

IN THE COURT OF APPEAL
APPELATE JURISDICTION

CIVIL APPEAL NO. ABU 13 of 2013
(High Court Action HPP 25 of 2010)

BETWEEN : **DEVENDRA PRASAD SHARMA**
As father and next friend for Niraj Sharma

Appellant

AND : **RANJULA DEVI KUMAR**
RESHMI DEVI SHARMA
Executrices and Trustees of the Estate of Jasoda Devi Sharma

Respondents

Coram : **Suresh Chandra JA**
Almeida Guneratne JA
David Alfred JA

Counsel : **Mr. R. K. Naidu for the Appellant**
Mr. W. Clarke for the Respondents

Date of Hearing : **4 February 2016**

Date of Judgment : **26 February 2016**

J U D G M E N T

Chandra JA

1. This is an appeal against the decision of the learned High Court Judge delivered on 15 February 2013 and to have the said decision partially set aside and seeking an order and/or declaration as follows:

“THAT clause 6 of the last will and testament of Jasoda Devi Sharma, deceased, cannot be interpreted to allow the beneficiaries named therein to retain rental proceeds from the estate property after the date of demise of the testatrix for their own benefit.”

2. The notice of appeal dated 27 March 2013 sets out the following ground of appeal:

“The Learned Trial Judge erred in law in construing the will of the deceased by holding that clause 6 read with clause 3 of the will entitled the beneficiaries named therein to retain rental proceeds from the estate property, after the date of death of the testatrix. The learned Trial Judge should have held that clause 6 of the will does not allow the beneficiaries named therein to retain rental proceeds from the estate properties after the date of demise of the testatrix for their own benefit. Alternatively, the Learned Trial Judge should have held that, the effect of Clauses 3 and 6, read with the rest of the will, is that, after the expenses including maintenance, estate debts and funeral expenses. Niraj Sharma shall be entitled to the residue of rent from the property comprised in Certificate of Title No.21978.”

Factual Matrix

3. The Appellant filed an originating summons seeking a construction of two clauses of the Last Will dated 19th December 2008 of the Testatrix, Jasoda Devi Sharma.
4. The Testatrix had died on 2nd March 2010.
5. The Appellant, Devendra Prasad Sharma is a son of the Testatrix and is the father and next friend of Niraj Sharma, a beneficiary under the will.
6. Ranjula Devi Kumar and Reshmi Devi Sharma the first and second Respondents are daughters, executrices and trustees named in the will.
7. The Appellant sought the following declarations by his originating summons:

“Clause 7 of the will bears the meaning that any repairs, upkeep and maintenance in respect of estate property, including that

comprised in Certificate of Title No.21978 should be paid from rental proceeds of the estate property.

Clause 6 of the will cannot be interpreted to allow the beneficiaries named therein to retain rental proceeds from the estate property after the date of demise of the deceased for their own benefit."

8. The learned trial Judge having considered the affidavits, documents and submissions tendered by both parties, made the following orders by his decision of 15 February 2013:

"(a) Clause 6 read with Clause 3 of the will entitles the beneficiaries named therein to retain rental proceeds from the estate property, after the date of death of the testatrix.

(b) In terms of Clause 7 of the will, all debts of the estate including debts relating to property should be paid from rental proceeds of the estate property."

Analysis

9. The interpretation or construction of a Last Will has to be determined from the wording therein as set out by the Testator or Testatrix. It is necessary to arrive at what the real intention of the Testator or Testatrix was. It has often been said that, the words in the last will have to be treated as the dictionary unless the wording therein purports to bring in some ambiguity. It is only when there is ambiguity that extrinsic evidence would have to be resorted to in interpreting a Will.
10. The Respondent's submissions dealt with the **Armchair Principle** in interpreting a Last Will. According to this principle "the Court tries to put itself in the "armchair" of the testator so they can see the Will and understand its wording through the testator's eyes". **Re: Theimer Estate** 2012 BCSC 629, foreshadowed in the case of **Re Jebb** [1966] Ch. 666 per Lord Denning M.R.
11. In construing a will, the objective of the court is to ascertain the intention of the testator as expressed in his or her will when it is read as a whole. The court has to put itself in the

position of the testator at the point in time when he or she made the will. The main source of evidence should come from within the “four corners” of the will.

12. The Last Will of the Testatrix contained 7 Clauses and the relevant Clauses are Clauses 3, 4, 5, 6 and 7 which are as follows:

“Clause 3 : I HEREBY GIVE DEVISE AND BEQUEATH residue of my real personal property whatsoever and wheresoever the land comprised in Certificate of Title No. 21978 being Lot 2 on DP No.5132 and dwelling, furniture and accessories thereon unto my grandson NIRAJ SHARMA (f/n Devendra Prasad Sharma) of Toorak for his own use and benefit absolutely when he attains the age of 30 years. I direct my trustees to arrange my funeral rites to be held in the country where my death occurs.

It is my intention that upon my death my body is cremated. I direct my trustees to distribute the contents of my Will one year after my death. Until that time all proceeds to be held in estate late account.

Clause 4: I HEREBY DIRECT MY TRUSTEES to sell the commercial property comprised in Certificate of Title No.21979 upon my death to any individual as long as it is not to any of my children, their spouses, relatives of my children's spouses, and my grandchildren. And in the event that the property is to be sold to a company the Trustees are to ensure that the directorship or shareholding in that company is not held by any of my children, their spouse, relatives of my children's spouses, and my grandchildren.

The sale proceeds from Certificate of Title No.21979 are to be distributed as follows:-

25% of the share is to be given to my son VINESH CHARMA (f/n Ambika Prasad) of Toorak, Suva. The children are SHYAM SHARMA and SHIVNEEL SHARMA when they reach the age of 30 years.

Clause 5: I make no contribution or include my son DEVEN SHARMA because I have given \$140,000.00 (One hundred and forty thousand dollars) for his share.

Clause 6: The following persons whose names are given below shall be entitled to the equal divided monies that are held in my account after my death: RESHMI DEVI SHARMA of Australia,

ANJULA PRASAD of Jalim Avenue, Nausori, RANJULA DEVI KUMAR of Auckland, New Zealand and MANJULA SINGH of Nasinu all children of Ambika Prasad Sharma and my sons SASHI SHARMA and ARUN SHARMA (f/n Ambika Prasad Sharma).

The 50% of the sale proceeds of this building shall be given by my Trustees to D A V Girls College, Samabula, Suva for the use of children who are poor for their education.

Clause 7: I DIRECT my Trustees to pay all my just debts, funeral and testamentary expenses including all estate succession and other duties payable in respect of my estate also add debts relating to property should be paid by rental income."

13. It is clear that the Testatrix had by Clause 3 devised the property in relation to Certificate of Title No.21978 to her grandson, Niraj Sharma and by Clause 4 property in relation to Certificate of Title No.21979 was to be sold and 50% of the proceeds of sale were to be given to D A V. Girls School, 25% to son, Vinesh Sharma and 25% to be equally divided and given to Grand Sons, Shyam Sharma and Shivneel Sharma.
14. According to Clause 3, apart from the property in Certificate No.21978, Niraj Sharma has been devised the residue of the testatrix's real and personal property "whatsoever and wheresoever" and for him to benefit by them absolutely when he attains the age of 30 years.
15. Clause 3 directs the trustees to distribute the contents of the will one year after the Testatrix's death and till such time for all proceeds to be deposited in the estate account.
16. The question that arises is as regards "all proceeds" stated in Clause 3. It is on record that there are two flats apart from the flat occupied by Devendra Prasad Sharma and his son Niraj Sharma, in the property relating to Title Certificate 21978, which two flats have not been given out on rent. Therefore there are no proceeds as far as that property is concerned. Given the tenor in which Clause 3 is framed it is apparent that the intention of the Testatrix had been to give the proceeds (after accounting for any expenses relating to such property) if any, from that property to Niraj Sharma, when he attains the age of 30

years by stating that the residue of her real and personal property should devolve on him and that such proceeds if any, would have to be held by the Executrices until such time as he attained the age of 30 years. It is clear that it is only Niraj Sharma who is to benefit from the property so devised.

17. As regards the title in the said property, Clause 3 lays down that Niraj Sharma would have the house and benefit (thereof) absolutely “when he attains the age of 30 years”. The question arises as to when such property would vest in him. The authorities favour the view that the title to such property vests immediately in the beneficiary on the death of the Testator or Testatrix. In **Re Squire** [1962] High Court of Ontario, Canada, [1962] O.R. 863, the testator left certain real property to trustees “To hold ... until my grandson ... reaches the age of 30 years” . It was held that there was an absolute and vested gift. The case of **Wheedon v Lea** (1789) 3 Term RE, 42, 100 ER 445, was cited in **Re Squire**, where it was held that when a testator uses the words “when and so soon as he should attain the age of 24 years” or “upon attaining 24 years”, rather than “if he should attain the age of 24 years” that such words do not establish a condition precedent.

18. In **Bickersteth v Shanu** [1936] 1 ALL ER 227 it was observed (at p.231) thus:

“On the whole their Lordships see no reason for doubting that the established rule for the guidance of the Court in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.”

19. In **Mildred White and Louisa Chard v Thomas Barton** (1941) the Supreme Court of Canada 426, where a Testator by his will gave to his grandson the sum of \$7,000 “when he shall attain the age of 25 years”, it was held that the gift vested in the grandson at the testator’s death (subject to be divested if he died before attaining the age of 25 years), so that on his attaining the age of 25 years he would be entitled to receive, in addition to the said sum, the intermediate income therefrom (less sums, if any, paid out for his maintenance and education).

20. We are of opinion, that the property devised to Niraj Sharma while vesting in him on the death of the Testatrix, the residue of rental income, if any, from the same would also accrue to him as in terms of Clause 3 the residue of the testatrix's real and personal property also on his reaching the age of 30 years, and such residue, if any, would have to be held in trust for him by the Executrices and the Trustees till he reaches the age of 30 years.
21. Clause 6 provides for the beneficiaries named therein only as regards the moneys in the Testatrix's account after her death. Her account would have ceased to operate on her death and the beneficiaries named in Clause 6 would be entitled to whatever monies that were there in that account. Apart from that the beneficiaries named in Clause 6 are not entitled to any other benefit.
22. Clause 6 would stand on its own and refers to moneys in the Testatrix's account. It is not possible to read it with Clause 3 as has been interpreted by the learned High Court Judge in his judgment. Therefore the beneficiaries named in Clause 6 will not be entitled to retain rental proceeds from the estate property as stated in the judgment of the learned High Court Judge.
23. At the argument stage before us after hearing the arguments of the Appellant and the pertinent observations made by the Panel, Counsel for the Respondent conceded that Clause 6 of the Last will did not entitle the beneficiaries named therein to rental proceeds.
24. In the above circumstances, as the Appellant has only sought to partially set aside the Judgment of the learned Judge, the appeal is allowed to that extent by setting aside that part of the judgment which refers to Clause 6 of the Last Will of the Testatrix.
25. The Testatrix died in 2010, and it is unfortunate that Probate has still not been obtained. It would be in the best interests of all parties that they proceed to obtain probate as soon as possible so that the wishes of the Testatrix can be given effect to.

26. It is to be observed that there is a duty cast on Solicitors to assist clients in drafting Last Wills to set out their intentions with clarity to avoid possible subsequent litigation. In the present case, if the Testatrix's wishes were set out with more clarity the present situation could have been avoided.
27. (a) As Lord Denning reminds us, it is this lapse on the part of the solicitors that had resulted in judges saying that their object was to ascertain the intention of the testator but going on in the same breath to declare his intention could only be ascertained from the words he used. "The result of this double-thinking was that they ignored his intention and construed the words of the will literally. As a result the law books became full of reported cases as to the meaning of such common words as 'money', 'children' and so forth which successive judges slavishly followed." (See: Lord Denning, *The Discipline of Law*, p.23 Butterworths, (Aditya) New Delhi; 1993.
- (b) It will be seen that, words such as 'moneys' and 'beneficiaries' used in the last will in question are reminiscent of what Lord Denning, MR was cautioning against. (supra).

Almeida Guneratne JA

28. I agree with the reasons and the conclusion of Chandra JA.

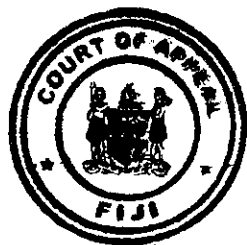
Alfred JA

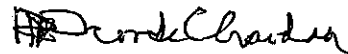
29. I have read the draft of the Judgment of my learned brother Chandra JA with which I concur. I am however constrained to add a few words of my own. This Appeal and the Probate Action from which it arises, stems from a letter written by the Solicitors for the Respondents as the Appellant's counsel informed this Panel. It was an ill considered and ill advised letter which impelled the Appellant to file his Originating Summons thereafter. It is unfortunate that Counsel for the Respondents only saw the light after the Appellant's Counsel had completed his oral submission and after members of the Panel had made their

necessary and pertinent observations. At that juncture Counsel for the Respondents conceded his client had no entitlement to the rental income from the property devised to the beneficiary, Niraj Sharma. This was indeed a departure and a far cry from the written submission of the Solicitors for the Respondents which starts off in para 2.1 by stating the Respondents “vehemently” oppose this Appeal and ends in para 3.1 by asking for costs to be paid by the Appellant (next friend) personally. The costs asked for is the sum of \$15,000.00 to be “paid as compensation to the party which was required to incur unnecessary expenditure in defending a wholly unmeritorious action.” In my view, the contrary was the case. It was the Appellant who was required to incur unnecessary expenditure in vindicating a right, which the Respondents’ Counsel conceded at the end of the day, he (Niraj Sharma) has had right from the start.

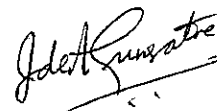
Orders of Court

1. *The appeal is allowed. The interpretation given to Clause 6 of the Last Will in the judgment of the High Court is set aside.*
2. *The Respondents shall pay the Appellant’s costs here and in the Court below which we summarily assess at \$2,500.00 and \$1,500.00 respectively, making a total of \$4,000.00*

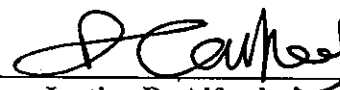




Hon. Justice S. Chandra
JUSTICE OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



Hon. Justice D. Alfred
JUSTICE OF APPEAL