

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HPP 07 of 2015

BETWEEN : **EILEEN PREMILA SINGH** of 95, Birkdale Road, Birkdale, Auckland 0626, New Zealand, Unemployed, **EVELEEN PRATIBHA SINGH** of 7615 Bluebrook Way Sacramento, Ca. 95823 USA, Unemployed, **JAMES JYANENDRA SINGH** of 34 Pottery Circuit, Sydney, Australia, Teacher, **EIREEN PRAVEENA SINGH** of 95 Birkdale Road, Birkdale, Auckland 0626, New Zealand, Non Clinical Support - Mail Room and **PATRICK DHIRENDRA SINGH** of 18 Joe Singh Place, Suva, Business Proprietor.

PLAINTIFFS

AND : **KAMLA WATI ZITA SINGH** formerly of 7 Buckingham Crescent, Papatoetoe and latterly of 108 Kilkenny Drive, Dannemora, Auckland, New Zealand.

DEFENDANT

COUNSEL : Mr. Suresh Chandra for the Plaintiffs
Mr. Ronan Singh for the Defendant

Date of Hearing : 10 February 2016

Date of Ruling : 13 May 2016

RULING

INTRODUCTION AND BACKGROUND

- [1] This is an application made by the Plaintiffs, by way of a Writ of Summons.
- [2] In their Statement of Claim the Plaintiffs claim the following reliefs:
1. That Court shall pronounce against the validity of the pretended Will, dated 11 August 2009;
 2. An Order that the grant issued pursuant to the pretended Will, dated 11 August 2009, to be refused to be re-sealed in Fiji;
 3. That the grant be issued in Fiji pursuant to the Will dated 22 October 1979 be accepted in solemn form;
 4. Alternatively the Defendant to make adequate and equitable provision or share to the Plaintiffs out of the estate of James Shankar Singh;
 5. The Defendant to be restrained from receiving rent and incomes of the properties until this action is heard and determined by this Honourable Court;
 6. Cost of this action;
 7. Such further and other reliefs this Honourable Court deems fit in the circumstances of the case.
- [3] On 20 April 2015, the Plaintiffs filed a Notice of Motion to serve the Writ of Summons and Statement of Claim on the Defendant out of jurisdiction of this Court, by way of Registered Post. This Motion was supported by an affidavit filed by Savenaca Siga, a Senior Law Clerk, working at the office of the Solicitors for the Plaintiffs. Court made Order on 1 May 2015, granting Order in terms of the Notice of Motion.
- [4] The Defendant filed a Summons to dispute the jurisdiction of the Court, issue of writ and service of writ out of Jurisdiction. The Summons was supported by an Affidavit sworn by the Defendant, Kamla Wati Zita Singh.
- [5] On 21 July 2015, the Solicitors for the Plaintiffs filed a Summons for preservation of property, pursuant to Order 29 Rule 1 of the High Court Rules, 1988. An Affidavit in

Opposition to the Defendant's Affidavit and Affidavit in Support of the Summons was filed by James Jyanendra Singh, the third named Plaintiff. Further another Affidavit was filed in support by Warren John Scotter, a Barrister and Solicitor from New Zealand.

- [6] This matter was taken up for hearing before me on 10 February 2016. Both counsel for Plaintiffs and Defendant were heard. The parties also filed detailed written submissions, and also referred to several case authorities, which I have had the benefit of perusing.

STATEMENT OF CLAIM

- [7] The contents of the Statement of Claim can be summarized as follows:
1. The five Plaintiffs are the lawful children of the Deceased James Shankar Singh, who died on 27 July 2014 leaving the true last Will, dated 22 October 1979.
 2. The Plaintiffs are the children of the first marriage of the Deceased, James Shankar Singh, and Elleen Vidya Wati Singh. The said Elleen Vidya Wati Singh died on 7 October 1996.
 3. Kamla Wati Zita Singh, the Defendant herein, married the Deceased on 12 November 1996 and is the second wife of the Deceased. There are two children from this marriage, namely Francis Aneet Singh and Anita Bidesi.
 4. Subsequent to the said last Will being executed, the Deceased is alleged to have executed another Will on 11 August 2009, which is five years before his death on 27 July 2014.
 5. The Plaintiffs claim that the alleged pretended second Will, dated 11 August 2009, was not executed in accordance with the Wills Act and amendments thereto as the Deceased was not capable of signing or understanding the nature of the Will.

6. The Plaintiffs allege that the signature on the pretended Will, dated 11 August 2009, is a fraud and/or fraudulent and the signature is a forgery.
7. The Plaintiffs claim that the witness or witnesses to the purported Will exerted their influence over the Deceased to sign the pretended Will without proper explanation or interpretation of the same, so as to obtain the interest of the Deceased in favour of the Defendant at the time. They further claim that if the pretended Will was executed by the Deceased, it was obtained by exerting pressure and undue influence from the Defendant, her daughter Anita Bidesi and son in law Tony Bidesi.
8. It is claimed that the Deceased was about 85 years old and was frail in his mind when the pretended Will was executed and also that he was suffering from several medical ailments at the time.

SUMMONS TO DISPUTE THE JURISDICTION OF THE COURT

- [8] In the Summons filed to dispute the jurisdiction of Court the Defendant takes up the following legal objections:
1. The Writ filed on 8 April 2015 be struck out for want of jurisdiction.
 2. Alternatively, the Writ be set aside.
 3. Alternatively, the service of the Writ be set aside.
 4. Alternatively, the Writ be stayed pending the making of Orders under Order 80, Rule 2 of the High Court Rules.
 5. That the Plaintiffs pay the Defendant costs on an indemnity basis and
 6. Such other relief as the Court deems necessary or just.
- [9] In terms of the provisions of Order 12, Rule 7 of the High Court Rules, the Defendant is seeking the Writ to be struck out for want of jurisdiction, on the following grounds:
- a) That the Testator in this action, James Shankar Singh, was domiciled in New Zealand, on 11 August 2009, the date he made the Will which is the subject of this action and also at the time of the death, on 27 July 2014.

- b) The Will was signed in New Zealand and the signing of the Will was witnessed by witnesses who were domiciled and remain domiciled in New Zealand.
 - c) Probate of the Will was granted in New Zealand, on 24 October 2014.
 - d) Of the five Plaintiffs, only one is domiciled in Fiji (Patrick Dharendra Singh), while two of the Plaintiffs are domiciled in New Zealand (Eileen Premila Singh and Eireen Praveena Singh).
 - e) The Defendant, who has been named as the sole Executrix and Trustee of the Will, is domiciled in New Zealand.
- [10] In the alternative, the Defendant states that the Writ of Summons is defective or irregular, in that it purports to sue a non-resident Defendant but does not prescribe 42 days for her to respond to it as required under Order 11, Rule 2(3) of the High Court Rules. Leave has not been obtained under Order 6, Rule 6 for the issuance of the Writ (that is a Writ which is to be served out of the jurisdiction), to which the proviso under Order 6, Rule 6(1) does not apply.
- [11] Alternatively, the Defendant states that the Plaintiff did not properly serve the Writ because the orders for service of the Writ did not limit the time within which the Defendant must enter an appearance, which is in breach of Order 11, Rule 2(3) of the Rules, and the orders for service were not served on the Defendant.
- [12] Alternatively, the Defendant states that the first named Plaintiff, Eileen Premila Singh, is a person under disability and must sue by next friend in terms of the provisions of Order 80 of the High Court Rules.
- [13] The Defendant is claiming costs on an indemnity basis as the Plaintiffs have been given fair notice of the irregularities and the relevant law pertaining to Wills and grants of probate abroad.

THE AFFIDAVIT FILED BY KAMLA WATI ZITA SINGH

[14] The Defendant filed an Affidavit in support of the Summons to dispute the jurisdiction of the Court. The contents of the Affidavit can be summarized as follows:

1. The Defendant states that she is the lawful wife and now the widow of James Shankar Singh, the Deceased. She married the Deceased on 12 November 1996, but deposes that they were in a relationship since 1958. They have two children from the marriage, namely Francis Aneet Singh and Anita Bidesi.
2. The Deceased and the Defendant lived together at No. 7, Buckingham Crescent, Papatoetoe, Auckland between the years 2002 and 2010 and then at 108, Kilkenny Drive, Danemora, Auckland, New Zealand until his death on 27 July 2014.
3. The Plaintiffs are all the children of the Deceased from his first marriage to Eileen Vidya Wati Singh, who died on 7 October 1996. She personally knows all of the Plaintiffs as they have visited the Deceased at their home in New Zealand from time to time.
4. The Defendant deposes that Eileen Premila Singh (the first named Plaintiff), suffers from a mental disorder. The Deceased was aware of this and made special provision for Eileen in his Will dated 11 August 2009. The Defendant is under certain directions in the Will for her care and maintenance. She is certain that Eileen is incapable of managing and administering her own affairs.
5. She deposes that the Deceased died on 27 July 2014 at their residence in 108, Kilkenny Drive, Danemora, Auckland, New Zealand.
6. The Deceased made and signed his last Will on 11 August 2009. The signing was witnessed by Imelda Francis Hardiman (a Counsellor of Remuera, Auckland) and Carolyn Kingham (a teacher aide of Papatoetoe, Auckland). A copy of the Will has been annexed to her Affidavit.
7. On 24 October 2014, the High Court of New Zealand (Wellington Registry) granted Probate in the Estate of the Deceased. A copy of the Probate, bearing the seal of the

High Court of New Zealand has been annexed (bearing Probate No. CIV 2014-485-602314).

8. Since the Deceased has some assets in Fiji, after the grant of Probate, she had instructed her Lawyers in New Zealand to take steps to re-seal the New Zealand Probate in Fiji. The Fiji law firm Crompton filed for re-sealing in Fiji.
9. On 13 August 2014, the third and fifth named Plaintiffs, James Jyanendra Singh and Patrick Dhirendra Singh, lodged a caveat claiming that the Deceased died intestate. This caveat had lapsed on 13 February 2015. Thereafter, on 24 February 2015, the fourth named Plaintiff, Eireen Praveena Singh, lodged a similar caveat claiming that the Deceased died intestate.
10. The Defendant denies the claims made by the Plaintiffs, inter alia, that the Deceased was incapable of understanding what he was doing at the time he made his last Will on 11 August 2009.

THE AFFIDAVIT FILED BY JAMES JYANENDRA SINGH

[15] In the Affidavit in Opposition to the Defendant's Affidavit and Affidavit in Support of the Summons, filed by James Jyanendra Singh, the third named Plaintiff, he responds to all the averments made by the Defendant. He deposes that the Plaintiffs' Solicitors in New Zealand have filed a Statement of Claim in the Auckland High Court Registry claiming that the Probate No. CIV 2014-485 granted to the Defendant be recalled.

[16] He states that if the Writ of Summons with the Statement of Claim is dismissed, the Defendant would be in a position to re-seal the Probate and to deal with all the Estate properties in Fiji according to the Will of the Deceased, which is being challenged in New Zealand. Accordingly the claims made by the Plaintiffs in this action and in the action in New Zealand would be an exercise in futility if the

Defendant is allowed to re-seal the Probate and to deal with all the Estate properties.

THE AFFIDAVIT FILED BY WARREN JOHN SCOTTER

- [17] The deponent states that he is a Barrister and Solicitor of the High Court of New Zealand and a Partner of the firm Harkness Henry, Lawyers, Hamilton, New Zealand. His law firm is acting on behalf of the second to fifth named Plaintiffs in this action.
- [18] On 17 July 2015, proceedings had been commenced on their behalf in the High Court of New Zealand at Auckland, challenging the validity of the Will made by the Deceased on 11 August 2009 and thereby seeking the recall of the Probate No. CIV 2014-485-602314, granted to Kamla Wati Zita Singh, the Defendant in these proceedings.

LEGAL PROVISIONS AND ANALYSIS

- [19] The Defendant has filed a Summons to dispute the jurisdiction of Court, along with a supporting Affidavit, pursuant to Order 12, Rule 7 of the High Court Rules, 1988. The rule provides as follows:

“Dispute as to jurisdiction

7. –(1) A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or on any other ground shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence apply to the Court for-

- a) an order setting aside the writ or service of the writ on him, or*
- b) an order declaring that the writ has not been duly served on him, or*
- c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction, or*

- d) *the discharge of any order extending the validity of the writ for the purpose of service, or*
- e) *the protection or release of any property of the defendant seized or threatened with seizure in the proceedings, or,*
- f) *the discharge of any order made to prevent any dealing with any property of the defendant, or*
- g) *a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action, or*
- h) *such other relief as may be appropriate.*

(2) An application under paragraph (1) must be made by summons or motion, and the notice of motion or summons must state the grounds of the application.

(3) An application under paragraph (1) must be supported by an affidavit verifying the facts on which the application is based and a copy of the affidavit must be served with the notice of motion or summons which the application is made.

(4) Upon hearing an application under paragraph (1), the Court, if it does not dispose of the matter in dispute, may give such directions for its disposal as may be appropriate, including directions for the trial thereof as a preliminary issue.

(5) A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the Court by reason of his having given notice of intention to defend the action; and if the Court makes no order on the application or dismisses it, the notice shall cease to have effect, but the defendant may, subject to rule 6(1), lodge a further acknowledgement of service and in that case paragraph (6) shall apply as if the defendant had not made any such application.

(6) Except where the defendant makes an application in accordance with paragraph (1), the acknowledgement by a defendant of service of a writ shall, unless the acknowledgement is withdrawn by leave of the Court under Order 21, Rule 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings”.

[20] In determining this issue it is important to refer to Order 4 of the High Court Rules, which deals with the Commencement and Progress of Proceedings and Consolidation of Proceedings. Order 4, Rule 1 reads as follows:

(1) Proceedings must ordinarily be commenced in the High Court registry located in the Division in which the cause of action arises.

(2) Applications for Probate or Letters of Administration and Resealing made under the provisions of the Succession, Probate and Administration Act (Chapter 60) shall be filed in the principal probate registry in Suva.

(3).....

(4).....

[21] It is clear from this Rule that proceedings in the High Courts of Fiji ‘ordinarily’ commence where the cause of action arises. In the instant case, it is clear that the cause of action, which is the making of the last Will of the Deceased, took place in New Zealand. It is clearly established from the pleadings filed that the Deceased was domiciled in New Zealand, on 11 August 2009, the date he made the Will which is the subject of this action and also at the time of the death, on 27 July 2014.

[22] The Will was signed in New Zealand and the signing of the Will was witnessed by witnesses who were domiciled and remain domiciled in New Zealand. Therefore, the witnesses to the Will are domiciled and remain domiciled in New Zealand.

[23] Of the five Plaintiffs, only Patrick Dharendra Singh, is domiciled in Fiji. Two of the Plaintiffs, namely Eileen Premila Singh and Eireen Praveena Singh, are domiciled in New Zealand as well.

- [24] The Defendant, who has been named as the sole Executrix and Trustee of the Will, is also domiciled in New Zealand.
- [25] Furthermore, Probate has already been granted to the Defendant, on 24 October 2014, by the High Court of New Zealand (Wellington Registry) (bearing Probate No. CIV 2014-485-602314).
- [26] All these factors, which can be referred to as the so called 'connecting factors', make the High Court of New Zealand the most convenient forum to adjudicate upon any dispute pertaining to the validity of the Will made by the Deceased.
- [27] To cap it all off, four of the Plaintiffs in this action have commenced proceedings in the High Court of New Zealand at Auckland, challenging the validity of the Will made by the Deceased on 11 August 2009 and thereby seeking the recall of the Probate No. CIV 2014-485-602314, granted to Kamla Wati Zita Singh, the Defendant in these proceedings.
- [28] As such, filing and continuing with these proceedings, in the High Court of Fiji, tantamount to duplicity of proceedings and an abuse of the process of law. There is a grave danger of having irreconcilable decisions by the two courts (New Zealand and Fiji) if they reach different decisions on validity of the Will.
- [29] In *Re Yahuda (Deceased)* [1956] 2 All ER 262, Justice Karminski referred to a passage on page 24 of *Mortimer on Probate Law and Practice* (2nd Edition.), as follows:

"When a Will has been recognised as valid by a court of competent jurisdiction in the country in which the Testator was domiciled at the time of his death, it is the established practice of the English court to admit to the probate in this country a duly authenticated copy of such Will, without further evidence of validity, as it is presumed that the foreign court has been satisfied on that point."

Justice Karminski further added:

The inconveniences of re-examining the validity of testamentary documents which have been pronounced valid by the court of the domicile appear to be obvious and have often been commented on in this court. The executors are entitled to the prayer in the motion, and I so order.

- [30] In *Reddy v Shah* [2005] FJHC 469, the Plaintiffs alleged that a will on which probate had been granted in the Australian State of Victoria was forged. They challenged its validity. Justice Jiten Singh made order striking out the action.

“The probate was granted in Victoria, Australia. Therefore it is a formal declaration of the validity of the Will by the Victorian Court. As such it is the proper forum to make contrary declaration of invalidity.

.....

To revoke the Victorian grant, the plaintiffs must file their action in the Victorian Court. There is comity between courts in Australia especially superior courts and courts in Fiji. There is a danger of having irreconcilable decisions over probate matters of the two courts if they reach different decisions on validity of the Will.

.....

I am of the view that the action is an attempt to get this court to dictate to another court what it should do with a grant it made. I consider I do not have the jurisdiction to do that. Accordingly I strike out the action with costs which I fix in the sum of \$400.00 to be paid in fourteen (14) days.”

- [31] The Counsel for the Plaintiffs has stated that the relevant statutory provisions in relation to this matter are Sections 3, 44, 45 and 46 of the Succession, Probate and Administration Act (Chapter 60).

- [32] Section 3 of the Act deals with the jurisdiction of court (now the High Court) and provides as follows:

3.-(1) Subject to the provisions of this Act, and to any rules made hereunder the court shall have jurisdiction in contentious and non-contentious probate matters and proceedings and in the granting or revoking of probate of wills and administration of estates of persons dying leaving property in Fiji.

(2) The jurisdiction vested in the court by the provisions of subsection (1) shall, subject to any modifications effected by any rules made under the provisions of section 52, be in conformity with the law and practice in force in England on the 1st day of January, 1967, or on such later date as the Chief Justice may from time to time appoint by notice in the Gazette, so far as the same can be read as capable of application to local circumstances.

[33] In terms of Section 3, there is no denying the fact that the High Courts of Fiji have jurisdiction in contentious and non-contentious probate matters and proceedings and in the granting or revoking of probate of wills and administration of estates of persons dying leaving property in Fiji. However, the issue in the instant case is whether the jurisdiction of the High Courts of Fiji is taken away when proceedings have already commenced in another competent forum in respect of the same matter.

[34] Sections 44 and 45 of the Succession, Probate and Administration Act apply to applications for resealing of probates or administration. The Sections stipulate as follows:

44.-(1) Every executor or administrator appointed under this Act, or named in any probate or letters of administration granted by any court of competent jurisdiction in any country or territory of the Commonwealth and making application under this Act for the resealing of such probate or administration, shall be deemed to be resident in Fiji.

(2). Where not actually so resident he shall, before the issue or sealing of any probate or administration, file with the Registrar an address within the city of Suva at

which notices and processes may be served upon him, and all services at such registered address shall be deemed personal service.

45.-(1) When any probate or administration heretofore or hereafter granted by any court of competent jurisdiction, in any country or territory of the Commonwealth, is produced to and a copy thereof deposited with the Registrar by any person being the executor or administrator, whether original or by representation or by any person duly authorised by power of attorney in that behalf, duly executed by such executor or administrator, such probate or administration may be sealed with the seal of the court.

(2) When so sealed, such probate or administration shall have the like force, effect and operation in Fiji and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities, as if such probate or administration had been originally granted by the court.

(3) The court may require any such administrator or attorney of an administrator, to give security for the due administration of the estate in respect of matters or claims in Fiji.

[35] Since the Deceased has some assets in Fiji, it is in terms of the above provisions of law that the Defendant has, after the grant of Probate, instructed her Lawyers in New Zealand to take steps to re-seal the New Zealand Probate in Fiji.

[36] Section 46 of the Act deals with the lodging of caveats.

46.-(1) Any person may lodge with the Registrar a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under the provisions of this Act, at any time previous to such probate or administration being granted or sealed.

(2) Every such caveat shall set forth the name of the person lodging the same, and an address within the city of Suva at which notices may be served on him.

- [37] As stated before, it is in terms of these provisions that the third, fourth and fifth named Plaintiffs, James Jyanendra Singh, Eireen Praveena Singh and Patrick Dhirendra Singh, lodged caveats claiming that the Deceased died intestate and that no grant be sealed in the estate of the Deceased without notice to them.
- [38] The Counsel for the Plaintiffs has also brought to the attention of Court the provisions of Order 76 of the High Court Rules, 1988. These are Special Provisions to Probate Proceedings. It is the view of this Court that these provisions must be read in conjunction with Order 4 of the High Court Rules.

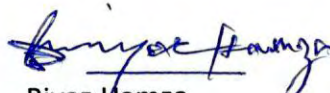
CONCLUSION

- [39] For all the aforesaid reasons, I am of the view that the Writ of Summons filed by the Plaintiffs, on 8 April 2015, should be struck out for want of jurisdiction. Since I have decided to strike out the Writ of Summons for want of jurisdiction, there is no necessity for Court to adjudicate upon the alternative objections taken up by the Defendant.
- [40] I now turn to the issue of costs. The Defendant is claiming costs on an indemnity basis. The counsel for the Defendant has made detailed submissions seeking costs on an indemnity basis.
- [41] Court has considered these submissions. Indeed the Defendant is entitled to costs. However, taking all factors into consideration I am not inclined to award costs on an indemnity basis. Instead I award costs to the Defendant summarily assessed at Fijian Dollars \$2000.
- [42] Accordingly, I make the following Orders:

ORDERS

1. The Writ issued on 8 April 2015 is struck out for want of jurisdiction.
2. I grant costs to the Defendant summarily assessed at Fijian Dollars \$2000, to be paid within one month from today.

Dated this 13th day of May 2016, at Suva.


Riyaz Mamza

JUDGE

HIGH COURT OF FIJI

