

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Probate No 26174

Civil Action No. HPP 58 of 2014

IN THE ESTATE of RAM LAKHAN late of
Shiu Raj, late of Balata Tavua in the Republic of
Fiji, Cultivator, Deceased, Testate.

BETWEEN : SHARDA NAND aka SARDA NAND, of Balata Tavua, in the
Republic of Fiji, Driver.

PLANTIFF

AND : AMBIKA NAND, of Balata, Tavua in the Republic of Fiji, Farmer.

DEFENDANT

COUNSEL: Mr. Kunal Singh for the Plaintiff (Applicant)

BEFORE: Master Vishwa Datt Sharma

Date of Hearing: 20th January, 2015

Date of Ruling: 4th March, 2015

RULING

A. INTRODUCTION

1. The parties to this proceeding are real brothers and biological sons of the deceased Ram Lakhan.

2. The deceased **Ram Lakhan** left behind a "Will" which was executed by him on the 17th day of August, 1980, appointing his lawful daughter **Shiu Kumari** as the sole EXECUTRIX and TRUSTEE of his last will.
3. He also bequeathed his both real and personal properties to his daughter, **Shiu Kumari** and to his two (2) sons **Sarda Nand** and **Ambika Nand** as per his last Will and Testament dated 17th August, 1980.
4. The Executor/Trustee **Shiu Kumari** made an application for a **Grant of Probate** from the High Court of Fiji and accordingly the Grant was issued to her on 22nd January, 1991.
5. She did not completely administer the Deceased Estate in terms of the Deceased Will'
6. On 09th March, 1999, she executed a "change of Trusteeship" and pursuant to a Deed of Appointment transferred all her rights, powers, titles and interests of the land in the Certificate of Title No. 17283 to **Ambika Prasad** (Defendant).
7. The Plaintiff states as per his affidavit filed herein that after his father's demise, he did not have the use of the land that was allocated to him as per his father's Will, and the same being used by the Defendant all along that has now prompted him to file this application and seek justice from this court.

B. ORIGINATING SUMMONS

8. The Plaintiff instituted this action by way of an **Originating Summons** coupled with an affidavit in support and sought for the following orders:
 - (i) *That the defendant be discharged as the personal representative/trustee in the Estate of the deceased in the probate wherein a grant of probate was granted on 22nd January, 1991 (probate No. 26174 refers);*
 - (ii) *That the Plaintiff be appointed as the personal representative/trustee in the Deceased Estate;*
 - (iii) *That the defendant deliver the probate Grant in action no. 26174 to the court within 7 days of the court order;*

- (iv) *That the said grant of probate No. 26174 and records be noted to this effect;*
- (v) *That a new grant of probate in the deceased Estate be issued under the name of the plaintiff;*
- (vi) *That cost of this action is borne by the defendant.*

9. This application was made pursuant to *section 35 of the Succession, Probate and Administration Act Cap 60* of the Laws of Fiji and *Order 85 of the High Court Rules 1988*.
10. The same was served onto the defendant on 05th December, 2014 and an affidavit of service was filed into court as prove of service of the application onto the defendant.
11. The defendant failed to file any acknowledgment of service, affidavit in opposition and or made any court appearances to counter the plaintiff's applications for the orders sought.
12. The application was heard on an **undefended** basis since the defendant failed to counter the orders sought by the plaintiff in terms of the law.

C. THE LAW

Court may remove executor

13. **S. 35.** *The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made*
 - (a) make an order removing any executor of the will of such deceased person from office as, such executor and revoking any grant of probate already made to him; and
 - (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and
 - (c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and

- (d) make such further or consequential orders as it may consider necessary in the circumstances

ORDER 85 of the High Court Rules 1988

ADMINISTRATION AND SIMILAR ACTIONS

14. *Interpretation (O.85, r.1)*

1. In this Order "*administration action*" means an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust.

Determination of questions, etc., without administration (O.85, r.2)

2. (1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

- (2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions:-

- (a) any question arising in the administration of the estate of a deceased person or in the execution of a trust;
- (b) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;
- (c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

- (3) Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs:-

- (a) an order requiring an executor, administrator or trustee to furnish and, if necessary, verify accounts;
- (b) an order requiring the payment into court of money held by a person in his capacity as executor, administrator or trustee;

- (c) *an order directing a person to do or abstain from doing a particular act in his capacity as an executor, administrator or trustee;*
- (d) *an order approving any sale, purchase, compromise or other transaction by a person in his capacity as executor, administrator or trustee;*
- (e) *an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.*

Parties (O.85, r.3).....

3. (1) *all the executors----*

Grant of relief in action begun by originating summons (O.85, r.4)... ..

4. *In an administration----*

D. ANALYSIS and DETERMINATION

15. The Plaintiff seeks various court orders in Ram Lakhan's (deceased) Estate as mentioned hereinabove at paragraph 8 (i) to (vi) inclusive.
16. The Deceased owned a land in the Certificate of Title Number 17283 known as Lot 27 D,P. 3403 Nabuta (part of) situate at Balata, Tavua, comprising of sixty (60) acres one (1) rood and thirty two (32) perches and was subject to Sugar cane Contract number 4074 (Drumasi Sector).
17. He DEVISED and BEQUEATH his real and personal property as follows-
 - (i) *20 Acres as demarcated as Lot 1 in the plan to his daughter Shiu Kumari together with all improvements therein;*
 - (ii) *20 Acres as demarcated as Lot 2 in the plan to his son Sarda Nand (Plaintiff) absolutely;*
 - (ii) *20 Acres as demarcated as Lot 3 in the plan to his son Ambika Nand (Defendant) together with all improvements thereon absolutely and acknowledged that the dwelling house belonged to Ambika Nand, and*

- (iii) *Rest of the residue and remainder of his Estate both real and personal property to his sons, Ambika Nand, Sharda Nand and daughter Shiu Kumari in equal shares.*
- (iv) *That his sons Muni Nand and Sahadeo have already been provided for by him during life shall have no share in his Estate.*
18. Subsequently, on 09th March, 1999, a **change of Trusteeship Instrument** was executed by the deceased's daughter, Shiu Kumari (as the Executrix and Trustee in the deceased will) appointing **Ambika Nand (Defendant)** as the **new Trustee**, and **Shiu Kumari transferred** all her rights, powers titles and interests of her share of the land to **Ambika Nand**.
19. It is also noted that the **Transmission by death Instrument** was also executed by **Shiu Kumari** on the same date as the **Change of Trusteeship Instrument** which was registered on the **Certificate of Title number 17283** on 24th March, 1999.
20. On the same date the **change of trusteeship to Ambika Nand** was also registered on the **Title** as well.
21. The **Plaintiff** claims that since his father's demise he has not used the portion of the land that was allocated to him in the will instead is used by the **Defendant** to **cultivate sugar cane** and **no statement of account, royalty or benefits** has been given to the **Plaintiff**.
22. He further stated that he made numerous attempts and approached the Defendant and asked him for his share in the property but instead of a peaceful resolution, he had been chased away by the Defendant.
23. Subsequently, the Plaintiff approached his Lawyers Khan & Co to write to the Defendant and sub-divide the land and give his share in the property, but to date no response was received from the Defendant.
24. The Plaintiff then approached Reddy Nandan Lawyers who again wrote another letter to the Defendant asking him to sub-divide the land and transfer 20 acres out of the 60 acres to him which was his entitlement under the Estate. To date the Plaintiff received no response.

25. It is important to note that **Shiu Kumari** as the **Executrix and Trustee** in the **Deceased Estate** obtained a **Probate Grant** on 22nd January, 1991.
26. In her capacity as an **Executrix and Trustee**, she had certain **duties and responsibilities** to carry out. Some important ones are as follows-
- (i) *To administer the deceased's Estate to its fullest; (as in this case);*
 - (ii) *It does require the highest degree of honesty, impartiality, and diligence. This is called a "fiduciary duty" -- the duty to act with scrupulous good faith and honesty on behalf of someone else. (as is applicable in this case).*
 - (iii) *Figure out who inherits property. If the deceased person left a will, (as in this very case) the executor will read it to determine who gets what.*
 - (iv) *Supervise the distribution of the deceased person's property. The property will go to the people or beneficiaries named in the will or those entitled to inherit under the law. (as is applicable in this case).*
27. The **Executrix and Trustee, Shiu Kumari** knew very well that the **deceased** had left behind a **Will** wherein he had clearly **expressed his wishes** and how he wanted his Estate to be disposed off after his demise.
28. She did not carry out any distribution of the deceased property as spelt out in his Will instead thought fit to execute a **Change of Trusteeship** in favour of the Defendant and further transferred her rights, interests, title and powers as well to the Defendant.
29. This application of change of Trusteeship was made to the Registrar of Titles in terms of *section 102 (5) of the Land Transfer Act Cap 65* which provides as follows-

Where it is desired to appoint a new trustee or new trustees under the provisions of the Trustee Act, the person or persons empowered by that Act to appoint a new trustee or new trustees may execute a form of appointment, and the new trustee or trustees shall endorse his or their consent on the form of appointment, and the Registrar shall enter a memorial of the appointment in the register and the land, or estate or interest therein, shall thereupon vest in the new trustee or new trustees and the surviving or continuing trustees.

30. The question that arises here is this:

- (i) *Why didn't the Executrix/Trustee think appropriate to make an application to this court and renounce her Executrix/Trustee powers to the Defendant rather than executing a Change of Trusteeship in terms of the Land Transfer Act Cap 131?*
- (ii) *Further, why didn't Shiu Kumari make an application into court in terms of section 89 (1) of the Trustees Act Cap 65.*

31. The law empowers Shiu Kumari who is also a beneficiary to make an application in court for the appointment of a new Trustee. It reads-

Persons entitled to apply to Court

89.-(1) An order under the provisions of this Act for the appointment of a new trustee, or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under a disability or not, or on the application of any person duly appointed trustee of the property or intended to be so appointed.

After all the High Court had granted a Probate Grant in her favor empowering her to administer the deceased's Estate in terms of his WILL.

32. The next question which comes to mind is this:

- (i) *What happens to the Probate Grant which was granted to Shiu Kumari on 22nd January, 1991?*
- (ii) *Does this Grant lapses and is ultra vires now or the change of trusteeship to the Defendant has the overriding power over this Probate Grant?*

33. The next question that sets in mind is this:

- (i) *Since the Defendant was bestowed with the Trusteeship powers in the Deceased Estate by the initial Executrix/Trustee, Shiu Kumari by a Deed, did the Defendant seek any further Grant or variation of the initial grant in order to administer the deceased's Estate?*
- (ii) *Did he obtain any Letters of Administration with Will grant in his favour to administer the deceased's estate?*

The answer to this is simple. Shiu Kumari had transferred all her rights, powers, title and entitlement to the Defendant so the Title of Trusteeship was obviously with the Defendant and therefore he should have made an application in the High Court asking for revocation of the earlier Grant to Shiu Kumari and that he be granted with a Letters of Administration with Will annexed, because he was the beneficiary as well. Once the grant was given to him then he could have distributed the beneficiaries with their entitlement as expressed in the Will of the Deceased Ram Lakhan accordingly. What was stopping him from taking this course of action and considerable delay has been caused in distributing the Estate?

34. It is necessary and appropriate to also look at the under mentioned laws contained within the *Succession Probate and Administration Act Cap 60* which states as follows-

Real estate to vest according to will

s. 12. Subject as aforesaid, the real estate of every person who dies testate shall be held by the executor to whom probate has been granted or the administrator with the will annexed according to the trusts and dispositions of the will of such deceased person

Probate or administration if executor, etc., absent or neglects to obtain probate, etc.

s. 31. Where an executor neglects to apply for or to renounce probate within 6 months from the death of the testator or from the time of such executor attaining the age of 21 years, or where an executor is unknown or cannot be found, the court may, upon the application of any person interested in the estate, or of any creditor of the testator, grant administration with the will annexed to the applicant, and such administration may be limited as the court thinks fit.

Absent executor liable to account

s. 34. Should an executor or administrator neglect to apply for an order for the rescission of any special grant as aforesaid, he shall, until such special grant is rescinded, be liable to make good all claims and demands against the estate of the deceased to the extent of the assets which have come to his hands, or which might have come to his hands but for his wilful neglect or default including the neglect herein mentioned.

Court may remove executor

s. 35. The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

- (a) make an order removing any executor of the will of such deceased person from office as, such executor and revoking any grant of probate already made to him; and
- (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and
- (c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and
- (d) make such further or consequential orders as it may consider necessary in the circumstances.

Power to postpone distribution

s. 37. An executor or administrator shall not be bound to distribute the estate of the deceased before the expiration of one year from the date of grant of probate or administration as the case may be.

Devisee or legatee may apply to court in certain cases

s. 38. Subject to the provisions of section 37, if an executor who has obtained probate or an administrator with the will annexed, after request in writing neglects or refuses to-

- (a) execute a transfer of land devised to a devisee; or
- (b) transfer, pay or deliver to the person entitled any bequest, legacy or residuary bequest, such devisee or person may apply for an order upon such executor or administrator to comply with such request, and the court may make such order as it thinks fit.

Inventory and accounts

39. (1) Every person to whom probate or administration is granted may and shall if so required by the Registrar file an inventory of the estate of the deceased, and pass his accounts relating thereto within such time, and from time to time, and in such manner as may be prescribed by the rules or as the court may order.

(2) The order of the court allowing any account shall be prima facie evidence of the correctness of the same, and shall, after the expiration of 3 years from the date of such order, operate as a release to the person filing the same, except so far as it is shown by some person interested therein that a wilful or fraudulent error, omission or entry has been made in such account.

Court may settle all questions arising in administration

s. 41.-(1) The court may make such order with reference to any question arising in respect of any will or administration, or with reference to the distribution or application of any real or personal estate which an executor or administrator may have in hand, or as to the residue of the estate, as the circumstances of the case may require.

(2) Such order shall bind all persons whether sui juris or not.

(3) No final order for distribution shall be made except upon notice to all the parties interested, or as the court may direct. (underline is mine for emphasis)

35. The statutory jurisdiction to remove an executor (ix) and appoint an administrator with will annexedis enshrined insection 35 of the *Succession Probate and Administration Act Cap 60*. The Court also has an inherent jurisdiction to do the same based on the principles of equity. The New Zealand Court of Appeal said in *Georgina Kain & others v Hutton & Others CA 246/01*.

36. The 'general supervisory powers' that equity bestows upon this court also imposes a solemn duty to see that a trust or an estate is properly executed.

37. I also make reference to the recent case of the Hon. Mr. Justice Anare Tuilevuka; *In the matter of the estate of Kamal Shah and Jamal Shah* wherein he quoted the case of Letterstedt, Blackburn LJ said as follows at page 386-

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principle duty, to see that the trusts are properly

executed. The duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out or were greatly exaggerated, so that the trustee was justified in resisting them, and the court might consider that in awarding costs yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

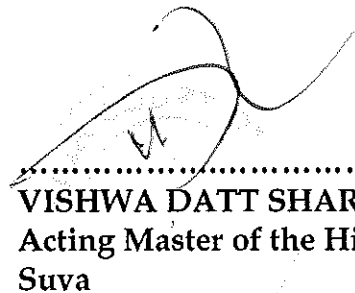
At page 387;

In exercising so delicate a jurisdiction as that of removing trustees. Their Lordships do not venture to lay down any general rule beyond the very broad principles above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great variety. But they proceed to look carefully into the circumstances of the case.

38. The same principles were resonated In **Snell's Principles of Equity (28th Edition) at page 210-211**.- *that the welfare of beneficiaries must be the court's guide in exercising both its inherent and statutory jurisdiction to remove a trustee (or executor (ix).*
39. For the aforesaid reasons, I grant the following orders-
- (i) That the Grant of Probate issued to the initial Executrix/Trustee Shiu Kumari in the Estate of Ram Lakhan be revoked forthwith.
 - (ii) That the Probate Grant No. 26174 be returned and deposited into the High Court in Suva immediately.
 - (iii) That the Defendant Ambika Nand is removed as the New Trustee in the Estate of Ram Lakhan forthwith but remains as a beneficiary in the estate.
 - (iv) That the Plaintiff Sharda Nand aka Sarda Nand is hereby appointed as the new trustee in Ram Lakhan's Estate forthwith.
 - (v) That the Plaintiff is entitled to apply for a Letters of Administration with will grant (*since he is a beneficiary*) in the Estate of Ram Lakhan.

- (vi) That the plaintiff must ensure to administer and distribute the deceased's property in terms of the will in the Estate of Ram Lakhan without any delay.
- (vii) That initial Executrix/Trustee Shiu Kumari and Defendant Ambika Nand are directed to prepare full account on the Administration of the deceased Estate and serve a copy to the Plaintiff expeditiously accordingly.
- (viii) That the said grant and records be noted to this effect.
- (ix) That a copy of the sealed order to be immediately served onto the Fiji Sugar Corporation Ltd and Ambika Nand (defendant) and Shiu Kumari immediately so that they are made aware of the abovementioned orders and must comply accordingly.
- (x) Costs of this action is summarily assessed against the Defendant in the sum of \$1000.00.

Dated at Suva this 4th Day of March, 2015


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VISHWA DATT SHARMA
Acting Master of the High Court
Suva