MAHESH CHAND and 2 Ors v DEWAN CHAND and Anor

HIGH COURT — CIVIL JURISDICTION

JITOKO J

28 October 2003

[2003] FJHC 64

Succession — probate — plaintiffs not given anything in will — will's due execution and testator's testamentary capacity — whether second will valid — whether undue influence exists — Wills Act (Cap 59) s 6.

Deceased made two wills. He gave property to his legal wife in the first will, and then another property to his de facto wife including their children in the second will. Plaintiffs opposed the second will alleging its due execution and deceased's lack of testamentary capacity because of illness. They also contended that undue influence exists.

Held — Deceased was in charge of his full mental faculties and was presumed to have intended, of his own volition and free of any pressure and undue influence from others, not to include the Plaintiffs in the share of the residue of his estate. He had in fact signed his name in full as "Puran Prasad". Plaintiffs now can only rely on the grace and favour of their mother who had been gifted an additional 15 acres to the house originally given her in the first will.

Action dismissed.

Cases referred to

Baudains v Richardson [1906] AC 169; *Boyse v Rossborough* (1857) 6 HL Cas 1; *Hall v Hall* (1868) LR1 P & D 481; *Williams v Goude* (1828) 1 Hagg Ecc 577; *Wingrove v Wingrove* (1885) 11 PD 81, cited.

Rajendra Dutt Maharaj v Harry Ram Lochan [1979] 25 FLR 156, considered.

M. Sadiq for the Plaintiffs.

A. Kohli for the Defendants.

Jitoko J. The background to this probate action is succinctly summarised with disarming simplicity and perhaps an eye to nursery fabled-humour by the Defendant counsel in his written submission. I can do no more than recite it in full.

> In the settlement of Daloko in Dreketi, Labasa there lived an Indian man by the name of Puran Prasad. He married Raj Pali who bore three sons Mahesh Chand, Ami Chand and Subhash Chand and a daughter by name of Bimla Wati. Amongst other things, he owned a piece of freehold land known as "Daloko" containing 34 acres. On this land he planted rice and sugar cane with the help of his wife and children. Everyone lived happily in a community setting. For reasons best known to him Puran Prasad brought a lady by name of Aisa Bi who shared Puran Prasad with his legal wife. They also shared the same house for a while until one day Aisa Bi built a new house. For a while Puran commuted between the two houses and cohabited with the two women. Aisa Bi bored him two children Dewan Chand and Ravin Chand (The Defendants). He made a Will on 29th of September, 1980 (hereinafter called the "first Will") wherein he appointed his two sons from his legal wife Mahesh Chand and Ami Chand as Executives and Trustees. In that Will he gave his wife their dwelling house 30' x 20' and his de-facto wife their other dwelling house 26' x 13'. He gave his daughter 5 acres of land and the remainder of the estate to all his children in equal shares. His children included the Plaintiffs and the Defendants.

On 30th of April 1986 Puran (Pooran) made another Will in which he made the Defendants as Executors and Trustees. In that Will he gave his wife a life interest in the house she occupied and 15 acres of land for her benefit absolutely. He gave his de-facto wife the life interest in the house she occupied. He gave 5 acres to Bimla Wati and the residue of the estate to the Defendants. The Plaintiffs having been cut off from the second Will filed a Writ challenging the 2nd Will.

Puran (Pooran) Prasad died of diabetes aged 60 on 4 January 1992. Interestingly and perhaps indicative of the Casanova lifestyle of the deceased, his death certificate showed that he sired an additional 6 female children elsewhere apart from Bimla Wati. A Grant of Probate (Probate No 27710) to the Defendants by virtue of the deceased's 1986 Will, was proved in the High Court at Suva on 26 March 1993.

The plaintiffs in their writ filed on 9 July 1998 sought the following:

(i) That the Court shall pronounce against the validity of the alleged Will dated the 30th day of April, 1996.

(ii) An order for the revocation of the said Probate No 27710.

(iii) An Order that the Defendants do lodge the said Probate No 27710 to the Court forthwith pursuant to Order 76 Rule 4 of the High Court Rules 1998.

(iv) An Order restraining the Defendants from evicting the Plaintiffs or stopping them from cultivating their share of the land pending the determination of this action.

(v) An Order restraining the Defendants from mortgaging, transferring or dealing with the said freehold land in any other manner pending the determination of this action.

(vi) An Order pronouncing for the force and validity of the deceased Will executed on the 29th day of September, 1980.

The crux of the Plaintiff's case and the only issue in these proceedings is whether the deceased's Will of 30th April 1986 ("second Will") is valid.

Plaintiff's submissions

In support of their case, the Plaintiffs argued that:

(a) the second Will was not executed in accordance with the provisions of the Wills Act (Cap 59);

(b) that the deceased was not of sound mind when he executed the second Will;

(c) that alternatively, the execution of the second Will was obtained under duress and influence of the Defendants; and

(d) that the deceased at the time of the execution of the second Will did not know or approve of its contents.

As to whether the provisions of the Wills Act had been complied with, the Plaintiffs first say that the deceased first name "Puran" is spelt "Pooran" in the second Will. According to counsel, this mistake arose from the Solicitors for the deceased (in respect of the second Will) not adhering to proper procedures of taking formal instructions from the deceased, before drawing up the Will. Mr Raman Singh of Kohli & Singh, Solicitors, Labasa, who had drawn up the deceased's second Will, could not recall, on cross-examination by the Plaintiff's counsel, whether in fact he had "taken instructions" from the deceased prior to drawing up the Will. Further the Plaintiff contends, Mr Singh on examination, could not recall the name of the other attesting witness and gives rise to suspicion that the signatures of the witnesses may not have been made in the presence of the deceased and of one another as required under s 6 of the Act.

The Plaintiffs also argued that at the time of the making of the second Will on 30th April 1986, the deceased was not of sound mind. They point to his medical condition and records to support this view. They say that the deceased was a known diabetic for over 20 years and for which he was an inpatient of the Labasa Hospital between 5–14 November 1985. He was also admitted on 7 February 1983 for what the Plaintiffs claim was "acute myocardial infarction". A day before he made the second Will, the Plaintiffs claim, the deceased visited the hospital complaining "about decreased vision". The deceased, again according to the Plaintiffs, was also suffering from "peripheral neuropathy which affected his mind".

Dr John Damargo (PW2) of the Labasa Hospital, confirmed that the deceased was a diabetic for over 20 years. Dr Damargo also confirmed from the hospital patient records, that the deceased had been admitted three times: in 1982 for foot sepsis, in 1983 of a heart attack, and in 1985 for diabetes. Medical records also showed that the deceased did visit the Eye Department of the hospital on 29 April 1986, a day before making the second Will. As the doctor readily conceded, vision and other eye problems can be linked directly to diabetes.

The Plaintiffs further claim that the second Will and specifically the deceased's signature to the said document was obtained by undue influence. They point to the evidence of one of the Defendants, Ravin Chand (DW2) who confirmed that his mother Aisa Bi, had taken the deceased to Labasa Hospital on 29 April, stayed overnight in Labasa town, and taken him the next day to Raman Singh solicitor, to make the second Will. After making it, he failed to inform anyone of his first family about the change. This, according to the Plaintiffs, clearly showed that the deceased was not free but acting under compulsion and pressure from his "de facto" wife Aisa Bi. This action of the deceased, was clearly in contrast to his earlier behaviour, where according to the evidence of Ami Chand (PW1) and one of the Plaintiffs, he had showed and discussed the contents of his first Will with everyone in the family. Shiu Ram (PW3) the brother of the deceased, also gave evidence and said that the deceased spoke many times to him confirming that in his Will he has divided his property up equally among his five (5) sons.

Finally the Plaintiffs contend that at the time of the making of the second Will, deceased's illness and medical conditions had deteriorated to such an extent that he was not able to understand the nature of his actions nor the contents of the document he signed on 30 April 1986. In support, the Plaintiffs point to the evidence of PW2 which suggests that given the deceased medical conditions, the making of the second Will should not have proceeded without a medical practitioners' certificate.

Defendants' submissions

For their part the defendants argue that the second Will is valid and was made and executed in accordance with the provisions of the Wills Act. The variation in the deceased first name from "Puran" to "Pooran" is not of substance. The identity of the person is the more important consideration. The deceased's signature is the same in both Wills. Taking instructions from a client before making a Will is not something that requires formal proof and the fact that the solicitor responsible for drawing up the second Will does not now remember the witness(s) to the execution of the document is, given the lapse of time, excusable.

As to the deceased's state of mind, the Defendants point to the evidence of Dr Tarmago (PW2). His assessment of the deceased's medical conditions closer to and during the time the latter made his second Will, merely supports the view

that the deceased was in full charge of his faculties on 30 April 1986. There was nothing in his medical history to suggest that the deceased was incapable of making his own rational decision when he decided to make a new Will on 30 April 1986.

Generally the Defendants deny that there was undue influence exerted on the deceased to change his Will and that he was fully aware of and approved the contents of the second Will before he signed it.

Court's consideration

This is a very simple case of this court deciding whether the deceased's second Will of 30 April 1986 is invalid and therefore his first Will of 29 September 1980 remains. If the court so finds, then the grant probate issued in favour of the Defendants on 26 March 1993 be revoked and the first Will pronounced valid. It is for the Defendants to show and satisfy this court that the second Will was validly made and executed.

The Plaintiffs had raised the deceased's mental and physical condition arguing that he lacked the testamentary capacity to make the second Will. The term "testamentary capacity" is defined in *Tristram and Coote's Probate Practice,* 22nd ed, p 695 thus:

> The testator must understand the nature of the act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and with a view to the latter object, no disorder of the mind must poison is affections, pervert his sense of right, or prevent the exercise of his natural facilities, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made.

Such a condition may arise from old age or illness. At the time of making of the second Will, the deceased was aged 54. The issue of old age therefore does not arise and in fact was not raised by the plaintiffs.

The Plaintiffs have however placed a great deal of emphasis on the deceased's illness to prove testamentary incapacity. They point to the deceased's 20 year history of diabetes which constantly resulted in his visits to the hospital for treatment and admission. Over a period of time, the deceased's diabetic condition had contributed to his vision difficulties. Dr Damargo gave evidence that the deceased was also suffering from peripheral neuropathy which he described as the result of infection of the peripheral nerves of the eyes. But while it could cause paralysis, Dr Damargo stated that it does not affect the central nervous system and therefore would not affect the brain of an individual. The evidence provided from the deceased's medical records also show that he had suffered a stroke in 1983 which necessitated his hospitalisation but only for a day. The Plaintiffs had in particular pointed to the fact that the deceased had visited the hospital a day before he made the second Will.

The court, after having considered all the evidence submitted before it, finds that there is nothing in the deceased's illness nor in his medical history or his conditions to the day he made his second Will, to suggest that he lacked the testamentary capacity. While he suffered from diabetes for over 20 years, and laboured under other ailments that are the consequences of the disease, there is nothing to suggest that the deceased's diabetic conditions or his failing heart, had significantly affected his mental state to such an extent that this court would have seriously considered the possibility that he may not have possessed the legal capacity to make the second Will on 30 April 1986. Dr Damargo himself stated in examination, that the worst of any diabetic conditions, would not affect the

brain to the extent that a person would suffer from mental incapacity or delusion. The same is also true of the deceased's failing heart. Again there is no medical evidence to support the Plaintiffs' suggestion that his congestive heart condition was such that it would have contributed to the deceased's mental instability to the extent that he would have been deemed to lack the testament capacity on 30 April 1986. Other types of illnesses referred to by the Plaintiffs such as sepsis of the feet, are not in the court's view, remotely connected to the deceased's frame of mind, or such illnesses post-dates 30 April 1986, that they are irrelevant to the issue.

The Plaintiffs also allege undue influence. They allege that the deceased was not permitted by the Defendants and their mother Aisa Bi to go to and stay with his legal wife. Further on the eve of the second Will, Aisa Bi had accompanied the deceased to the hospital, remained with him overnight in Labasa town, and "took" him to the solicitor Mr Raman Singh, the next morning, when he made his second Will. A picture is portrayed by the Plaintiffs that the deceased was under the influence and the thumb of the Defendants mother, Aisa Bi. However, this appears contrary to the evidence adduced before the court. For example, according to PW1, his father, the deceased, was a strong character and more or less did as he pleased. "Once his mind was made up, he could not be persuaded otherwise", PW1 stated.

What constitutes undue influence is defined at p 697 of *Tristram and Cootes* as follows:

> To be undue influence there must be coercion (*Wingrove v Wingrove* (1885) 11 PD 81); or fraud (*Boyce v Rossborough* (1857) 6 HLC at p 45; *Williams v Goude* (1828) 1 Hagg at p 581); a testator may be led but not driven; his will must be the offspring of his own volition and not the record of someone else's (*Hall v Hall* (1868) 1 P & D 481).

In *Rajendra Dutt Maharaj v Harry Ram Lochan* [1979] 25 FLR 156, Fiji Court of Appeal endorsed the following two passages from *Wingrove v Wingrove* (above):

> To be undue influence in the eye of the law must be — to sum it up in one word — coercion.
>
> It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence.

As to the burden of proof, the Court of Appeal in *Rajendra Dutt Maharaj* quoted as authority the following passage from *Williams & Mortimer or Executors, Administrators and Probate,* 1970 ed, Ch 17, pp 161–2,

> While the overall burden of providing a Will lies on those who propound it, such burden is, in general, discharged by showing that the Will was duly executed and that the testator had testamentary capacity. On these matters being shown, those alleging undue influence must prove it; for as already stated, undue influence cannot be presumed. It is not sufficient to show that the circumstances attending the execution are consistent with its having been procured by undue influence, it must be shown that they are inconsistent with any other hypothesis.

In this case the fact that the deceased had spent more of his time with Aisa Bi and the Defendants than with his legal wife and family does not of itself impute undue influence by the Defendants. The deceased was a strong-willed individual and did as he pleased. It is not beyond the comprehension of this court, that the deceased would have of his own volition decided to stay with Aisa Bi. Similarly, the fact that Aisa Bi had accompanied the deceased to the hospital on the 29th of April 1986, looked after him overnight and went with him to Mr Raman Singh

the next day to make a new Will, does not of itself impute pressure exerted by the said Aisa Bi nor the Defendants on the deceased. On the contrary, it would seem to the court that the behaviour of Aisa Bi in accompanying the deceased on his visit to the hospital and looking after him before the visit to the solicitors, reflects only of a caring individual. As Tristram and Cootes' reflects at p 697:

> Appeals to affection, ties or kindred, gratitude for past services, or pity for future destitution are legitimate.

These do not constitute undue influence.

> Even immoral considerations do not amount to undue influence unless the testator is in such a condition that if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it" (*Baudains v Richardson* [1906] AC 169 at p 184).

As far as this court is concerned, there is nothing in the evidence given by the Plaintiffs to support their contention of undue influence. All of the Plaintiffs and their witnesses have painted a somewhat glowing picture of warm relationship between themselves, their mother and the deceased. The Plaintiffs, it is evident from their stories, deeply respected and to some extent, lived in fear of their father. But the fear was borne not only out of physical harm, which according to PW1 he was capable of, but even more so out of fear of being dispossessed of their father's land. At the end of it all however, the picture of the deceased as a strong character capable of acting on his own overshadows the issue of undue influence. On the facts of this case, the court is satisfied that the ingredients for undue influence have not been established by the Plaintiffs.

Finally the Plaintiffs argue that the second Will should be declared invalid because it does not comply with the requirements of the Act. The particulars include the solicitor, Mr Raman Singh not taking "proper" instructions from the deceased before drawing up the second Will; the possible breach of s 6 since Mr Singh could not recall the name of one of the witnesses and therefore the inference that the second witness may have signed later; and the discrepancy in the deceased's first name of "Puran" in the first Will, to "Pooran" in the second. The court does not agree with the Plaintiffs' contention. First, as counsel for the Defendants rightly pointed out, there is no legal requirement under the Act that formal instructions are to be first taken before a Will is drawn. It goes without saying that a solicitor will of necessity be required to discuss the contents of the Will first, before any attempt is made to have it drawn. Second, it is quite unfair to expect Mr Raman Singh to remember both or even one of the names of the witnesses to the second Will drawn and executed some 17 years ago. Witnesses to the document are normally drawn from the staff of a solicitor's office and depending on the number and turn-overs, it is expecting too much for an individual to remember all that had happened and those that were involved on 30 April 1986, some 17 years ago. As to the discrepancy in the name, the court is satisfied that it does not constitute a breach of the Act to the extent that the second Will becomes voidable. In this regard, the court notes that while the name "Pooran" appears in the recital and body of the document, the deceased had in fact signed his name in full as "Puran Prasad". The court having considered the evidence presented before it, does not agree with the Plaintiffs that the second Will does not comply with the provisions of the Act.

In the end, this court finds that, Puran (Pooran) Prasad in charge of his full mental faculties, must be presumed to have intended, of his own volition and free of any pressure and undue influence from others, not to include the Plaintiffs in the share of the residue of his estate. They now can only rely on the grace and

favour of their mother who had been gifted an additional 15 acres to the house originally given her in the first Will. It is at the end of it all, a sad and tragic tale of someone who tried to please as many but ended up disappointing a few.

In the result, the Plaintiffs' action fails and is hereby dismissed. I award costs to the Defendants to be taxed if not agreed.

Action dismissed.