal and of whatsoever nature or wheresoever situate to my wife Phul Mati (daughter of Kuar Pal) for life and upon her death to my sons namely, Ram Vilas, Sunil Datt and Deo Chand Dean in equal shares shares share and share abide absolutely."
16. So, there is no authority granted to any executor to transfer any property prior to demise of widow as she had life interest of entire estate. There is no evidence of late Phul Mati renouncing her life interest in regard to this property. So any authority that administrator had prior to demise of Phul Mati, was to administer in accordance with the last will of late Ram Din, so that all properties to be bequeathed only upon death of late Phul Mati. She cannot transfer any of the properties belonging to estate of late Ram Din, before her death, and there is no proof of that.
17. Second Defendant's position is that while widow of late Ram Din was living two other properties were transferred to two Plaintiffs. There was no evidence of such transfer other than her statement. Such a transfer will be in violation of last will, without renouncement of life interest.
18. Even if such a thing happened second Defendant cannot prevent this property being disposed in terms of last will of late Ram Din. So allegations contained in affidavit in opposition, do not prevent sale of property.
19. Upon death of widow of late Ram Din, property in issue was transferred in terms of the last will of late Ram Din. This position is also not disputed as memorial of property in issue will show said transfer in terms of last will.
20. Second Defendant had instituted an action prior to this originating summons, seeking removal of first Plaintiff as administrator *de bonis non* of estate of Ram Din and appointment of second Defendant to same position to administer, payment of money held and production of accounts of estate and restraining order for interfering with enjoyment of second defendant and her children's share of property.
21. Institution of an action should not prevent disposal of property if that benefits majority of beneficiaries. Plaintiffs are co-owners of 2/3 of the property but they are deprived of enjoying any fruits while second Defendant, who is the widow of remaining 1/3. co-owner, is enjoying the property to the detriment of others.

22. Plaintiffs in the affidavit in reply admitted second Defendant filing an action against him but states that it should not prevent a decision being made in this originating summons. In my mind, this is an appropriate situation where court should intervene in order to prevent abuse of process, for the benefit of minority share co-owner.
23. Instituting an action for removal of administrator, should not prevent sale of property and distribution of proceeds ^{to} by beneficiaries of the estate, considering the circumstances of this action. In terms of undisputed last will of late Ram Din, property in issue is presently co owned by three beneficiaries of the last will.
24. The title of property is indefeasible, and statement of claim filed by the second Defendant has not sought any relief to vary the transfer of the property in issue equally to all three siblings. Though second Plaintiff had alleged fraudulent transfer of assets there was no relief sought to cancel said transfer in terms of last will of late Ram Din, and or for specific performance of any promise.
25. Second defendant's objection to sale of the property cannot be substantiated. She is living in the property and fully enjoying it while other two co owners who own 2/3 are deprived of the fruits of the property. In the written submissions filed by second Defendant Court of Appeal (unreported) decision of Jai Chand Prasad v Registrar of titles office et al (decided on 13.10.2008) (ABU18 of 2008S) was relied, but ratio of that decision cannot be applied to present scenario.
26. This is an instance where undisputed evidence prove that second defendant is depriving 2/3 share owners the benefits of it. This is an expedient and or necessary instance where sale can be granted.
27. Plaintiffs and estate of late Ram Bilas are equal share co owners of the property in issue and sale of the property is justified considering the love lost between the parties and enjoyment of property by minority co-owner.

Caveat lodged by second Defendant

28. White Book (1988) p 505 , 31/1/3 which dealt with 'Discharge of incumbrances on sale' stated;
- “...Except under a statutory provision, a sale of land by order of the Court must necessarily take place subject to the incumbrances of any incumbrancers who do not consent to the sale.”
29. Second Plaintiff had lodged a caveat to this property after transfer of property in terms of last will to all three beneficiaries. This is not a hindrance to the sale of property subject to removal of same. This caveat only, prevents any transfer of property hence needs to be removed before sale is completed and transfer of the property to prospective purchaser. This may be done by removal of caveat by

consent, or if caveator is the prospective purchaser. If there is no removal, a separate application, to court, for that is needed.

30. Considering circumstances of this case in my mind Plaintiffs through undisputed evidence established that it is expedient and or necessary to sell the property in issue which is co-owned upon the transfer in terms of last will of Ram Din.
31. Order 31 of High Court Rules, 1988 allows the court to take control over sale of land. In my mind circumstances support intervention of court in the sale and take necessary and ancillary measures to ensure property is sold to its commercial value, which gives maximum benefit to the beneficiaries.
32. Subject to removal of caveat and any decision already made , regarding this property comprised in CT 11143 in HPP 2 /2014 following orders are made to sale of the same subject to following conditions: (Final Orders)
 1. Property comprised in CT 11143 be sold by the supervision and control of High Court, through Chief Registrar. Property is to be assessed through two independent valuers and set off price, for offers to be determined from highest price (minimum bid is to be determined from the higher value and no value should be accepted below this) If the highest offer received is less than this set off price property should not be sold and should be re-advertised.
 2. Property to be advertised with suitable size, that is attractive enough for prospective purchasers, and a coloured, of suitable size, picture of the property should be included in the advertisement, in two local newspapers, simultaneously, at least twice on two consecutive Saturdays. Closed tenders/ offers to be accepted at the office of Chief Registrar, upon his directions and supervision and ultimate goal should be to realize maximum price for sale of property.
 3. Plaintiffs and second defendant are at liberty to make offers to purchase property and get priority over others in case of two equal highest bids. If there is unanimity between three co owners of said property, one of them can purchase the other's share prior or during sale.
 4. Proceeds of the sale to be deposited with separate interest bearing account and after deduction of cost of sale and other expenses relating to sale remainder to be distributed equally between two plaintiffs and estate of late Ram Bilas.
 5. At the conclusion of sale .All the deducted expenses with proof of the same to be submitted to administrator of estate of Ram Bilas, with a copy being issued to other two beneficiaries.

6. Chief Registrar of High Court or his appointee to execute all necessary documents including transfer of CT 11143.
7. Parties are at liberty to make an application to court for variation of any of the orders, relating to procedure with sufficient reasons for doing so.
8. No order as to cost of this action.

Dated at Suva this 22nd day of July, 2019.



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Justice Deepthi Amaratunga
High Court, Suva