

In the High Court of Fiji at Suva

Probate Jurisdiction

HPP Action No. 06 of 2010

1. Ram Raji Prasad
2. Arun Kumar
3. Adit Kumar
4. Rohini Devi
5. Lalika Latika Devi
6. Keshni Chandra
7. Nalini Prahalad

Plaintiffs

And: Anoop Kumar

Defendant

Written submissions of the plaintiff filed on 27 November, 2012

### **JUDGMENT**

1. The plaintiffs and the defendant are beneficiaries of the estate of their father, Surendra Prasad. Surendra Prasad died intestate on 2<sup>nd</sup> March, 1982. The defendant was appointed as administrator of the estate on 9<sup>th</sup> September, 1982. In these proceedings filed by way of originating summons, the second and third plaintiffs allege that the defendant has sold estate property and not accounted for nor distributed the sale proceeds to the beneficiaries. These plaintiffs seek that the defendant be removed as administrator and they be substituted. The defendant denies the allegation and states that the plaintiffs gave him authority to sub-divide and sell lots of land. He further states that he utilised the proceeds for the farm and to obtain a new lease.
2. The plaintiffs also seek the following reliefs:
  - a. *The defendant.. furnish . a full and complete account of the .. Estate including a complete account of all or any monies received pursuant to a purported disposal off . the real and personal property of the Estate ..*
  - b. *The defendant ceases forthwith to sub-divide or continue to sub-divide and sell or dispose off howsoever the real estate or other property ...*
  - c. *The defendant forthwith do all such things that are usual and necessary for the transmission of the real estate to the incoming administrators and trustees ...*

- d. *Alternatively or additionally, for an Order for distribution of the estate to all beneficiaries after a complete account has been taken of the Estate and rendered to the Court.*
- e. *The defendant be Ordered to give possession of and or facilitate the return to possession and occupation of the family dwelling of the deceased to the widow of the late Surendra Prasad.*

3. In their affidavit in support, the second and third plaintiffs, Arun Kumar and Adit Kumar, state that:

- a) They make this affidavit on their own behalf and their siblings, viz,(i)Praveena Balgovind,(ii)Keshni Chandra,(iii)Rohini Devi,(iv)Lalika Latika Devi, and(vi) Nalini Prahalad.
- b) Surendra Prasad was survived by his widow and eight issues.
- c) Since all the beneficiaries were resident abroad, they consented to appoint the defendant as Administrator, as he was the only beneficiary resident in Fiji.
- d) The defendant is not discharging his duties as Administrator diligently, effectively and fairly.
- e) Several plaintiffs previously consented to a sub-division of the deceased's estate, Crown Lease no. 69293 comprising of 28 acres of agricultural land.
- f) The defendant has sub-divided the land and sold several lots. He has failed to render accounts to the beneficiaries and utilised the proceeds of sale.
- g) The plaintiffs state that the lack of accounts and selling of assets is most injurious to their interests in the estate.

4. *The affidavit in reply of the defendant*

The defendant, in his affidavit in reply states:

- a) The first and third plaintiffs commenced this action without the authority of the other named plaintiffs.
- b) The plaintiffs persuaded him to be administrator of the estate. The plaintiffs were resident in Fiji at that time.
- c) The defendant states that the proceeds of the sale of the land have "*mostly been*" used for cultivation and upgrading of the estate land, payment of land rent to the Lands Department, and given to his mother when she was in Fiji.
- d) The plaintiff have been residents of Australia for over 20 years. They are not fit to be appointed as Administrators.



5. *The first plaintiff's reply*

The first plaintiff, in his reply states that the plaintiffs have heard “*anecdotal accounts from third parties*” that the land is being sub-divided and sold. The defendant has failed to render accounts of the proceeds of sale and the income and expenditure of the farm. The plaintiffs believe that unless there is a change of trustee, the defendant will appropriate the proceeds of sale to himself.

6. *The defendant's supplementary affidavit*

The defendant in his supplementary affidavit states as follows:

- a) Five plaintiffs have withdrawn from this action. The seventh plaintiff, Nalini Prasad has provided reasons why she does not desire to bring this action.
- b) Parbina Balgovind, a beneficiary who was not part of this proceeding in her letter dated 22<sup>nd</sup> March, 2010, to the plaintiffs' solicitor has stated that she will not be part of any proceedings against the defendant.
- c) The plaintiffs, his late mother and other siblings gave him written authority dated 6<sup>th</sup> and 9<sup>th</sup> May, 2005, to sub-divide and sell portion of Crown Freehold Lease no. 69293.
- d) The plaintiff's mother passed away on 23<sup>rd</sup> June, 2011, at a Nursing Home in New South Wales.
- e) Some of the proceeds from the sub-division has been collected by Arun Kumar, the second plaintiff.
- f) Upon the expiry of the lease he applied for a new lease. Crown Lease No. 717923 was renewed to him, as administrator.
- g) The affidavit concludes stating that the defendant continues with planting sugar cane on the said land.

7. *The hearing*

This case was taken up before Hettiarachchi J, who had made order that this action be concluded by written submissions. The plaintiffs submissions were filed on 27<sup>th</sup> November, 2012.

I had a call-over of this matter on 26 July, 2013. On that day, the plaintiffs were unrepresented. Mr N. Tuifagalele represented the defendant. I made order that the defendant file submissions on 16<sup>th</sup> August, 2013. This has not been filed.

8. *The determination*

- a. The first and third plaintiffs seek to remove the defendant as administrator of the estate of the deceased, on the ground that the defendant has been sub-dividing and selling the estate land and not distributing the proceeds to the beneficiaries nor an account of the proceeds.
- b. It is common ground that the plaintiffs concurred in the appointment of the defendant as administrator.
- c. The plaintiffs admittedly, authorised the defendant in writing, to sub-divide the land belonging to the estate, sell lots and use the proceeds.
- d. The defendant's supplementary affidavit attaches a letter from the first to the sixth plaintiffs authorising the defendant to subdivide and sell a portion of Crown Freehold Lease 692993. The letter concludes stating that the rest of the land cannot be sub-divided and sold.
- e. I also find correspondence from the second plaintiff stating :

*Whatever you have sub-divided and sold is all yours. No-one is interested in it at all. What you do with it & the money is no interest to any one at all.*

*I would like to know the exact amount left over so that we can then go ahead and organise the shares and whatever else. (emphasis added)*

- f. The defendant, in his affidavit states that the second plaintiff has collected proceeds from the sub-division.
- g. The seventh plaintiff, Nalini Prasad, in relinquishing her share to the defendant stated further:

*Mr Anoop Kumar has worked on the farm the most and is thus entitled to remain as an administrator of the estate. His work on the farm alongside my father during his high school years allowed my brothers Mr Arun Kumar and Mr Adit Kumar to attend boarding school. Without the sacrifice that was made by Mr Anoop Kumar my two brothers would not have been afforded the luxury of attending boarding school. With the death of my father Mr Anoop Kumar became the sole provider of our family. His generosity during trying times allowed our family to remain intact and his sacrifice for his brothers and sisters should be noted.*



- h. In her detailed statement withdrawing the claims made against the defendant, Nalini Prasad states that there are “*anomalies*” in the affidavit in support of the second and third plaintiffs and the “*facts are manipulated*”. She also states:

*Anoop Kumar and our mother was not the only beneficiary living in Fiji during our father's death...It was later decided in the best interest of our mother that she take up Australian residence for the later years of her life...*

*The defendant has been occupying the home since he was born. It was my father's wish that the defendant, who has worked on the farm the most, will occupy the family home once both my dad and mum are deceased. Our mother was looked after by my brother (referenced defendant) who cooked, clean and cared after her day and night with the help of his family. The defendant and some of the named plaintiffs agreed to bring mum to Australia as she would not get the care and medical attention in Fiji as she will in Australia. Also the matrimonial home needs to be upgraded with facilities available at any aged care facility...*

*There was no agreement amongst the plaintiffs that our mother would return to Fii and live in the environment of her choosing...*

*The defendant did offer to accommodate our mother since the time of our father's death however, given the current health of our mother he can no longer provide the care that she is receiving in Australia.*

- i. Nalini Prasad too states that the defendant was given approval and permission by the beneficiaries to sell portions of the land and use the proceeds for his family. She concludes that there was “*never an agreement amongst the plaintiffs that they would receive a portion of the proceeds . These funds were to be kept in whole by the defendant*”.
- j. Another beneficiary, Parbinda Balgovind of New Zealand, in her letter of 22<sup>nd</sup> March,2010, withdraws any claims she made against the defendant .
- k. The defendant states that he has used the proceeds of the sale for farming the agricultural land of the lease and to obtain a new Crown Lease No. 717923 renewed to him, as administrator. The lease has been attached to the defendant's supplementary affidavit.

- l. Section 73(2)(a) of the Trustees Act,(cap 65) empowers the Court to appoint new trustees in substitution for a trustee who has misconducted himself in the administration of the estate.
- m. In the present case, in light of the written authority clearly given by the beneficiaries to the defendant to sub-divide and sell lots of the Crown Lease and use the proceeds, I do not find that the defendant has misconducted himself in administering the estate, as alleged .
- n. The courts' discretion to remove a trustee must in my view, be exercised by the beneficiaries collectively and of course, for good reason.
- o. In the present case, the majority of the beneficiaries: the first, fourth, fifth, sixth and seventh plaintiffs in their Notice of Discontinuance filed on 2<sup>nd</sup> November,2010 ,have "*wholly and completely discontinued*" their action against the defendant.
- p. The remaining plaintiffs, the first and third, state that the defendant has provided incomplete accounts on the income and expenditure of the farm and not given accounts on the income derived from sale of sub-divided lots of land .
- q. On the duty to keep accounts, 17(2) *Halsbury, Laws of England*, (4<sup>th</sup> edn) para 801 provides:

*Duty to keep accounts. It is the duty of personal representatives to keep clear and accurate accounts, and always to be ready to render such accounts when called upon to do so. It is no excuse that they are inexperienced in keeping accounts, for in that case it would be their duty to employ a competent accountant to keep them. Where they are required by the beneficiaries to furnish accounts, they may demand to have the costs of doing so paid or guaranteed before complying with the request. A legatee is not entitled to a copy of the accounts at the expenses of the estate, but he is entitled to inspect the accounts kept by the representative. (emphasis added)(footnotes omitted)*

*A personal representative is liable to be ordered by the court to account either generally in proceedings for general administration of the estate or under the court's jurisdiction to order specific accounts.*



- r. Fatiaki J(as he then was) in *Vosailagi v Mara and others*, (Civil Action no.569 of 1991) cited the following passage from the judgment in *Re Watson*, (1904) 49 Sol.Jo.54:

*The duty of a trustee is three-fold: there is the duty to keep accounts, the duty to deliver accounts, and the duty to vouch accounts. The duty to keep accounts is an essential duty, he must keep such accounts, so as to be able to deliver a proper account within a reasonable time showing what he has received and paid.*

- s. I make order for the defendant to give the second and third plaintiffs, a full and complete account of the income and expenditure on the farm and all monies received on the sale of lands within 14 days.
- t. I find that the administration of the estate has not been completed, although the defendant was granted letters of administration on 9<sup>th</sup> September, 1982.
- u. I make order that the distribution of the balance of the estate to the beneficiaries, (that is after the sale of the sub-divided lots, as approved by the beneficiaries), be completed within three months from the date of this judgment.

**9. Orders**

I make orders as follows:

- (a) The defendant shall provide the plaintiffs with full and complete accounts of the income and expenditure on the farm and all monies received on the sale of land within 14 days of this judgment.
- (b) The distribution of the balance of the estate to the beneficiaries shall be completed within three months from the date of this judgment.
- (c) I decline all the other reliefs sought by the plaintiffs .
- (d) The second and third plaintiffs shall pay the defendant a sum of \$ 1000 as costs summarily assessed.
- (e) The matter to be called for review on 25<sup>th</sup> August, 2015.

15<sup>th</sup> July, 2015



*A.L.B. Brito-Mutunayagam*  
A.L.B. Brito-Mutunayagam  
Judge