

original

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 190 of 2010

BETWEEN: **SHANTI DEVI SINGH** of 114 18139 Ave, North West, Edmoton TSX3L4,
Canada, Trustee in the Estate of **VEER SINGH**, in place of Veer Singh of
Vancouver, Canada, Businessman

PLAINTIFF

AND: **SAKUNTLA DEVI** aka **SHAKUNTALA DEVI** as Administratrix in the
Estate of Lala Ram also known as Mannu Singh father's name Nandu and
as Trustee in the Estate of Amar Singh father's name Lala Ram also known
as Mannu Singh of Martintar, Nadi, Deceased of 4/177 Shirley Road,
Papatoetoe, Auckland, New Zealand

DEFENDANT

Appearances: Messrs. Ravneet Charan Lawyers for the Plaintiff
 Pillai Naidu & Associates for the Defendant
Date of Hearing: 26 May 2016
Date of Ruling: 28 August 2020

RULING

INTRODUCTION

1. At the heart of this case, is a Deed dated 29 July 1993. The said Deed was purportedly executed by one Amar Singh ("Amar").
2. By the said Deed, Amar purportedly agreed to transfer his one undivided half beneficial interest in the Estate of Lala Ram in favour of his brother, Veer Singh ("Veer"). I reproduce the said Deed below in its relevant part:

In consideration of the natural love and affection that the parties hereto bear towards each other and by way of family arrangement this Deed witness as follows:-

(1) Amar Singh shall upon the death of his mother, Bir Mati, father's name Ram Swarup, transfer one undivided half share of all his beneficial interest in the estate of Lala Ram, father's name Nandu deceased to his brother Veer Singh, father's name Lala Ram except for one Nissan Vannette Registration No: BH518 and/or proceeds thereof.

3. Amar and Veer are both now deceased. Amar died on 29 August 1999. Veer died on 31 March 2015.
4. Two questions are raised in this case about the said Deed. The first, which is the only single question of fact in this case, is whether or not Amar really executed the said Deed. The second, assuming that Amar really did execute the said Deed, is whether or not the Deed is enforceable in any event?

DID AMAR REALLY EXECUTE THE DEED?

Only 1 Issue Of Fact – 1 Witness Called

5. At the trial of this case before me, both counsel agreed that only one witness is needed, and that is Mr. Hari Ram. Mr. Ram is a barrister and solicitor based in Nadi. He was the one who purportedly drafted the Deed and purportedly witnessed the execution of it.
6. Mr. Ram began practicing as a solicitor in 1991. He positively identified his witnessing signature on the Deed when copy of the instrument was showed to him. Looking at the Deed, he said it is likely he prepared it, and also witnessed it. I note that he seemed hesitant.
7. Mr. Ram does not recall anything about preparing the Deed in question, let alone witnessing it. I accept that. After all, it has been twenty-five years or so since the Deed was executed. Moreover, Mr. Ram would have been in his second year of practice only at the time the Deed was prepared. He left the firm in question more than twenty years ago.
8. Mr. Ram spoke generally about the practice in 1993. He said clients who were known to the firm were not required to furnish a photo identity when they presented themselves.

Comments

9. It is hard to assess whether or not the signature on the said Deed was forged when the solicitor who prepared and witnessed it does not recall much.

10. The onus is on he who alleges fraud or forgery to prove it. The defendant was not called to testify as to why she asserts that the signature on the Deed that is purported to be by Amar – is a forged signature. Normally by choosing not to give evidence, she would have missed the golden opportunity to shed her perspective on this issue, especially if the onus is on her. However, as I explain below, I am of the view that the onus has yet to shift to her.
11. The only other person who could have provided some perspective on this was Veer. He too is now long deceased. Still, one wonders why Amar would want to sign away to his brother, Veer, his interest in his father’s estate and completely pass over his wife and children.
12. The question whether or not Amar really did sign the Deed in question, I would rather not resolve. To make a finding on this is to potentially, implicate Hari Ram, who I found to be a truthful witness. Nonetheless, what I am prepared to do in this case is address a basic fundamental evidentiary point which, in my view, resolves the issue anyhow.
13. I start by saying that, before the onus shifts to the defendant who alleges fraud to prove fraud, firstly, it is incumbent upon the plaintiff to place before me evidence of a *prima facie* validly executed Deed. The onus only shifts to the defendant to rebut the presumption after the plaintiff has successfully raised the presumption that there is a validly executed deed.
14. The question I ask is - how might the plaintiff, in the circumstances of this case, raise the presumption of a validly executed Deed? To answer that question, I look to sections 10 and 13 of the Civil Evidence Act 2002.

Sections 10 & 13 Civil Evidence Act 2002

15. Section 10 of the Civil Evidence Act 2002 provides:

Part III-DOCUMENTARY EVIDENCE

Proof of statements contained in documents

10.-(1) *If a statement contained in a document is admissible as evidence in civil proceedings, it may be proved-*

(a) by the production of that document; or

(b) whether or not that document is still in existence, by the production of a copy of that document or the material part of it, authenticated in a manner the court approves.

(2) It is immaterial for the purpose of this section how many extracts there are between a copy and the original.

16. Section 13 provides:

Presumption as to documents 20 years old

13. *In any civil proceedings, there is a rebuttable presumption that a document proved, or purporting to be not less than 20 years old, was validly executed.*

17. The effect of section 10, in my view, is to empower the court to be more receptive towards a document, even if the document does not comply with the traditional best evidence rule. Hence, if the original Deed is available, it should be produced to prove the transaction which Amar purportedly committed himself to. However, if the original is not available, the court should be open to accepting a copy of the Deed as secondary evidence, even if the copy is a copy of a copy of a copy – so long as it is authenticated in a satisfactory manner.
18. Indeed, one way to authenticate the document is through the direct *viva voce* evidence of a person who witnessed or who was present when the original Deed was made, and who verifies the copy being produced in court (subject of course to credibility and other exclusionary rules). This, I gather, was the purpose why the parties agreed that only Mr. Hari Ram be called to testify on the only perceived issue of fact.
19. The use of the word “may” in section 10 denotes that I have a discretion.
20. Section 13 simply says that if a document is proved to be twenty years old or more, or is purported to be 20 twenty years old or more, it is open to the court to presume that any signature on the document which purports to be in the handwriting of Mr. X, is in fact a valid handwritten signature of Mr. X. Similarly, any signature of Mr. Y purporting to witness or attest to Mr. X’s signature on the document, will be presumed by the court to be the signature of Mr. Y, hence, the presumption that the document was validly executed.

Applying Sections 10 & 13. Was The Deed Validly Executed? An Evidentiary Gap!

21. In this case (i) the Deed in question was executed twenty-seven years ago (ii) the original was not produced in court, but only a copy, and (iii) the attesting witness, Mr. Ram, does not appear to remember anything at all about the document, nor does he have any personal knowledge of Amar or Veer or their family. He only recognizes what purports to be his signature on the copy of the Deed produced.
22. I apply section 10 first. In terms of the above facts, section 10 confers a discretion upon this court to accept and admit into evidence the copy of the Deed in question, provided the copy is authenticated in a manner which this court approves.

23. Once that is satisfied, then the section 13 presumption kicks in, so that the copy of the Deed, can be presumed to be validly executed, of course, subject to rebuttal evidence by the defendants.
24. What these all boil down to is whether or not Mr. Ram's evidence satisfies the threshold under section 10, that is, whether he has sufficiently authenticated the copy of the Deed presented in Court. If I hold that he has, then the copy of the Deed may be evidence that it was validly executed, subject to rebuttal under section 13.
25. As I have said, I find Mr. Ram very truthful. He said he does not remember anything about this particular Deed, nor does he have any particular recollection of Amar. He said he only recognizes what purports to be his signature on the copy of the Deed presented to him. In fact, what he is recognizing is a likeness of his signature.
26. It is hard for me to accept that the original of such an important document as the Deed in question, which purports to confer such substantial benefits on the plaintiff, could not be produced in court by the plaintiff, who is asserting the document. Furthermore, the plaintiff does not proffer any explanation sufficient to account for why the original could not be produced. In my view, Mr. Ram's evidence is not sufficient to authenticate the Deed vide the copy produced.

WHETHER OR NOT THE DEED IS ENFORCEABLE IN ANY EVENT?

27. I have already formed the view that there is insufficient evidence before me to authenticate the Deed. It is unnecessary for me to consider whether the Deed is enforceable. In any event, I will attempt to deal with this second issue as briefly as possible.
28. The issues concerning whether or not the Deed is enforceable are being raised on account of the following facts:
 - (a) under Lala Ram's last Will, Amar is bequeathed one undivided half beneficial interest in the estate.
 - (b) the main asset of the estate of Lala Ram is a piece of land comprised in Certificate of Title No. 18285 being Lot 70 on DP 45009. On this land, is erected a concrete and iron double story building.
 - (c) however, the Will also devised to Bir Mati a life interest in the entire estate property.
 - (d) hence – it is only upon Bir Mati's passing, when Amar's one undivided half interest in the estate will pass to Amar.

- (e) however, as it turned out, Amar died on 29 August 1999 and pre-deceased Bir Mati. His half interest in the Lala Ram estate should naturally, under the Will, pass to his estate.
- (f) the personal representative of Amar's estate is his widow, Shakuntala Devi - who is the defendant in this case.
29. While a testator (T) is still alive, an heir-apparent (H) under (T)'s Will, has a mere chance of succeeding under (T)'s estate. (H)'s chance of succeeding to (T)'s estate is a '*spes successionis*'. It is a mere expectancy. That expectancy does not amount to an interest in property and cannot be made the subject matter of a transfer (see **Re Ellenborough: Towry Law v Burne** [1903] 1 Ch 697; 72 LJ Ch 218; 87 LT 714; 51 WR 315; 47 Sol Jo 255; **Parsons, Re; Stockley v Parsons** (1890) 62 LT 929; 45 ChD 51.
30. In this case, the testator (Lala Ram) bequeathed a life interest in his estate to his wife Bir Mati who was to retain ownership until death. Lala Ram gifted a remainder interest to Amar who was to take over ownership when Bir Mati dies.
31. The Deed in question was purportedly made by Amar after the passing of Lala Ram – but while Bir Mati was still alive enjoying her life interest in the property. Did Amar, at the time of the purported Deed, still have an expectancy interest in the form of a '*spes successionis*' incapable of being transferred, or had he, at the time, acquired an interest beyond a mere *spes successionis*?
32. Arguably, at the time of the purported Deed, Amar had acquired a vested contingent interest in the estate property given that, at the passing of Lala Ram, the testamentary bequests of Lala Ram became perfected, and thus crystalizing all beneficial interests thereunder to a status which was more than just a '*spes successionis*'.
33. Lord Chancellor Hardwicke said in **Duke of Marlborough v. Lord Godolphin** [1750] 28 All E.R. 41 (H.L.).
- "[T]he law says that a testamentary act is only inchoate during the life of the testator from whose death only it receives perfection, being until then ambulatory and mutable, vesting nothing, like a piece of waste paper ..."*
34. However, the alternative view to the argument in paragraph 32 above would be the Privy Council's dicta in **Amrit Narayan v. Goya Singh** [1917] UKPC 95 (22 November 1917):
- "A Hindu reversioner has no right or interest in proesenti in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or relinquish or even to transmit to his heirs. His right becomes concrete only on her demise, until then it is mere spes successionis."*

35. I am inclined to follow the Privy Council's dicta above. I am of the view that it applies here in Fiji too.

CONCLUSION

36. The plaintiff's claim is dismissed. Costs follow the event. I award costs in favor of the defendant which I summarily assess at \$4,000-00 (four thousand dollars) only.




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Anare Tuilevuka
JUDGE
Lautoka

28 August 2020

[https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKPC/1917/1917_95.html&query=\(Amrit\)+AND+\(Narayan\)+AND+\(v\)+AND+\(Gaya\)+AND+\(Singh\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKPC/1917/1917_95.html&query=(Amrit)+AND+(Narayan)+AND+(v)+AND+(Gaya)+AND+(Singh))