IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Probate Jurisdiction

Action No. 2 of 1974

IN THE ESTATE OF SHIU PRASAD JOHN LOCHAN
ALIAS SHIU PRASAD JOHN LOCHAN s/o Lochan
late of Lautoka, Fiji, Theatre Proprietor

BETWEEN:

HARRY RAN LOCHAN s/o Ranjit — Plaintiff

and

RAJENDRA DUTT MAHARAJ s/o Ram Lal
and OLIN MAYA MAHARAJ d/o Shiu Prasad
John Lochan. — Defendants

Mr. S.M. Koya, Counsel for the Plaintiff
Mr. K.C. Ramrakha, Counsel for the Defendants.

JUDGMENT

This action follows the death of S.P.J. Lochan, hereinafter called the testator, who made several wills between the beginning of 1965 and his death in October 1973.

He had two daughters, OLIN & JUNE, a son-in-law Rajendra Maharaj who is married to the daughter OLIN, a common law wife hereinafter called the wife and a nephew Harry Lochan, the plaintiff.

His will of 17.2.65 provided for his wife for her life, for the maintenance of his daughter OLIN and for his estate to be divided between the two daughters and his nephew Harry Lochan. He appointed his nephew (the plaintiff) and his son-in-law Rajendra Maharaj (hereinafter called Rajendra as executors.

In 1971 he had a stroke and was in hospital for several weeks; in 1972 and 1973 he had further strokes. During 1973 he made three further wills which are disputed by the nephew Harry Lochan (hereinafter called the nephew). The wills, put in by consent as Exhibits D2, D3 & D4 are dated 21.6.73, 22.9.73 and 25.9.73 respectively and they all omit any reference to the nephew. The testator died on 24.10.73.

The statement of claim alleges that the wills Exs. D2, D3 & D4 are forgeries or were prepared when the deceased was not of sound mind and memory or are the products of undue influence exerted upon an enfeebled testator by OLIN and her husband Rajendra. Allegations of forgery we e abandoned during the trial and the issues are whether there was a lack of testamentary capacity and/or undue influence.

The testator was about 69 years when he died and the nephew had been brought up as his son from an early age. There is no evidence that in 1973 the testator was on anything but reasonable relations with his nephew who continued to live with him after his marriage in 1967. The testator's wife did not get on well with her "daughter-in-law" and after one year the nephew moved to a house of his own. However, there is no evidence that the father-son relationship ceased or was strained. In fact the evidence which I accept points to its continuance. Why therefore should the testator's last 3 wills disinherit the nephew when in 1965 he was a beneficiary as to one third and a co-executor?

The earliest of the 1973 wills Ex. D2 dated 21.6.73 was drafted by a solicitor, Mr. D.S. Sharma, sho received his instructions Ex.D1 from Rajendra, (deft.), on 21.6.73. Mr. Sharma's (D.W.1) office was near to the testator's flat in the Globe cinema building which belonged to the testator. The will Ex. D.2 appoints Rajendra, who instructed the solicitor, as sole executor and equal beneficiary with the wife and two daughters. Thus half the deceased's estate went to the daughter Olin and her husband Rajendra (deft.).

Such a share out may not have appealed to the wife and daughter June. Anyway a handwritten will Ex. D3 appeared on 22.9.73 excluding Rajendra (deft.) and sharing the property equally among the wife and 2 daughters. On 25.9.73 a typewritten will Ex. D4 was made repeating the terms of Ex. D3.

What was the testator's mental and physical state when he made his 1973 wills? Mr. Sharma, D.W.1, said that on 21.6.73 the deceased was in bed; he read the instructions Ex. D.1. and the will to him. He said the testator spoke rationally and over a cup of tea said he had had a stroke. In cross-examination, D.W.1, (solicitor), stated that the testator's family did not inform him that he was

receiving medical treatment; he did not inquire about relatives who might hope to benefit under the will but learned that he had made a will several years earlier. No effort was made to obtain the existing will of 1965 which was being revoked. In Rattan Sing v. Amirchand 1948, 1 A.E.R. 152, at 156 E, the Privy Council observed that one would expect a testator of sound mind who intended to disinherit a near relation to send for any previous wills. D.W. 5, A.S. Ali, the senior clerk of D.W.1, witnessed the signing of the will Ex. D2; he was not aware that the testator had had a stroke but said he was in bed. D.W. 5, said that the testator spoke normally but I find that evidence to be far from reliable.

Rajendra (deft.) gave Mr. Sharma, D.W.1, the instructions for the will Ex. D.2 of June 1973. He denied knowing of the subsequent will Ex. D.3 until after it had been made but for reasons hereinafter appearing, I do not believe him. Ex. D3 was prepared by a Mr. Mishra, solicitor, who is now in Canada. His clerk SHABAZ KHAN, D.W.2, was present when the typed will, Ex.D4 was signed by the testator at the latter's flat on 25.9.73 in the presence of the solicitor, Mr. Mishra. Ex. D.3, dated 23.9.73 is the handwritten will of which Ex. D.4 is a typed repetition. D.W.6, Janti, a domestic, who worked for the deceased for many years witnessed Ex. D.3. She says that the testator spoke reasonably at that time and that he told her it was his will. I have not the slightest doubt that at this time the testator's speech was considerably affected by a paralysis of the left side of his face and I am not at all sure what D.W.6 meant by the expression "spoke reasonably". Did she mean "less slurred" than usual?

D.W.8, Olin, one of the testator's two daughters, says that she was not aware of the wills Ex. D.3 and Ex. D.4 until after they were executed. For reasons which appear later I find that she was aware that they were being prepared and executed even if she did not know the contents before hand. She remembered the solicitor, Mr. Mishra coming to the testator's flat and writing the will Ex. D3 and later returning with the typed replica Ex. D4. She indicates that in regard to each will the testator asked "them" if they were satisfied. Her evidence indicates that the persons thus addressed were the witness D.W.8, her sister and her mother.

D.W.9, Natwarlal Vagh, says that he saw the testator every Sunday. He is in the film distribution business and the testator was a cinema proprietor. He stated that the testator was bedfast for about a month prior to his death and that until 10 days before his death he was "all right" and that up to a month before his death he was in control of his mental faculties.

The medical evidence tendered by the defendant came from two doctors. D.W.2, Dr. Yankat Raju, was called to attend the testator on 11/8/72 and says that there was a paralysis of the left side of the body due to a stroke. He saw him again on 14/8/72 when there had been a slight improvement. Dr. Raju did not appear to have been informed that this was a second stroke and that the first one had occurred in 1971. He observed no positive signs of mental impairment. But this was about a year before the disputed wills were executed and his evidence, does not greatly assist as to the testator's mental capacity in 1973.

D.W.4, Dr. Young, attended the testator at a time which he thinks was about 4 to 6 months before his death. He had suggested that the testator be sent to hospital but his family did not respond. He said that had the testator suffered an impairment of the mind he would have noticed this. The doctor stated that the testator was in pain and said very little. Dr. Young had no notes made at the time. He did not purport to have an accurate recollection and I think it may have been much more than 6 months before the death that he saw the testator.

The daughters Olin and June both state that the deceased was in possession of his mental faculties until after the will of September 1973 was made. Like the plaintiff (nephew) they are beneficiaries and could be tempted to colour the evidence in their own favour.

Evidence as to the deceased's mental state given by the plaintiff's witnesses reveals a somewhat different picture from that presented by the other side.

Mrs. Marriott, P.W. 1, worked at the Globe Cinema, for the testator, from 1957 to 1972. She mentioned the testator's second stroke in August 1972 and said Dr. Raju had visited him on that occasion. After the third stroke in June 1973 she visited him often. In August 1973 she wanted him to sign some papers connected with hurricane damage to her home but

he could not understand and she approached Rajendra to sign them. She said the deceased appeared not t recognise her in September 1973.

P.W. 2, Ramat Ali, a hairdresser renting accommodation on the ground floor of the Globe Cinema dressed the testator's hair. He gave evidence of the strokes and the testator's deteriorating condition saying that after the third stroke in 1973 the testator was bedfast, his mind wandered and he spoke of his childhood. Two months prior to the testator's death when he dressed his hair his speech was slurred and laborious.

P.W. 3, A.C. Chand, worked at the Globe Cinema. He witnessed the testator's first stroke in 1971 and said Dr. Young attended him. If that is so Dr. Young's recollection of the occasion is two years out in point of time. He P.W.3, recollected the second stroke in 1972 when Dr. Raju attended the testator. P.W.3 visited the testator each day for instructions and received them up to the occasion of the third stroke in June 1973. He says that from August 1973 onwards the deceased did not appear to recognise him. Prior to this the deceased used to lie on his bed with closed eyes and open mouth and it took time to get instructions from him because his mind wandered. From August 1973 onwards P.W. 3 received instructions from Rajendra. On 3.9.73 was resigning but could get no response from the testator and so he handed his resignation to Rajendra. In cross-examination he said the testator was very sick after July 1973. A.C. Chand's recollection of the chronological order of events appeared to be reliable.

P.W. 4, V.N. Singh, Clerk to the Agricultural Tribunal, visited the testator every week in 1973. He says that in July 1973 the testator's face was twisted, he was on his back and his tongue hung out. On those occasions when the deceased could talk he stayed with him for 10 minutes or so but there were occasions when he could not speak. A visit of 10 minutes duration is rather short and suggests that the testator's more lucid periods did not call for anything but short visits.

The evidence of P.W.'s 1.2, 3 & 4 fits in with that of P.W. 5 Dr. Gounder. The latter first visited the testator on 13/5/73 and noted the partial paralysis of the

left side. He said the testator could not sit up by himself and when assisted to a sitting position complained of pain. He visited him on the 15th and 16th May and gave pain killing injections advising "the family" to get him out of bed 3 times a day to exercise a painful left knee. During visits he saw the wife and he saw D.W.9, June (the daughter) whom he identified in Court. At that stage Dr. Gounder stated that the testator's mind was not clear although he was apparently capable and had some capacity for understanding. Dr. Gounder nevertheless made sure that the relatives knew what was to be done.

At the instance of the nephew (plaintiff) Dr. Gounder states that he asked Mr. Ramesh Patel, consulting physician, to examine the testator on 30/6/73.

I ignore certain questions which were erroneously put to the doctor in evidence-in-chief as to the testator's testamentary capacity. His replies if I acted on them would save me from making a decision because they would answer the very decision which I have to make. Therefore I exclude the doctor's opinions as to the testator's testamentary capacity.

On 11/8/73 Dr. Gounder again saw the testator who was still in bed;he was very weak and suffering from diarrhoea. The testator's words were slurred; they did not make sense and the doctor had to ask the wife what it was that the testator was trying to say. On 14/8/73 the testator's condition was much the same. He saw him again on 13/9/73 and gave him a multi-vitamin injection which was what he had done on other occasions. The restator showed no emotional change when the doctor appeared at his bedside and did not seem to appreciate that a doctor was in attendance or what the doctor was telling him to do. This was before the last of the wills was executed.

On 19/10/73 when called again the doctor found the testator crying and trying to speak but unable to make himself understood. At this stage the last of the said wills had been executed. Dr. Gounder said that during this visit Rajendra appeared and said,

> "Oh there is nothing wrong with him. He has just had too much to dring. "

In cross-examination the doctor said that prior to 19/10/73 the testator's replies had been unintelligible. One therefore wonders what, if anything, lay behind the comment

that the testator had had too much to drink. It was only a few days before his death and any drink he may have consumed would have had to be carried to him. The nephew who allegedly encouraged the testator's acknowledged drinking habits was no longer an accepted visitor. He, the doctor agreed he did not ask any questions designed to check the testator's mental capacity to conduct his business, to deal with property and to formulate a will.

In re-examination he doubted whether one could have got cogent replies from the testator to questions about his personal and business affairs. Prior to 19/10/73 he would answer, shake his head or remain silent. From that evidence I conclude that the testator was, prior to 19/10/73 in an exceptionally weak, exhausted and dependent state in the physical sense; that even if he understood he could only shake his head, and at times he was silent. One could not tell from silence whether or not he had understood.

The nephew, P.W. 6, says that he saw the testator regularly until August 1973 but then his aunt (the wife) prevented his visits. From May to August he noticed the testator deteriorating, he was forgetful and could not remember whether he had had his medicine. In July he had to tell the testator who he was.

Out of the evidence on both sides the picture emerges of a man who had a stroke in 1971 which made it difficult for him to get around but he did so with a stick. His condition did not improve and he had a further stroke in August 1972 which made him worse. It appears that about May 1973 he had a third stroke when trying to use the bathroom and from then onwards was virtually bedfast. P.W.6 Janki says he was bedfast for about 6 months prior to his death and that appears to fit in with the evidence of Dr. Gounder, P.W.5.

In determining the testator's mental condition during that period I have to pay regard to the credibility of all the witnesses and I have no hesitation whatever in using P.W. 5, Dr. Gounder as the yardstick. The doctor was undoubtedly a witness of the highest intergrity and I accept his evidence with the exception of those inadmissible portions

which give a direct opinion as to the testator's testamentary capacity. In cross-examination the doctor said he had formed an opinion of the testator's mental capacity from his ansers answers to general questions concerning his health, habits and well being.

I find on the evidence of Dr. Gounder and P.W.'s 1,2, 3 & 4 that following his third stroke in May 1973, the already seriously weakened and partially paralysed testator became bedfast and was absolutely dependent upon those around him. Indeed for the whole of 1973 he was dependent upon his wife and daughters to help him to move and even to eat. His memory was not good and from May onwards grew worse as did his understanding. No doubt there would be periods of greater lucidity and ability to comprehend but I consider that there was no depth to his understanding. In other words he would probably remember people when his recollections were prompted. That conclusion is supported by his behaviour when he made out his will. Thus he did not call for his former will or wills. In revoking his earlier testamentary disposition in favour of his adopted son he gave no reasons and if he recollected him and remembered he had been a beneficiary in an earlier will I think he would have mentioned this. Such behaviour was commented on by the Privy Council in Rattan Singh v. Amirchand 1948, 1 A.E.R. 152 at 156 F who said,

> "It is relevant to note that he failed to employ the solicitor who had acted for him previously or even to ask him to send the previous wills or copies of them, for these are precautions which a testator of soundmind who deliberately intended to alter his will and disinherit his near relations would naturally take. "

The will Ex. D. 3/D.4 of September 1973 is very short. It makes no reference to the kind of property disposed of and contains the statement,

> "I Declare that no person other than my above-named wife and two daughters are entitled to any share or benefit of any kind under this my will."

Was the testator there saying these are the only persons who have "a claim upon me" by way of close kinship? If so, it was not accurate because he had an adopted son who was also his

nephew. Surely the latter, having been brought up as a son from childhood would have a moral claim on the estate. By statute an adopted child has the same rights as a natural child. On signing that will had the testator failed to recollect the adopted nephew? Did he intend to disinherit him? The above phraseology does nothing to help determine that very important question.

There is no evidence that the solicitor who drafted the will questioned the testator about the size of his family, or his close relatives, or any previous testamentary dispositions or the extent of his disposable possessions. According to the Privy Council supra those are considerations which help to determine whether a testator intended to disinherit a near relative.

I am satisfied that the will Ex. D3/D4 was the product of a man so enfeebled by a succession of strokes, pain and resultant partial paralysis that his mind and memory were not sufficiently sound as to appreciate and understand the nature of the dispositions therein.

I arrive at a similar conclusion for similar reasons in regard to the will of June 1973.

Should I be wrong in t ese conclusions there is the issue of undue influence. The evidence shows that from the time of the first stroke in 1971 the testator began to be increasingly dependent upon others. In August 1972 he clearly could not survive and move around even in his own abode and could not sit outside it without assistance. He was dependent upon his wife, friends and relatives and the defendant Rajendra began to take an increasing part in the management of the testator's business affairs and it is not unreasonable to deduce that he w uld gain more of the testator's confidence. After the 3rd stroke in May 1973 he became an enfeebled and partially paralysed old man who could only sit up in bed with assistance. His wife and two dau hters were in constant attendance on him and were in a position greatly to influence him having regard to his dependence upon them.

The law appertaining to undue influence was con sidered by Ungood-Thomas J. In Re Craig deceased, 1970, 2 W.L.R. 1219. He referred to instances where undue influence may be presumed as arising where the dence has been in a

position to exert undue influence over the donor although there has been no actual proof of its exercise. In such cases the courts require proof of its non-exercise. In Blomby v. Ryan (1956) 99 C.L.R. 362 at 405 Fullager J. observed in relation to the probable existence of undue influence that the circumstances which may induce a court of equity to set a transaction aside are of great variety and they include a need of any kind on the part of the donor such as sickness, age, infirmity. The common characteristic being that they set one party at a serious disadvantage vis a vis the other.

In the instant case at the times of the 1973 wills the testator was in my view, absolutely dependent on those around him. It would be a simple matter for his wife and two daughters to remind him of their existence and to omit any reference to his adopted son. In my view it is significant that this bedridden, partly paralysed elderly man made three wills in 3 months and that the second of those was handwritten by a solicitor and later typed as a third will and that the testator signed them all. His hand was very shaky indeed. Such behaviour implies a considerable degree of urgency on the testator's part to put his affairs in order at a stage when his mental capacity was such that he would scarcely be fully alive to such an emergency. I think that the motivation probably came from some other source such as those in regular contact with him, namely his wife, daughters and Rajendra. I am satisfied that the nephew had at this stage been prevented from seeing the testator.

P.W.2, the hairdresser, says that in September 1973, between 1 & 2 p.m., one day, both the testator's daughters appeared in his shop. They were agitated and were permitted to use his telephone to contact Rajendra in Nadi. He says (Olin (Rajendra's wife) said,

> "Father is very ill. Get a lawyer as quickly as possible."

Both daughters deny that such an incident took place. I believe P.W.4. He appred to be reliable and his account has the ring of truth about it. It will be noted that Dr. Gounder P.W. 5 was attending the testator in September and his evidence is that his patient was in a very poor mental condition. A solicitor did come to see the testator in September; in fact

he came twice, once when the handwritten will was made and once when the typed draft of it was prepared for the testator's signature.

P.W. 4 not unnaturally asked if he could see the testator when he heard that disturbing telephone message but he says the sisters stated that the doctor had forbade any visitors.

The sisters did not simply say that they could not recollect that incident; they denied its occurrence. Their evidence suggests that they were unaware of the hairdresser's shop. I find it hard to accept their denials. Why are they untruthful about the incident? It is probable that they wanted a solicitor to change the testator's will but they wish to conceal that anxiety. They had every opportunity of priming the testator in what to say and their sending for a solicitor in those circumstances is, to my mind, rather suspicious.

With regard to the will of June 1973 in which the deceased disinherited his adopted son the wife and daughters were, as I have said, in a position to exert undue influence upon the testator. His condition then was very poor physically and weakened mentally. On this occasion the solicitor Mr. Sharma received his instructions by the hand of Rajendra and it is significant that these instructions not only omitted any reference to the adopted son but completely disinherited him and gave $\frac{1}{4}$ of the estate to Rajendra. These instructions formed the basis of the will Ex. D2. When Ex. D2 was to be revoked 3 months later it is significant that Mr. Sharma (solicitor) whose office was only yards away from the testator's home was not again called - see Ratton Singh v. Amirchand (supra). Why did the testator not call upon Mr. Sharma? Was it because Mr. Sharma might query the executing of another will so soon after that of June 1973?

In my view the circumstances attending the wills of June and September 1973 are such as to raise a presumption of undue influence exercised by the beneficiaries upon the testator. It is significant that the person who was omitted from those wills, the nephew and adopted son, had been deterred from visiting the man who had been his father from childhood. Those who benefitted were actually present i.e. within the flat

when they were made and at least one of them, namely the de facto wife, had deterred the nephew from visiting the testator on what proved to be his deathbed.

There is nothing in the evidence given by the defendants to rebut the presumption of undue influence which arises in the circumstances. It would be rebutted by showing that the testator's former will had been carefully explained to him and that he realised that he was disinheriting the nephew and showing that the solicitor had carefully questioned the testator about his surviving relatives, children and family generally, about his property and in the circumstances, he being in bed at the time, about his health, kind of illness, how long he had been bedfast and so forth. In fact I would go so far as to say that this is what the solicitor in regard to each of the 1973 wills should have done to ensure that the particular will which he was then executing represented the testator's definite and lucid wishes unhampered by any outside influence or bad memory.

The presence and assistance of a doctor at the material time would have been of help. No one knows better than a solicitor that wills are frequently challenged and that they are sometimes set aside on grounds of lack of testamentary capacity and of undue influence. The solicitors connected with the 1973 wills appear to have been slow to appreciate the obligations placed upon them by what they actually saw. This in large measure was probably due to the omission of the wife and daughters to draw the solicitors' attentions to the fact that the testator had had a series of strokes, had been in hospital and had during the preceding 2 years been attended by doctors.

Judgment is entered against the wills of June and September 1973 and probate of the will of 17/2/65 should be decreed in solemn form.

Costs to be paid by the defendant to the Plaintiff.

LAUTOKA, (Sgd.) J.T. WILLIAMS,
26th October, 1978. JUDGE

Messrs Koya & Co., Counsel for the Plaintiff
Messrs Ramrakhas, Counsel forthe Defendants.

Date of Hearing: 2nd, 3rd, 4th, 5th and 6th October, 1978.