IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0147 of 2016
[Probate HPP NO. 44 of 2013]

BETWEEN : **SHAKUNTALA DEVI**

Appellant

AND : **SAHADEI**

Respondent

Coram : **Dr. Almeida Guneratne, P**
Jitoko, VP
Basnayake, JA

Counsel : **Ms A Singh for the Appellant**
Mr A Sen for the Respondent

Date of Hearing : **1st May, 2023**

Date of Judgment : **26th May, 2023**

JUDGMENT

Almeida Guneratne, P

[1] This is a case where the Appellant (de facto wife of the deceased) in Probate claimed rights on the basis of a last will said to have been executed by the said deceased and dated 19th August, 2004.

[2] The Appellant's Statement of Claim is at pages 16 – 17 of the Copy Record.

[3] The Respondent (the de jure wife challenged the alleged last will and sought letters of administration on the basis of intestacy, claiming rights for herself and her five children. (vide: Respondent's Statement of Defence at pages 20 – 23 of the Copy Record).

[4] These followed a pre-trial conference (pages 100-101. In the agreed facts the assets owned by the deceased were recorded and two issues were framed namely "*Whether the said deceased made adequate provisions for the defendant; Was the defendant dependent upon the deceased during his life time for income which was provided and paid on regular basis together with sundry expenses?"*

[5] The plaintiff (appellant) commenced her evidence testifying to her relationship with the deceased and after producing the death certificate of the deceased when she moved to mark a copy of the Will, **Mr Sen** for the defendant-respondent objected on the basis that no affidavit of testamentary script has been filed under Order 76 Rule 5. **Mr Sidique** for the plaintiff-appellant had submitted in response that there was no objection to the Will at the Pre-trial Conference.

[6] Thereafter the plaintiff produced a copy of the will as Exhibit 2, subject to objection of Mr Sen. (The proceedings as recounted above are at page 149 of the Copy Record).

[7] At the close of the plaintiff's case Mr Sen had made the submission (in his words) on the *"strict requirement on how Will is to be proved. Onus does not shift. We are challenging Bal Ram made a Will*" (page 156 of the Copy Record, repeated at page 160 of the Copy Record), while submitting that, "*plaintiff should have called Attorney at law*" and concluding that "*the plaintiff has not proved Will*" (page 160, *supra*). In that passage of time, the defendant-respondent gave evidence and concluded the same (pages 156-159 of the Copy Record).

[8] Mr Sidique in his reply submissions emphasized on two principal matters that:-

(i) At the pre-trial conference only two issues were raised (and) the Will was not an issue *and*;

(ii) evidence was there (regarding) the Will (vide: page 161 of the Copy Record).

[9] At the conclusion of the proceedings, the learned High Court Judge reserved his Judgment which he eventually delivered on 11th November, 2016.

The High Court Judgment – the final orders and the basis for the same

The Final Orders

"(a) I decline the plaintiff's case

(b) I hold that Bal Ram died intestate

(c) Costs of $1,000.00 in favour of the defendant (at page 10 of the Copy Record)".

The basis for the said Orders

[10] That is found at page 9 of the Copy Record which I reproduce as follows:-

> *"29. In my judgment, it is axiomatic the onus was on the plaintiff to raise the relevant issue and prove that the Will was executed by the deceased, since the defendant has disputed the validity of the Will on the grounds set out in her amended statement of defence and counterclaim."*

The grounds of appeal urged against the High Court judgment

[11] The grounds of appeal are contained at pages 1 to 3 of the Copy Record which I shall not reproduce verbatim here but which I shall refer to taking them cumulatively when I proceed to make my final determination in the light of the written submissions tendered on behalf of parties and the oral submissions made before this Court.

[12] The gist of Ms Singh's argument (as covered in the grounds of appeal urged) was that neither of the matters urged by Mr Sen featured at the Pre-trial conference.

Discussion

[13] The two fold basis on which Mr Sen resisted the appeal was that (i) there was no affidavit of testamentary transcript as required by Order 76 Rule 5(1)(a) read with Rule 5(5) of the High Court; and (ii) the alleged Will was not proved as envisaged by the Wills Act (1972 as amended).

[14] I shall deal with the said matters *seriatim*.

The Pre-trial Conference – legal implications

[15] Order 34 Rule 2(4) of the High Court Act states as follows:

> *"(4) At the conclusion of any such conference the solicitors attending it shall (the underlining is mine) draw up and sign a minute containing a succinct statement of:*
>
> *(a) the matters, if any, upon which they are agreed, and*
>
> *(b) the issues of (sic) fact, law or procedure remaining for determination by the Court."*

Interpretation to be placed on Order 34 Rule 2(4)

[16] The only decision of this Court that I was able to discover (at the risk of saying so) is the decision in **Victor Janson Ho v Kennet *etal*** as regards the object or purpose of a pre-trial conference (vide: ABU 6/96, March 1998) which went up to the Supreme Court [1998] CBV 4/97.

[17] Therein it was held that the purpose of a pre-trial conference under the rules is to curtail the duration of the trial. One of the means of achieving that object is by defining the issues.

[18] If one were to stop at this point, Ms Singh had made her point. But could the matter have been allowed to stand or fall on the issues framed at the pre-trial conference?

A High Court decision – Rapchan Holding Ltd v NLTB [2010] HBC 438/03L, 16 June 2010.

[19] In that case, it had been held that, *"…a PTC is for parties and their counsel to identify and narrow issues of fact and law, if possible. The Court is not bound to accept agreed issues for trial, but is duty bound to correct them so that justice is done accordingly to the respective cases as pleaded in the Statement of Claim, Defence and Reply…"*

[20] That Judicial statement (per Inoke, J) I endorse fully by reference to what **Rupert Cross on Judicial Precedent** has said (in effect) viz: any decision of a Court, even sub-ordinate, is entitled to persuasive value and if accepted by a higher Court would become a precedent.

Pleadings vs. Issues framed at the Pre-trial Conference

[21] Having regard to the judicial thinking as recounted above in that case, it is my view that, the learned High Court Judge in the instant case had not addressed that aspect, which left me in doubt as to whether justice had been done, in consequence of which, my mind was taken to Ms Singh's plea that, at least a "*trial de novo*" ought to be ordered by this Court.

[22] While leaving that matter (for the time being) I shall now address the next matter which I had proposed to deal with at paragraph [14] above.

The argument based on Order 76 Rule 5(1)(a) read with Rule 5(5) of the High Court

> *"Order 76 Rule 5(5): In this rule "testamentary script" means a Will or draft thereof, written submissions for a Will made by or at the request or under the instructions of the testator and any document purporting to be evidence of the contents, or to be a copy, of a Will which is alleged to have been lost or destroyed."*

Construction to be placed on the said Rule

[23] When a statute says that a word or phrase shall "*mean*" – not merely that it shall "*include*" certain things or acts "*the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition*." (Esher M.R. in **Gough v Gough** [1891] 2 QB 665. See also **Briston Trans Co. v. Bristol**, 59LJQB449.

[24] To the like effect is the following passage in Maxwell on The Interpretation of Statutes that,

"when a statute states that a word is supposed to bear a particular meaning, it means just what the legislative intended and nothing more or nothing less."
(Maxwell, 12th ed, p.270. See also **R v. Britton** [1967] 2 QB 51.

[25] Consequently, as in the instant case, when in fact there was a "*Will*" (though challenged as to its validity), filing of an "*affidavit of testamentary script*" did not arise in as much as, the definition in the said Rule "*is exclusive*."

[26] The learned High Court Judge only made a fleeting reference to the matter at paragraphs 7 and 8 of his judgment but did not make a finding on the point raised by Mr Sen.

[27] At paragraph 1 of the Statement of Claim the plaintiff had pleaded thus:

"That Balram _ _ _ died on the 10th day of February, 2013 testate (page 16 of the Copy Record)."

[28] In response to that averment the defendant-respondent had replied in her Statement of Defence thus:

"The defendant admits paragraph 1 of the Statement of Claim"
(vide: page 20 of the copy record)
Even in her Amended Statement of Defence the defendant-respondent admitted paragraph 1 of the Statement of Claim (vide: page 91 of the Copy Record).

What then was the resulting position?

[29] That, there was "*a Will" but on the defendant-respondent's contention it had been procured through "undue influence."* If so, did the initial legal burden lying on the plaintiff to prove "*the Will" shift to establish "undue influence."*

[30] Before proceeding to deal with that question, I was prompted to look at Order 34 Rule 4 once again.

[31] Both parties had not complied with the mandatory provisions contained therein.

[32] In the absence of such compliance by the parties, should the learned judge have proceeded to determine the validity or otherwise of "*the Will*?"

[33] Subject to that, in regard to the proof of the Will, it is a matter of evidence that "*the alleged Will*" was produced and marked in evidence as Exhibit 2. I also took cognizance of the attestation clause and the simple narrative deposed to by the testator. In regard to the requirement of two witnesses subscribing to the Will, thus, taken in the overall, the essential particulars as to an "*alleged Will*" being pleaded (pages 16 – 17 of the Copy Record), there was *prima facie* evidence that the propounder (the plaintiff) had discharged

the initial legal burden in raising a rebuttable presumption as to a valid Will, satisfying the requisites laid down in Section 6 and/or Section 6A of the Wills Act 1972 (as amended), thus shifting the evidential burden to the defendant-respondent to establish that the Will had been procured through undue influence.

[34] In that context, I derived assistance from the English Court of Appeal decision in **Fuller v Strum** [2002] 1 WLR1097 which was cited in **King v King** [2014] EWHC 2827 which held that:

"So long as there is no problem of a lack of testamentary capacity, the testator's knowledge and approval of the contents of his Will would be assumed from the fact that he has signed the document and had it attested in proper form." (cited by **Theobald on Wills**, 18th ed., (2016) page [64], paragraph 3-021).

[35] Having said that, the matter which I have recounted above, the learned Judge needed to address his mind to. Had he done that, and enunciated the principle His Lordship propounded at paragraph [29] of his Judgment I would have had no quarrel with.

[36] One final matter remains to be addressed in this appeal and that is, Mr Sen's final submissions in response to Ms Singh's submissions.

[37] Mr Sen had submitted at the close of the plaintiff's case that he took exception to the proof of "*the Will*" (vide:- page 156 of the Copy Record) and therefore it was incumbent on the part of the Appellant's lawyers to have called for evidence by calling either the attesting notary or at least one of the attesting witnesses to "*the Will."*

[38] Indeed, I saw some merit in that submission for if none of them were available for whatever reason then the Court should have been apprised of it, to enable the Court to take an appropriate view of the matter and make an order thereon as permitted under Section 6A of the Wills Act 1972 (as amended in 2004).

[39] The plaintiff's lawyers having fallen foul of that duty, should that lapse have visited the plaintiff?

The Supreme Court decision in Fiji Industries Limited v.National Untion of Factory and Commercial Workers, CBV0008/2016, 27th October, 2017

[40] The Supreme Court granted leave to appeal as being a matter of public interest (against my single judge decision in this Court wherein I had held that, lawyers faults must stand visited on their clients) but dismissed the appeal.

[41] That was a case where the lawyers had misconstrued the application of a Practice Direction issued by the Chief Justice as to compliance with time lines to tender an appeal.

[42] In contrast, here is a case where, a testator's wishes on the basis of an "alleged Will" may result in being defeated.

[43] Thus, in addition to the matters I have focused on earlier, this was another matter that needs to be given consideration.

Conclusion

[44] On the basis of the reasoning as articulated above, although I am not inclined to declare "*the impugned Will as a proved Will,*" I agree with Ms Singh's submission that, this Court ought to order "*a trial de novo."*

[45] Thus, the need does not arise for me to address on the provisions of the Family Law Act and the Inheritance (family) Provision Act No.12 of 2004.

[46] On the basis of the reason's adduced above, I proceed to make my proposed orders as follows.

Jitoko, VP

[47] I have had the advantage of reading the draft judgment of Guneratne, P in this appeal and I entirely agree with his reasoning and conclusions.

Basnayake, JA

[48] I agree with the reasons and conclusions of Guneratne, P.

Orders of Court:

1) *The impugned judgment of the High Court is set aside and "a trial de novo" is ordered and to that extent, the Appeal is allowed.*
2) *Given the intricate legal issues that were involved in the Appeal that needed interpretation, I do not order any costs.*
3) *The Chief Registrar is directed to communicate this judgment to the High Court of Suva to have this case listed on a priority basis in the cause list for hearing to be heard "de novo".*

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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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