

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 65 OF 2017
(High Court Civil Action HBC No: 3 of 2009)

BETWEEN : **JAMES PREM SINGH**
Appellant

AND : **MADAN KUMARI**
First Respondent

AND : **BHARAT SINGH**
Second Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Dayaratne JA

Counsel : **Mr S Chandra for the Appellant**
Mr. R Prakash with Mr S. Nandan for the First and Second Respondent

Date of Hearing : **23 May 2019**

Date of Judgment : **7 June 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions of the judgment of Lecamwasam JA.

Lecamwasam, JA

[2] The appellant, being aggrieved by the judgment of the learned High Court Judge at Suva delivered on 9th May 2017, has preferred this appeal on the following grounds of appeal:

“(1) An Order that the case be remitted to the High Court for a retrial on the Notice of grounds filed herein; or alternatively:

FURTHER TAKE NOTICE THAT THE GROUNDS OF THIS APPEAL ARE AS FOLLOWS:

- (2) *The learned trial judge misdirected himself in law and in fact by failing to consider and recognize that the Appellant as trustee also claimed for benefits arising for his mother (Bhanmati) as to one undivided half share pursuant to Lease No.58869 when she legally held in pesonam and continues to hold her share in the said lease when the deceased Suruj Pal Singh died.*
- (3) *The learned trial Judge misdirected himself in law and fact by failing to properly assess the evidence adduced on behalf of the Appellant as an alternative claim apart from challenging the will per se from the Estate of Suruj Pal Singh for her equitable entitlements when she contributed towards the estate assets while continued to be legally married to the deceased when Suruj Pal Singh died.*
- (4) *The Appellant appeal against the grant of cost against him summarily assessed at \$5,000.00 on the grounds of being excessive and unreasonable in the circumstances of the case.”*

[3] However, in the course of argument before the Court of Appeal, the appellant’s counsel stated that he is relying only on the second and third grounds of appeal.

[4] As this is a case which involves the property of a deceased person it is advisable to describe the background to the case. Suruj Singh, the original owner of the property died on 6th February 2008. Prior to his death he had executed his last will in favour of his two de facto wives leaving nothing in favour of the legal wife. The legal wife, namely

Bhanmati commenced this action claiming her rights out of the matrimonial property and upon her death on 20th June 2009, the present appellant/original plaintiff James Prem Singh was substituted in her place to continue the action. As per the evidence available to this court and the pleadings it is revealed that Suruj Singh and his wife Bhanmati had married in 1953. Subsequently, they have invested in lease No.58869 in equal shares between the husband and the wife. Upon the death of the husband, the undivided half share of the wife remained intact. However, she did not derive any property by virtue of her matrimonial rights upon the death of her husband, as he had executed the above last will in favour of his de facto wives prior to his death.

[5] As no evidence exists to prove that Bhanmati had parted with her property in favour of any other person up to the time of her death, the appellant, as trustee of her estate is entitled to administer the estate of Bhanmati. The respondent too admits the fact that the appellant is the Executor and Trustee of Bhanmati.

[6] At the stage of argument, the appellant's counsel stated that they will no longer challenge the validity of the Will. Therefore the majority of the averments contained in the pleadings naturally recede to the background leaving this Court to only decide on the rights Bhanmati had derived on her own irrespective and independent of her marriage to Suruj Singh.

[7] The lessees of No.58869 are the deceased Suruj Singh and his wife Bhanmati. Suruj Singh, under paragraph 5 of his last will, has provided a description of the properties in the following manner:

- (a) *Bharat Singh aka David is to have all my property for his own use and benefit absolutely;*
- (b) *My son Raj Pal Singh is to occupy my property at Grantham Road, Suva for life and until such time he remains in Fiji. Once the said Raj Pal Singh migrates to any other country, he shall forfeit his life interest in the said property;*
- (c) *My de-facto wives Madan Kumari (fn Mahesh Ram) and Daya Wati are to remain in the Grantham Road property for as long as they live;*
- (d) *All the rest, residue and remainder of my property is to go to Bharat Singh aka David."*

- [8] The description of the properties contained in the will do not appear to have the names of the properties. The property under suit is referred to as “*my property at Grantham Road*” in paragraph 5(a) above and again as the *Grantham Road property* under (c) of paragraph 5.
- [9] Leading to considerable confusion in the aftermath of his death, Suruj Singh had appointed one of his *de facto* wives as the trustee and sole executrix of his Will. The Will having being admitted to probate, the sole executrix had begun to deal with all the properties of Suruj Singh without heeding the legal rights of Bhanmati, especially in regard to her half share in respect of the lease in 58869. Bhanmati was entitled to enjoy her half share of the property which is the subject matter of lease 58869 in **her own right** without any inheritance accruing on the strength of her martial rights *viz-a-viz* Suruj Singh. Although the deceased Suruj Singh dealt with the property in various ways during his life time, those dealings do not in any manner appear to have affected the rights of Bhanmati. The first respondent, by virtue of the probate, could only have dealt with the property of Suruj Singh and not the property of Bhanmati.
- [10] In view of the pleadings and evidence unfolded before court, it is apparent that the original lease when issued in July 1954 was for a period of 75 years which would therefore lapse in July 2029. As I have already stated, Suruj Singh had not provided clear descriptions of his properties nor his exact entitlement in respect of each of those, thereby leaving room for further complications. His failure to reveal the fact that he was only entitled to half share of 58869 had precipitated never ending litigation.
- [11] It has been evidenced that Suruj Singh and Bhanmati had been living in separation since 1968 and she had migrated to Australia 15 years prior to the death of Suruj Singh. Based on evidence, it could be safely presumed that her contribution to the assets of Suruj Singh if at all would have been very minimal and insignificant. Hence any claim based on equitable entitlements cannot succeed and the third ground of appeal should fail.

- [12] Next, I advert my attention to the second ground of appeal, which at this point remains the sole ground of appeal to address. It is unfortunate that the learned Judge has been oblivious to the rights of the Appellant (through Bhanmati), devoting approximately four fifths of his 48 paragraph judgment to deal with the validity of the last Will. As the validity of the Will is no longer an issue (as the challenge to the last Will has been withdrawn), I will not deal with that aspect and instead lend my mind to the issue of the rights of the Appellant.
- [13] It is common ground that with the issuance of the above lease in favour of Suruj Singh and Bhanmati, she became entitled to half share of the leased property. I have not been apprised of any evidence to the effect that from the time of issuance up to now this half share has been surrendered, revoked or transferred. Therefore in as much as Suruj Singh had the right to deal with his half share of the property, Bhanmati, or the Plaintiff-appellant as the trustee, is entitled to the possession and enjoyment of Bhanmati's half share of the said property. As per the decision in DKLR Holding Co. (No.2) Pty Ltd v Commissioner of Stamp Duties (1980) NSWLR 510 observed "*the trustees has in law the right to possession of the land...he also has the legal possession of the land. He may maintain trespass against anyone who infringes that possession and ejectment against any person who without this consent takes possession*".
- [14] As I have commented previously, the learned Judge in his analysis of evidence has failed to advert his attention to the rights of the Appellant at all. On perusal of the judgment, the agreed facts, and admitted documents as per the pre-trial conference minutes, parties have agreed that the Appellant is the sole executor and trustee of the estate of Bhanmati who was legally married to the deceased, Suruj Singh. Further, parties have admitted the probate in the estate of Bhanmati as well. Despite the recounting of these facts in his judgment, the learned High Court Judge has, I repeat, paid scant attention to the rights of the Appellant, which is a regrettably glaring omission.
- [15] In paragraph 16 of his judgment, the learned High Court Judge refers to the evidence of Ms. Torika Goneca (PW4), the deputy Registrar of Titles. As per the above paragraph,

exhibit P6 reflects as current lessees Bhanmati and the deceased, Suruj Singh as tenants in common. The Registrar of Titles (ROT) transferred the title (Exhibit P7) to the second defendant **subject to the lease**. Hence it is obvious that any subsequent transfer was necessarily subject to the lease and therefore the rights of Bhanmati cannot be wiped out by the aforesaid transfer or any other dealing.

[16] The Court record also indicates that the learned Judge has devoted many dates to engage in rigmarolic conversations with the counsel without leading evidence in the case. For the foregoing reasons I hold that the learned Judge has erred in failing to consider and recognize the rights of the trustees and I uphold the second ground in favour of the plaintiff/appellant.

[17] In dealing with the outcome of the case, in paragraph 47 of the judgment, the learned Judge states thus;

“47. In the result, the Plaintiff’s case has collapsed and all his claims have fallen to the ground. It is consequently inexpedient, irrelevant and unnecessary to discuss them. I therefore dismiss the Plaintiff’s action against the First and Second Defendants, decline to grant the prayers (a) and (b) and (i), (ii) (a) and (b), (ii) (sic), (iii), (iv), (v), and (vi) contained in the Statement of Claim, and order the Plaintiff to pay the First and Second Defendants costs which I summarily assess at \$5,000.00.”

[18] The reliefs claim as per prayers (ii) and (iii) mainly emanate from the rights of Bhanmati. Therefore it was incumbent of the Learned Trial Judge to have delved in depth into the merits of the above prayers and make a decision. As per paragraph 47 of the judgment, he had perfunctorily dismissed the above claims without providing any reasons for the same. It is the duty of this court to remedy the above error of the learned Judge.

[19] In view of the above position, I hold that the Learned High Court Judge has failed to consider the rights of the Appellant, which compels this court to set aside the order of the learned High Court Judge. The matter is referred back to the High Court for the limited purpose of making an assessment of income derived from Bhanmati’s shares in the said

lease and to make an order to pay such amount from the date of issuance of the probate until the expiry of the said lease to the Plaintiff/Appellant.

Dayaratne, JA

[20] I agree with reasons given and the conclusions reached by Lecamwasam JA.

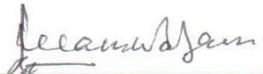
Orders of the Court:

1. *Appeal is allowed.*
2. *Case is referred back to the High Court as per paragraph 19 of this judgment.*
3. *Order dated 11th May 2017 of the Learned High Court Judge is set aside.*
4. *The Respondent to pay \$5,000.00 to the Appellant.*



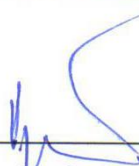
Hon. Justice E Basnayake

JUSTICE OF APPEAL



Hon. Justice S Lecamwasam

JUSTICE OF APPEAL



Hon. Justice V Dayaratne

JUSTICE OF APPEAL