THE HIGH COURT OF FIJI AT SUVA
PROBATE JURISDICTION

HPP Action No. 62 of 2017

IN THE ESTATE OF AATISH KUMAR

BETWEEN : **SUSHEELA LATA** aka known as **ROHINI KUMAR**

PLAINTIFF

AND : **PRITIKA** also known as **PRITIKA KUMAR**

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. M. Nand for the Plaintiff
: Ms. S. Devan for the Defendant

Dates of Trial : 24 & 25 July 2019

Date of Judgment : 12 February 2021

JUDGMENT

TESTAMENTARY Last will – Validity – Burden of proof ordinarily – omnia praesumuntur rite et solemniter esse acta – Exclusion of testator's wife – Allegation of forgery – Testator's knowledge and approval of will – Suspicious circumstances – Burden on whom to remove suspicion – Conscience of court to be satisfied

The following cases are referred to in this judgment:

1. *Nock v Austin [1918] HCA 73; 25 CLR 519*
2. *Muni Deo Bidesi and others v Public Trustee of Fiji [1975] FJLawRp 13; [1975] 21FLR 65 (25 July 1975)*
3. *Jaswant Kaur v Amrit Kaur [1977] AIR 74, 1977 SCR (1) 925*
4. *Tyrrell v Painton* [1894] 1 P 151
5. *Vernon v Watson [2002] NWSC 600*
6. *Low v. Guthrie (1909) A. C. 278*
7. *Barry v. Butlin (1838)2 Moores PCC 480, [1838] UKPC 22*
8. *Wintle v Nye [1959] 1 All ER 552*
9. *Farrelly v Corrigan [1899] AC 563*
10. *In re Nickson [1916] V.L.R 274*

Background facts

1. This case raises questions concerning the validity of a will, and whether or not the testator had knowledge of and approved the contents of the testament, which was allegedly executed about two months before his death. The protagonists are the testator's mother – plaintiff – who is the executrix named in the will, and the testator's widow – defendant.

2. The plaintiff filed a writ of summons on 4 October 2017, seeking the grant of probate in the estate of Aatish Kumar in terms of the last will dated 10 March 2017, and pleaded that the defendant was not entitled to letters of administration in respect of the deceased's estate. The plaintiff pleaded that she is the executor and trustee of her son's estate and that preceding this action, the defendant made an application for letters of administration to administer her son's estate; that thereupon, on 16 June 2017, she responded with a caveat against the sealing of letters of administration concerning the estate without notice to her; on 12 July 2017, the plaintiff applied for probate from the probate registry; and on the

following day, the defendant filed a 'warning to caveator', and that in response to that, the plaintiff filed an 'appearance to a warning' on 25 July 2017. Thereafter, this action was filed.

3. The defendant resisted the grant of probate. In her statement of defence, the defendant pleaded that her husband, Aatish Kumar, never left a will, that the will dated 10 March 2017 is a forgery, and that it did not contain the signature of her husband. She pleaded that the disputed will was not prepared by a legal practitioner, that there was no record of instructions by the deceased to draw up a will, that the purported will was executed after the death of her husband, that the will was not registered with the High Court of Fiji, that there was no reason for the deceased to not make provision for the defendant as she was his lawful wife and that the deceased had not told her of his intention to make a will, and that only the plaintiff and the deceased's niece would benefit under the will. The defendant pleaded that her husband had never conveyed to her that he executed a will, and called upon the court, *inter alia*, to pronounce against the validity of the will and to grant her letters of administration in the estate of Aatish Kumar.

4. Mr. Aatish Kumar died on 18 May 2017, when living at his parents' residence in Nakasi. The death certificate dated 8 June 2017, erroneously mentions the date of death as 19 May 2017. The actual date of death was a day earlier. The defendant was the informant of death. I see no material significance in the discrepancy. Mr. Kumar's estate comprised the following: fixed term deposit account bearing number 5889549 jointly held with the defendant; motor vehicle bearing registration number HS 797 jointly owned by the defendant, property comprised in CT 3328; bank policy cover and a staff life insurance cover.

5. The disputed will bequeathed the estate to Airah Aavya Kumar for her sole use and benefit absolutely after the plaintiff. Airah Aavya Kumar is the daughter of the testator's brother, Mr. Abhishek Kumar, who played a material part in the making of the alleged will.

6. The issues for determination are these: (a) whether the deceased left a will dated 10 March 2017 as alleged by the plaintiff? (b) whether the alleged will contains

the deceased's signature? (c) whether the alleged will has been fraudulently procured by the plaintiff? (d) whether the deceased did not know and/or approve the contents of the alleged will? (e) whether the alleged will was not fully executed according to the provisions of the Wills Act (Cap 59)? (f) whether the deceased died intestate and had never executed a will? (g) whether the deceased's marriage with the defendant had broken irretrievably, and they were living separately for more than 2 years before the demise of the deceased (h) whether there is any requirement for wills to be registered under the relevant governing laws of Fiji? (i) whether the will dated 10 March 2017 can be declared solemn form of law?

The law

7. The ordinary rule is that in the absence of fraud the fact that a will has been duly read over to a competent testator on the occasion of its execution, or its contents have been brought to his notice, that fact followed by proof of execution is conclusive evidence that he knew and approved its contents[1]. Where there is due execution a propounder of a will is ordinarily deemed to have discharged his burden. This is based on the maxim *Omnia Praesumuntur rite et solemmniter esse acta*[2]. This general rule is subject to exceptions.

8. In *Tyrrell v Painton*[3], Lindley LJ said that the onus of proving that the will propounded was executed as required by law is on the plaintiff or party propounding it, and that the onus was a shifting one. The court said that if the will is not irrational and was not drawn by the person propounding it and benefiting under it, the onus is discharged.

9. In cases where there is legitimate suspicion surrounding the execution of the will, the court needs to be vigilant and the evidence demands the closest scrutiny. Such cases stand on a different footing. 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

[1] Farrelly v Corrigan AC [1899] 563 at 564
[2] All things are presumed to have been correctly and duly performed. See the decision in Muni Deo Bidesi and others v Public Trustee of Fiji
[3] [1894] 1 P 151

court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

10. The High Court of Australia, relying on the decision of *Barry v Butlin*[4], said in *Nock v Austin*[5]: "In general, where there appears no circumstance exciting suspicion that the provisions of the instrument may not have been fully known to and approved by the testator, the mere proof of his capacity and of the fact of due execution of the instrument creates an assumption that he knew of and assented to its contents".

11. The degree of suspicion will vary with the circumstances of the case[6] . Whether such suspicion has been dispelled is a question of fact that must be decided upon the totality of the circumstances. In cases where a benefit is claimed by a person involved in drawing up a will, a greater burden rests on the propounder, and courts are likely to take a close look at the surrounding circumstances.

12. In *Muni Deo Bidesi v Public Trustee of Fiji*, the Fiji Court of Appeal, quoted with approval a passage from *Fulton v Andrew*[7]: "There is one rule which has always been laid down by the court having to do with wills, and that is that a person who has been instrumental in the framing of a will, and who obtains a bounty by that will, is placed in a different position from ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it. But there is a further onus on those who take for their own benefit, after being instrumental in preparing or obtaining a will. They have thrown on them the onus of showing the 'righteousness' of the transaction". This principle holds firm to the present.

13. 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 emphasises that in determining the question as to whether an instrument is the last will of the testator, the court is called upon to decide a

[4] (1838)2 Moores PCC 480, [1838] UKPC 22
[5] [1918] HCA 73, 25 CLR 519
[6] Wintle v Nye [1959] All ER 552
[7] [1875] L.R 7 H.L 448

solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

14. In *re Nickson*, the Supreme Court of Victoria explained the phrase 'righteousness of transaction in this way. "*I do not understand the righteousness of the transaction to mean that the will was a wise and just one, but that there was no unrighteousness in the conduct of the person who drew the will and took a benefit under it*".[8]

15. Where there are allegations such as fraud, coercion, etc. in regard to the execution of the will, these have to be proved, but even where such claims are absent, the circumstances surrounding the execution of the will may raise a doubt whether the testator was acting of his own free will. In that event, it is a part of the initial onus of the will's propounder to remove all reasonable doubts.

16. The principle laid down in *In the Estate of Osment, Child and Jarvis v Osment*[9], has been quoted time and again. The relevant passage was reproduced in *Nock v Austin*[10]: "It is well established 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 cause it to be vigilant and jealous in examining the evidence in support of the instructions for the will; it ought not to pronounce for the document unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased".

17. The taking of a benefit, however, will not invalidate a will. In *Low* v. *Guthrie*[11] the court held, "A principle was laid down by Parke B. in *Barry* v. *Butlin* (1), which has been referred to, and upon which judgment, I think, all other subsequent decisions have been based. That only requires that, where a person is interested, vigilance shall be exercised in seeing that the case, if he has to meet one, of undue influence is fully met or the knowledge of the testator is fully proved. It does not go further than that. There is no disqualification in the making of a will through a person who takes an interest having made it. Therefore, all you have to do in this case is to vigilantly look and see whether there is any evidence that can shake the fact that the will was made".

[8] [1916] V.L.R 274 at 281
[9] [1914]
[10] *Supra*
[11] [1909] A.C 278 at 282

18. In the well known case of *Barry v. Butlin*[12], the Judicial Committee of the Privy Council said this: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: the first, that, the *onus probandi* lies in every case upon the party propounding 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 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".

The will

19. The plaintiff told court that her older son, Mr. Aatish Kumar, had informed her on 10 March 2017 that he made a will, and gave it to her at about 7.30 in the evening. She had responded by asking, "are you mad". She said she placed the will in his drawer. He had said that the will is for the brothers. He had wanted to make a will because her two sons wanted to buy a property. It was for their security, she said. "Because Abhishek also wanted that and they agreed to make a will. Both my sons were talking about the will because they want to run a business". The business was to build six flats on a freehold property belonging to the plaintiff. The signature on the will, she said, is that of her deceased son. Mr. Kumar died of a heart attack while resident at his parents' home on 18 May 2017. He was 38 at the time of his death. The plaintiff, who did not attend the signing of the will, was not able to say much about the preparation and execution of the disputed will. She took the will out, she said, after Mr. Abhishek Kumar told her that the defendant had placed an advertisement in the Fiji Times.

20. Mr. Abhishek Kumar told court that his brother informed him that he wanted to make a will. That was because the testator had a great deal of confidence in his brother and usually consulted him for advice. Mr. Abhishek Kumar then contacted Mr. Mitchell Deve on 9 March 2017, to prepare the will. His evidence

[12] (1838) 2 Moores PCC 480; [1838] UKPC 22

was that instructions for the preparation of the will were given by his brother around mid-day on 10 March, the day on which it was signed, which is somewhat inconsistent with Mr. Deve's testimony that he prepared the will the day before its execution. The will was signed at Mr. Abhishek Kumar's office at BIMA Insurance at about 5 pm. Mr. Neeraj Ram, who came to the BIMA office at the request of Mr. Abhishek Kumar to witness the execution of the will, placed his signature and left within a short time.

21. Mr. Abhishek Kumar played a central role in arranging the making of the will on his brother's behalf. He described himself a businessman as well as a consultant. He was an accountant by profession with a commercial law background. He was a maker of wills when formerly working for the office of the Public Trustee. He claimed to be very familiar with the process of making wills. According to him the deceased was interested in writing a will from 2016. He said the will was prepared by Mr. Deve as "I know that I don't need a lawyer to prepare a will because I have prepared a number of wills, dozens of wills as well…". In cross examination, Mr. Kumar said that the services of a law firm were not retained as his brother could not afford the payment of legal fees for the preparation of the will. He said the signing took about fifteen minutes. Contrary to what Mr. Deve said, Mr. Abhishek Kumar said the instruction from his brother was verbal

22. The disputed will is a single page document comprising five paragraphs and contains the signatures of the two subscribing witnesses and of another said to be that of the testator. It was not a complex document. The instrument describes it as the last will and testament of Aatish Kumar. It is dated 10 March 2017.

23. Above the signatures of the attesting witnesses is a clause which states, "SIGNED AND ACKNOWLEDGED by the abovenamed testator AATISH KUMAR of Nakasi, Nausori, Fiji Procurement Manager as and for his last will and testament after the foregoing had been read and explained to him in the Hindustani language and he appeared to fully understand the meaning and effect thereof in the presence of us both being present at the same time who at his request and in his sight and presence and in the presence and sight of each other have hereunto subscribed our names as attesting witnesses".

24. According to this clause, the attesting witnesses subscribed their names at the request of the testator. This is not clearly evident from the evidence. One of the witnesses, Mr. Neeraj Ram, admitted that he was contacted by Mr. Abhishek Kumar and requested to call over at the BIMA Insurance office to witness the execution of the last will.

25. Paragraph 5 of the will states the testator intended to dispose in this way: "I give my property to my mother Susheela Lata aka Rohini Kumar for life and after her, to my niece Airah Aavya Kumar for her sole use and benefit absolutely". Elsewhere in the will, Susheela Lata aka Rohini Kumar was named to be the executrix and trustee.

26. The will was prepared by Mr. Mitchell Deve, an executive attached to the law firm, Parshotam Lawyers. Having been in the firm for about 17 years, he was quite familiar, he said, in the preparation of last wills. He testified that he prepared the will on telephone instructions from Mr. Aatish Kumar, whom he came to know the day prior to signing the will. Aatish had come on line after his brother, Abhishek spoke to him. Instructions by phone had come on the night before the signing of the will. He admitted that he did not know Mr. Aatish Kumar personally. Mr. Abhishek Kumar and the witness were friends, having met through a lawyer who had worked at Parshotam Lawyers; the lawyer who made the introduction was described as a friend of Mr. Abhishek Kumar. The will, he said, was prepared at the law firm he worked. He did not suggest that his law firm prepare the will as it was "just a piece of paper at that time" and "it was a very straightforward will, which needed to be drafted and put before the testator at that moment".

27. Mr. Deve initially said in cross examination, "Like I said it was done for a friend, there is no instructions". Soon after he said that instructions were also given in writing prior to the execution of the will. The witness was unable to produce the written instructions. His testimony is that he received instructions on 9 March 2017 and prepared the will on the same day. On that day, however, he said that he did not meet the deceased. The will, he said, was signed and dated in his presence on 10 March 2017, and was witnessed by Neeraj Sandhiv Ram and himself. This was at about 5 pm. The testator had signed, he said, after he checked the identity card of the deceased and had explained the will in Hindi

and English. Mr. Deve said the signing had taken about 30 minutes. He described the testator as having been in a good frame of mind.

28. Before that, on the same day, Mr. Deve said in cross examination, he met the two brothers to obtain copies of their identification. That he met both brothers to obtain identification copies is not consistent with his testimony given minutes previously. The copies said to have been obtained are not before court. There are no details as to how and where he met for the purpose of obtaining those copies.

29. Mr. Mitchell Deve, Mr. Neeraj Ram and Mr. Abhishek Kumar testified that the will was signed at the BIMA Insurance Office at Waimanu Road in Suva. This is where Mr. Abhishek Kumar was employed at the time.

30. Mr. Neeraj Ram was knocking off from work when Mr. Abhishek Kumar called him and asked him for his urgent assistance. Though he did not want to attend the signing, he did go in view of Mr. Kumar's request. The witness and Mr. Abhishek Kumar were friends since school. He said that the deceased placed his signature first and, thereafter, he signed. He seemed uncertain as to when Mr. Deve signed. Mr. Abhishek Kumar told him that the will was prepared by Mr. Mitchell. He could not, however, remember the details as he was in a rush to sign and leave. Nor was he interested in the details, he said. He was aware that the deceased was married, but it was not for him to raise questions about the testator's personal decision, he said. He was unaware as to who dated the will. His name near his signature was not placed by him.

31. The will was not registered at the High Court registry. Mr. Deve did not find it prudent to so register. "We decided not to lodge it in the High Court yet because we can always hold on to it in our custody. It is entirely up to him whether he wanted to lodge it and then he said he is fine, we don't have to lodge it at High Court registry for safe keeping". There are no written instructions on this matter.

32. Mr. Deve was aware that the defendant, the testator's wife, was left out of the last will. He said that Mr. Abhishek Kumar had told about certain issues that the deceased had with his wife and that, therefore, he was "respectful". The witness

said he asked the testator whether he forgot his wife and he had said the will would cover his loved ones; his mother and niece.

33. He agreed, in cross examination, that the signature on the disputed will was different to the signatures of the deceased on his passport, the appointment letter and the compliance register. He found all of the signatures to be different. Though acknowledging those differences, the witness insisted that Mr. Aatish Kumar signed the instrument in his presence at BIMA Insurance.

34. The plaintiff was not able to cast much light on the testator's signature except in saying that the will bore her son's signature. She said her son used to change his signature. She was not present when the will is said to have been signed. Counsel for the defendant relied much on the visible differences between the signatures of the deceased on the claimed will and in certain other documents bearing his signature. On the basis of those differences, the defendant suggested that the last will is a forgery, and was never signed by the deceased. In cross examination, the plaintiff was asked to compare Mr. Kumar's signatures appearing in his passport, a temporary letter of appointment and an extract of a compliance register maintained by the bank at which he was employed. The plaintiff identified them as her son's signatures and admitted that those signatures differed in some respects from that of the signature on the testament. But, the signatures on all of the documents put to her and on the last will, she testified, were that of her son. On this matter, Mr. Abhishek Kumar's evidence is not of assistance. He said that he has not seen his brother's signature and was unable to compare the testator's different signatures produced before court.

35. The defendant vigorously contested the signature on the will, and suggested that the document was a forgery that was contrived after Mr. Aatish Kumar's death. In support of that contention, the defendant pointed out the differences in signature on the will as against the testator's signatures on other documents. She had in her possession the testator's passport which had expired in February 2019, a relieving letter of appointment dated 27 July 2011 from the testator's employer and an extract of a compliance register dated 4 October 2011, also from his

employer. The defendant did not summon an expert to give evidence on the disputed signature.

36. She claimed that the deceased was a pen lover and always signed with a speed pen, which he carried in his pocket. In cross examination, when shown a town council receipt, she agreed it was signed by the deceased with a normal pen. She explained that the tenant may have filled the receipt on that instance and obtained the signature of the deceased, when he did not have a pen.

37. There is no doubt that there are discernible differences between the signature on the impugned instrument and the signatures of the testator on other documents. This evidence must be taken together with other material findings in deciding whether the plea of the propounder for probate is to be granted by court.

38. The defendant said that she and her husband had always used Neel Shivam Lawyers, and would have picked the same lawyers if there was a need. Her husband, she claimed, did not have a lawyer friend, and legal documents in their past transactions were stamped by Neel Shivam Lawyers. The defendant was not cross examined on this evidence.

39. The defendant's contention was that her deceased husband had no reason to make a will. Although he was accustomed to telling her most things, she said, he had not mentioned anything concerning a last will. Moreover, she explained, there was no reason for leaving her out of his estate as the couple had jointly acquired assets after marriage, even though her husband contributed the greater share in those investments.

Had the marriage of the deceased with the defendant broken down?

40. An issue before court is whether the deceased's marriage with the defendant had broken irretrievably, and whether they had been living separately for more than two years before the demise of the deceased.

41. The plaintiff stated in evidence that her son, Aatish Kumar, and the defendant resided at her place for a number of years after marriage before they moved out

in 2010. After renting a place for about a year, they had purchased a house in 2011. The plaintiff's evidence confirms the defendant's narrative post marriage except in the assertion that sometime in 2016 her son returned to her house as his marriage had broken down.

42. The deceased and the defendant both worked for BSP Bank, in different divisions. The defendant married Mr. Aatish Kumar in 2006. Aatish, she said was very loving, kind and a caring husband, and their love had grown over the years. After marriage they resided at Mr. Aatish Kumar's parents' residence. The couple left that residence in 2010 and rented a house at Nadera. Nearly a year and half later they bought a house in Nadawa. This was in February 2011.

43. The price of the Nadawa property was $148,000, according to the defendant. Each had contributed approximately $15,000 as equity at the outset. She paid through her account, her husband with his FNPF funds. She called it a joint investment. Both names were not included in the title deeds, as the bank's staff discount was available only for the purchase of the first property. They intended, she said, to purchase another property close to the city. The first house was to be under the name of the deceased, and the next one to be in her name. That way, she explained, the staff benefit could be utilized by both.

44. The defendant admitted that all loan repayments were made by the deceased. She explained that he was earning double her salary. He collected the rent and utilised those as well for loan repayments. Rents collected from tenants also helped meet their expenses. She said that she took care of their shopping. The housing staff loan account statement showed that after the testator's death, the defendant has been paying the fortnightly installment of $425 in settlement of the house mortgage with the rent monies. She put the loan outstanding at about $90,000.

45. The defendant gave evidence on another acquisition they had made. A brand new vehicle purchased from Carpenters Motors for some $63,000. The bank loan was in the region of $41,000. She claimed to have contributed four to five thousand, and the deceased paid the balance of the deposit. She produced a bill

of sale, which was registered on 15 January 2015, showing both their names. The other sums mentioned in evidence are not backed by independent evidence.

46. Their joint staff car loan account showed loan repayment by the deceased until May 2017. After his death the car loan settlement, she said, was with her salary. She commenced repayment from 26 September 2017, after taking possession of the vehicle from her in laws.

47. The defendant produced a deposit account renewal advice issued by the Bank of South Pacific relating to a term deposit that was jointly held between her and Mr. Aatish Kumar for $1495.07. The document is dated 16 August 2016 and is addressed to Mr. Aatish Kumar and Mrs. Pritika, Procurement Department, BSP Colonial, Private Mail Bag, Suva. The renewal date of the deposit is stated as 16 August 2016 and maturity at 16 August 2017. The document was issued approximately nine months prior to Mr. Aatish Kumar's death. He died three months before their deposit matured.

48. What can be inferred from the loan settlement accounts and the joint deposit account are not supportive of the plaintiff's contention that the testator and his wife had gone their separate ways.

49. The defendant said that when the house in Nadawa was purchased there were 3 flats, but they had converted it to 4 flats. They moved into one of the flats. Mr. Nilesh Chand, who was called by the defendant, was the first tenant and occupied the flat on top. She and her husband moved into the bottom flat in late 2011 or early 2012, while renovations were continuing, she said. The defendant's evidence is that they stayed together for 4 years. Their relationship turned difficult thereafter. She attributes it to her husband's drug abuse and aggression, and sometimes abusive behaviour. After a bout of aggression and abuse, she said, he would feel sorry for her. She was worried about his health, and their future. She explained the decision for her to move out as one that was taken mutually to give the deceased some space so that he could see the need for change. She had given nearly a decade of her time, she said, and she wanted things to improve. Her evidence is that she moved out around September 2015,

and joined her brother in Nadera. She stayed there for about a year and 8 months. During that period, the defendant said that they never lost contact and would meet daily. She said, "We used to go together; come together in the afternoon; spend time in the weekends; go out to dinner, and go to the movies".

50. She described the separation as one of mutual understanding between husband and wife. She said that she visited the Nadawa property with the deceased during renovations while living separately. Sometimes she stayed over at his place, on occasion he stayed at her place. It was put to the defendant in cross examination that she left their flat because the deceased wanted to return to his parents' home as his father was sick and she objected to that proposal. The defendant denied this suggestion.

51. The defendant said she moved out of their house in 2015. The deceased moved to his parents' place in 2016 and stayed there for about 5 to 6 months. In cross examination she said her husband picked her up in the morning and afternoon when they lived apart. They went out to dinner and also to the movies. She cooked for him, and he would come over for meals. Some nights he stayed over.

52. On the Sunday prior to his death, she and her husband, the defendant said, went to a movie, thereafter, he dropped her off to stay at a friend's place, as the friend's husband was away. Her husband died on Thursday. The defendant said she met him on Tuesday that week, when he visited her in office, having come over for a meeting. She denied ever having moved away from her deceased husband. Her evidence was that she met her husband daily while staying apart.

53. Mohamed Janif Razak, who was called as a witness by the defendant, gave evidence that he saw the deceased with his wife several times. He was aware that the defendant lived with her husband, Aatish Kumar, on the bottom flat. He resided opposite their house. The witness used to sign and collect deliveries on behalf of the deceased. One such collection was handed over to the deceased a couple of weeks prior to his death. He recalled meeting the deceased often. He said that renovations were continuing at the top floor flat at the time Mr. Kumar died. Both, Aatish and Pritika gave him instructions to pick up hardware items

for renovation work. He was aware that once the renovations were completed Mr. Kumar and his wife were to move into the upper floor flat. He said that he came to know that Mr. Kumar lived separately from his wife only after his death.

54. Mr. Nilesh Chand, a senior research and policy officer attached to the Fiji Commerce Commission was called by the defendant. He was a tenant of the property at Bal Govind Street, Nadawa. The property, he said, contained four flats, each having two bedrooms, and initially, he occupied a top floor flat. Aatish and Pritika, he said, moved in a few months after he did. They were downstairs. Later, he moved to one of the bottom floor flats at Mr. Aatish Kumar's request so as to allow renovation of the top floor flat. This was around October or November 2016. When he moved to the down stair flat, Mr. Kumar moved elsewhere. At the time he moved down, the flat on the top floor was getting renovated. Mr. Chand said that Mr. Aatish Kumar had indicated that after renovations, he would move into the top floor flat with his wife, Pritika.

55. Mr. Janif Razak, Mr. Nilesh Chand and another witness called by the defendant, Josaia Dawai, testified that they had seen the deceased and the defendant together on several occasions. Mr. Dawai, who was employed as a procurement clerk at BSP Bank, said in evidence that he had seen the deceased visit the defendant at her office. Evidence of these disinterested witnesses show that the marriage of the deceased and the defendant was intact, and that the two were regularly seeing each other, until the deceased's last days.

56. This position was confirmed by another witness, Sharina Khan, who is based in New Zealand. The witness has been a friend of the defendant since school, and claimed to be in frequent contact with her. She confirmed that the defendant was living on her own in Suva when she visited Fiji in 2016. During that year she had met the defendant, and also Mr. Aatish Kumar, when he visited New Zealand. The previous year when she visited Fiji, she said, she had celebrated the new year with Preetika and Aatish at their flat. She was aware that Mr. Aatish Kumar and the defendant were having a difficult relationship. However, she explained, the couple were trying to make the marriage work, and planned to move into their top floor flat after renovation.

57. The evidence given by the plaintiff and her son, Mr. Abhishek Kumar, is that the defendant's marriage had broken down by the time the will was executed, and the defendant had moved on in life. It was not suggested on behalf of the plaintiff that either Mr. Aatish Kumar or the defendant had initiated family court proceedings in relation to their marriage. Their evidence was that she did not look after the deceased, even when he was ill. This was denied by the defendant who went to lengths to explain the care she had given her husband, particularly during his spells of ill health.

58. The defendant said that when the deceased had several boils on his body she took him to the hospital on 2 November 2016. He was admitted for six days. She took leave to be with him for three days, and purchased his insurance covered medicines. After work she stayed with him till night. The defendant produced as evidence the nursing discharge note dated 7 November 2016, pharmacy receipts and medical certificates recommending leave from work. This was some six months before Mr. Aatish Kumar's death. When the deceased fell ill on that occasion, the defendant said, he was living in their Nadawa property.

59. The defendant said that she learnt of the last will only when it was submitted to her solicitors, Neel Shivam Lawyers. Why would her husband make a will, she asked while giving evidence, when he knew that they had equally contributed towards the acquisition of property? He had involved her in every discussion, she said. She called him an honest person, one with integrity. They were to move into the renovated flat in June 2017. She was involved in the renovations, and the deceased had transferred funds to her, and she, in turn, transferred funds to the contractor. Renovation of two small flats was completed at a cost of about $10,000, out of which her contribution, she said, was $2,000. The defendant's testimony concerning the transfers and renovation costs are not supported by independent evidence. However, I see no reason to disbelieve her, as this evidence is fairly consonant with other facts.

60. The deceased had made travel plans to visit his friend Ziarat in New Zealand in May 2017. The defendant said she had asked him to apply for a multiple entry

visa. She had his passport. She did not intend accompanying him, she said, as he planned to spend time with his best friend. The defendant produced an email forwarded to her on 8 May 2017 by the deceased. Mr. Aatish Kumar had received the email from Immigration New Zealand based in Suva informing him of the approval of a three year multiple entry visa and that his passport would be ready for collection the next day afternoon. On the same day, five minutes after receiving news of his visa, Mr. Aatish Kumar forwarded the email to his wife.

61. He forwarded it, she said, because they "communicated on small things". He got the visa, so he shared it with her is the reason she gave for receiving the email from her husband. The authenticity of the email was not challenged. The defendant said she congratulated him upon receiving his mail, but that message does not appear in the email tendered to court. The plaintiff's counsel suggested in cross examination that the defendant had on purpose deleted her reply. This was denied by the defendant. When questioned, the defendant said they mostly communicated by landline and through the bank's chat system. Email, she said, was not their usual form of communication.

62. A breakdown of marriage is not supported by this evidence. It is, in fact, quite to the contrary. This happened 10 days before the testator's death, and nearly two months after the making of the will. Communication of this nature, and evidence that the deceased and his wife were often seen together and had plans of getting together once their flat was renovated, makes the disposition by last will a curious act on the part of the testator.

63. That there were problems in the marriage of Aatish and Pritika is clear. What is not is that the marriage had broken down. I accept the evidence of the defendant that she and her late husband were staying separately to tide over differences; these she put down to misunderstandings with her husband's family, health concerns and the worrying use of substances. She described the period of staying apart – the period being a matter of contest – as giving her husband a little space.

64. From the findings that emerge, it is not easy to fathom why Mr. Aatish Kumar would want to exclude his wife from his estate. In the court's view, there is more than a tinge of irrationality clouding the contents of the claimed last will.

65. J. M Power in 'Will Making and Administration of Estates – A short Guide'[13] points this out where a widow(er) or children are omitted or reduced in benefit. "*If after consideration of the rights of a surviving spouse and children and professional advice thereon, the testator considers that the estrangement is so serious, the faults so grievous or improvidence so marked that the natural expectations of the survivor should be reduced or modified, the defence of the will against any subsequent challenge will be greatly assisted if the testator files with the will a full account of the circumstances prompting the omission, reduction or modification of the normal expectancy of the spouse or children or other entitled person. A short recital in the will itself will be of greatest value*."

Did the testator approve the contents of the will?

66. The disputed testament does raise the question whether the testator knew and approved of the contents of the questioned will. This inquiry is necessitated by the exclusion of the testator's wife from the estate. As has been observed, where testamentary capacity and execution of the will are proved, the testator's knowledge and approval is usually presumed. There is no challenge here to the testator's capacity to make the will.

67. Mr. Mitchell Deve, who prepared the will, told court that he read out the will to the testator. The printed clause of the subscribing witnesses says the will was read to the testator in the Hindustani language. The evidence makes no mention that the testator read the will. Neither Mr. Deve nor Mr. Ram say that. Nor is there insight on the matter by Mr. Abhishek Kumar. The personal reading of a will by a testator is not a *sine qua non*. The requirement is that a testator knows and understands the contents of his will, and understands the dispositions he is to make. It must also be mentioned that the disputed testament is not a complex document.

[13] Butterworths, 1984 Ed., 9

68. Mr. Deve did not prepare a draft of the will for the approval of the deceased. This, though prudent, is not always an essential requirement. In *Muni Deo Bidesi and others v Public Trustee of Fiji*[14], the Fiji Court of Appeal stated that though proof that the executed will accurately reflects the testator's instructions may be strengthened by the production of the instructions and of the draft, the absence of these documents is not fatal to the validity of the will. Whether a court of conscience sees this or any other factor as essential will depend upon the totality of the material circumstances. That a draft was prepared for the testator's perusal followed by a reading of the draft could have been an important consideration.

69. In regard to the obtaining of instructions, as has been said, Mr. Deve's evidence was vague and uncertain. At one point, having said that he received instructions by telephone the previous day, later, in cross examination, he spoke of written instructions by email, which he was unable to produce. No reasons were given for the unavailability. The testator's brother, who played a key role in the preparation and execution of the will, clearly said that instructions were oral. The evidence is not sufficiently persuasive that such written instructions from the testator were available prior to the making of the will.

70. Although in cross examination, Mr. Deve said that he had drawn the testator's attention to the exclusion of his wife, his testimony on this did not seem convincing. There is no evidence before court that the deceased was asked to obtain independent advice or to consult a solicitor in view of the unusual decision to completely leave his wife out of the estate. It is in fact, to the contrary. Indeed, the document was prepared and executed swiftly. Mr. Deve was asked, and he obliged with promptitude; the will having been prepared and executed, it seemed, within a day of receiving oral instructions. The court has not been told the reason for the haste in concluding the transaction.

71. The events post execution of the will merit mention. The evidence has it that the will was deposited by the testator with his mother. The wife's testimony is that she knew nothing of its making. The instrument was not registered with the

[14] [1975] FJLawRp 13; [1975] 21FLR 65 (25 July 1975). The appeal to the Privy Council was dismissed: this is reported in [1978] FJUKPC 2; [1978] UKPC 33 (11 December 1978)

probate registry of the High Court. Mr. Deve explained that this avoidance was notwithstanding his advice to have it registered. The failure to register, it needs to be said, is not required by law; rather, it is a cautionary measure taken by solicitors and facilitated by two practice directions: the Chief Registrar's Practice Direction No. 2 of 1994 (2/9/1994) was clarified and strengthened by the Chief Justice's Practice Direction No. 2 of 2012. A registered will is of useful evidentiary value and could be a source of comfort where the claimed wishes of a testator are under attack. Here, it could be said, the circumstances were ripe for the will to be assailed. The implications could not have been lost on Mr. Mitchell Deve and Mr. Abhishek Kumar, with their extensive will making experience.

72. The testator has the freedom to dispose his property by will. He does not have to disclose the nature of his relationship with his intimate relations; in this case his wife. But, Mr. Abhishek Kumar's presence looms large in the making of the will; not so much the testator himself. The will bequeathed the estate of Mr. Aatish Kumar to Airah Aavya Kumar – the niece of the testator, and the daughter of Mr. Abhishek Kumar – for her sole use and benefit absolutely after the plaintiff. The disposition of property to his daughter must, in the circumstances of this case, in my view, place Mr. Abhishek Kumar in a position of similarity to a person taking a benefit under the will.

73. The House of Lords in *Wintle v Nye* said, "There is no prohibition on the person preparing a will from taking a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. 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"[15].

74. The quality of the testator's understanding is relevant in the circumstances in which the will is said to have been prepared and signed. Had he given thought to the making of the will? Had he taken into account the wife's contributions to their joint investments? Had the testator considered the settlement of liabilities in connection with the assets they had acquired? Were these matters brought to his attention? Did the testator have enough time to consider these matters? Was he

[15] [1959] 1 All ER 552 at 557

rushed into the transaction? What was the reason for the haste? Did Mr. Mitchell satisfy himself that the testator understood the effect of his dispositions? What was the nature of the reading over of the instrument? Was it read over slowly? Were questions asked at any time? These are matters that are not sufficiently explained in evidence. In context, evidence on these could have shed light on the suspicions apprehended by court.

75. Suspicion can arise from what is before court and what is not. In *Farrelly v Corrigan*[16], the Privy Council held, **"**It could not be disputed that it was incumbent on those who sought to uphold the gift to William Farrelly to prove the truth and honesty of the transaction, and to remove the suspicions which the comparative magnitude of the gift and the circumstances under which the will was prepared were calculated to excite". In that case the will writer took a large share of the benefit.

76. The difficulty in cases where a will is disputed was highlighted by Mr. Abhishek Kumar's response when suggested that the testator had no reason to exclude his wife. The witness responded, "Well, that you can ask him. But, he is no more there to ask. He made the will. I didn't. I can't say anything on that". This situation was described by the Indian Supreme Court in these terms in *Jaswant Kaur v Amrit Kaur*[17], "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."

77. The absence of a clear rationale in excluding the wife from benefitting persuaded the court to take a closer look at the circumstances surrounding the making of the will. Those circumstances excited the suspicion of court. In my view, evidence concerning the testator's knowledge and assent is unsatisfactory. The court is not persuaded that Mr. Kumar intended to leave his wife out of his estate. The preparer of the will, in my view, fell short of the care that was desirable in these special circumstances. Lindley L.J, in *Tyrrell v Painton*[18], laid

[16] *Supra*
[17] [1977] AIR 74, 1977 SCR (1) 925
[18] [1894] P., 156

down that the proper question for a judge to ask where suspicion arises from the circumstances is this: "Do the defendants affirmatively establish to my satisfaction that the testatrix knew what she was doing when she executed this will". That question is apt in relation to the testator in this case.

78. The question of suspicion surrounding a will was considered in *Vernon v Watson,*[19] by the New South Wales Supreme Court. The court stated, "The burden imposed by the rule is the burden of removing the suspicion so as to show that the mind of the testator is indeed to be found reflected in the will that is propounded". The court made reference to the judgment of *Tyrrell v Painton*, where Lindley LJ made it clear that the rule is not confined to the case where a will is prepared by or on the instructions of a person taking large benefits under it, "but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document"

79. The plaintiff has not persuaded court that the last will dated 10 March 2017 is the last will and testament willingly made with the knowledge and approval of Mr. Aatish Kumar. The plaintiff has not satisfied the court's conscience in order to pronounce the will in solemn form of law and grant probate in the deceased's estate. A dismissal of the plaintiff's action must follow, and the defendant's counterclaim is allowed to the extent specified below. The defendant has pleaded that the plaintiff placed a caveat bearing number 21/ 2017 against the grant of letters of administration to her. Although there is no specific prayer for vacating the caveat, an order will nevertheless be made for its removal to facilitate the probate registry's processing of the application for administration.

[19] [2002] NSWSC 600

ORDER

A. The plaintiff's action is dismissed.

B. The caveat bearing number 21/ 2017 lodged by the plaintiff in the probate registry is vacated.

C. The registry may process the defendant's application for letters of administration in respect of the deceased's estate.

D. The plaintiff is directed to pay the defendant $3,000 as costs summarily assessed within 4 weeks of this judgment.

Delivered at **Suva** this **12th** day of **February, 2021**

M. Javed Mansoor
Judge

Solicitors for the plaintiff: Nands Law
Solicitors for the defendant: Neel Shivam Lawyers