

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA, FIJI ISLANDS

CIVIL ACTION HBC 144 OF 2010

BETWEEN : **SUMINTRA DEVI** father's name Mohruru of Tavarau, Ba,
Retired.

PLAINTIFF

AND : **SUSHIL CHAND** father's name Suruj Deo and Sole Executor
and Trustee of the **ESTATE OF SWARUP** alia **RAM SWARUP**
son of Drikpal of Tavarau, Ba, Farmer.

DEFENDANT

Appearances:

Ms. J. Naidu for the Plaintiff
Ms. U. Baleilevuka for the Defendant

J U D G M E N T

1.0 **Introduction**

1.1 In these proceedings the Plaintiff claims the following reliefs
against the Defendant;

- a) An Order that the Defendant be removed as sole administrator and trustee of the Estate of Ram Sasrup alias Ram Swarup (s/o Drikpal) of Tavarau, Ba, Ba, Cultivator, Deceased, Testate pursuant Probate No. 37569 and that Saha Deo f/n Ram Singh of Tavarau, Ba, Farmer or some other fit and proper person be appointed in his place.
- b) Orders for the vesting of the lands, monies and other property held pursuant to the Estate in the trustee so appointed.
- c) An order that the matter be reverted to the Master for the

taking of an account of all the dealings and transactions of the Defendant as trustee of the said Estate.

- d) An Order that such account be taken on a wilful default basis.
- e) An Order that the Defendant pay to the Plaintiff the amount found to be owing upon the taking of such account.
- f) Interest.
- g) Costs.

2.0 **Statement of Claim**

2.1 The Plaintiff was the wife of the late Ram Swarup who died on 10th December, 1999 leaving a Will dated 27th August, 1999. The Defendant is the Sole Executor and Trustee of the Estate of Ram Swarup under Probate No, 37569 and such appointment was made pursuant to the said Will dated 27th August, 1999. Under the said Will the Plaintiff is the beneficiary for her life and after her death his grandson Sushil Chand, the Defendant's will become the absolute beneficiary of the deceased properties. The Estate of the deceased consists of a farm and house on Crown Lease reference number LD 4/7/1741 together with Sugar Cane Contract No. 8210 Drasa Sector.

2.2 It was agreed that the Defendant would cultivate the said land and retain half of the monies from cane proceeds on behalf of the Plaintiff and would hold these monies on behalf of the Plaintiff. It was also agreed that the Defendant would in respect of the monies received from Cane proceeds less expenses for the Estate, pay the Plaintiff her half shares and expenses on the Plaintiff's behalf every year. The Defendant however, did not provide or give half of the Plaintiff's monies from cane proceeds between 26th May, 2000 to May, 2010. In breach of the agreement and in breach of trust and in wilful default as trustee the Defendant borrowed sums of money from Sugar Cane Growers Fund for \$12088.43 for his personal use and had given securities over the said Estate Farm and Land by way of Mortgage. He failed and continued to fail to remit to the Plaintiff any part of the monies received between year 2000 and year 2010 and thereafter failed and continued to fail to provide an account of the monies received between 2000 and 2010 and thereafter. He failed and continued to fail to complete the administration of the Estate. The Plaintiff has repeatedly sought from the Defendant details of what sums have been collected by

the Defendant on behalf of the Plaintiff, together with calculation of his commission and a statement as to the amounts remitted to the Defendant and the Defendant has refused to comply with any of these requests. Instead the Defendant has physically and verbally assaulted the Plaintiff and evicted her from the said house which is part of the Estate.

3.0 **Statement of Defence and Counter Claim**

3.1 The Defendant states in his Statement of Claim that the property Known as LD 4/7/1741 is only a Cane Farm and there is no house on the said farm land. On 15th July, 2000 the Plaintiff and the Defendant entered into a Deed whereas it was agreed that the Defendant will pay \$500.00 per annum for the Plaintiff's living expenses which will continue for the rest of the Plaintiff's life. The Defendant had been paying the \$500.00 per annum to the Plaintiff since the year 2000 for which the Defendant possess the receipts signed by the Plaintiff. By entering into a Deed the Plaintiff relinquished her rights to ask for accounts and or Administration of the Estate of late Ram Swarup. There was never a house built on the Estate property but the house which the Plaintiff and the Defendant were residing was the house that was in the Plaintiff's land known as Lot 7 on Plan BA 2416 which the Plaintiff sold to one Vijay Prasad who later sold it to Saha Deo Singh who is now residing overseas. When Saha Deo Singh purchased the property from Vijay Prasad he obtained an Order from the Court to remove the Defendant from the house on the said property. Accordingly, the Defendant prays the Plaintiff's Claim be dismissed with costs of the action.

4.0 **Reply to Defence**

4.1 In her reply to Defence the Plaintiff admits that there is currently no house on the property in question. She also admits that there is an agreement dated 15th July, 2000 which stipulates that the Defendant will pay \$500.00 to the Plaintiff but joins issues with the Defendant in relation to the alleged payments made by the Defendant. She also joins issue with the Defendant in relation to other facts stated in the Statement of Defence.

5.0 **Evidence of the Plaintiff**

5.1 The Plaintiff's only witness was the Plaintiff herself. During examination in chief the Plaintiff said her husband passed away 15 years ago and she is a beneficiary under his will. She also said

that the Defendant was fighting with her and he never paid anything after her husband's death.

- 5.2 She testified further that he had to go to her sister's place as the Defendant fought with him and did not give her food.
- 5.3 She admitted in evidence that they entered into an agreement on August 2000 for the Defendant to give her \$500.00 annually. She said he was giving her \$500.00 but when she asks for more from him, he refuses to give.
- 5.4 When she was asked about the signing of the agreement she said she kept her thumb impression to it before a lawyer Mr. Shahu Khan at Ba but she did not know anything about the agreement as she cannot read or write.
- 5.5 She said she received \$500.00 from the Defendant only two or three times and it was collected from the office of Solicitors Vijay Naidu Associates.
- 5.6 In her further testimony, the Plaintiff stated that the Defendant never revealed to her about the loan he obtained from Cane Growers Fund. She said the Plaintiff used all the loan money without giving anything to her.
- 5.7 In her cross - examination she said that she put her thumb print on the agreement before Solicitor Mr. Shahu Khan but contents of the agreement was never explained to her. When she was asked what is the agreement that is referred to in Clause five(5) of her Statement of Claim she said she can't remember and she never signed any other agreement.
- 5.8 When she was referred to the facts stated in her Statement of Claim she said she doesn't know who made the Statement of Claim. When she was asked why she did not plead in her statement of claim that the Defendant gave her \$500.00 only for food, she said how can she know because she never went to do the Statement of Claim.
- 5.9 When it was put to her that the Defendant paid her \$500.00 every year since the date of executing the agreement she said she was paid for 3 years and then he stopped paying.
- 5.10 In her cross-examination she reasserted that the contents of the agreement was never explained to her by the Solicitor.

- 5.11 When she was shown the receipts issued acknowledging the payments made by the Defendant (Defendants Exhibit 4 and 5) she said she never took the money. When she was shown another receipt Defendants Exhibit 6, she said one time the Defendant came home with \$500.00. When she was shown Defendants Exhibit 7 receipt dated 9th August, 2002, she said she received the money and that was the last payment. But when she was shown Defendants Exhibit 8 and Defendants Exhibit 9 dated 5th April, 2005 she said she received \$500.00. When she was shown receipt dated 1st May, 2005 Defendants Exhibit 10 she said he must have deposited that amount at Mr. Sahu Khan's office but she never picked it from there.
- 5.12 When it was put to her that the land occupied by the Defendant doesn't have a farm house she said she doesn't know. But she admitted that she sold her house to one Vijay Prasad and when it was sold she was occupying it with the Defendant.
- 5.13 When she was asked what she intends to do with the Estate she said she will take it and whoever looks after her can stay there. She said when she doesn't have anything, nobody will give her even a bowl of water but if she has the Estate they will treat her. When she was asked who else should be appointed as Trustee, she said she can't think at the moment but will see in the future.
- 5.14 In answer to re- examination she reiterated that the contents of the agreement was never explained to her and she had no idea about it. She also said as the Defendant is not looking after her she wants the land back in her name.

6.0 **Evidence of the Defendant**

- 6.1 The Defendant Sushil Chand testifying on his own behalf said that the Plaintiff is her maternal grandmother; and that the grandfather passed away in 1999 leaving a Will under which he was made the Trustee of the land. He said he applied for probate after the grand father's death and the Estate contain only a farm land.
- 6.2 In his further testimony the Plaintiff stated that the problems started when the Plaintiff sold the house and 6 acre cane farm which was under her name. It was revealed by him that he was thrown out of the house by a bailiff who came with a Court Order after the sale of the house.
- 6.3 When he was asked why a deed was made he said it was made

when some relatives came to their place after family problems arose and told him to pay \$500.00 to the Plaintiff. He said it was the idea of the Plaintiff and her sisters to draw up a deed and the Plaintiff went with her sisters and father's brothers to Solicitor's office to execute it.

- 6.4 When he was asked whether the Deed was explained to the Plaintiff the Defendant said it was explained to her by the lawyer in the presence of law clerks.
- 6.5 He testified that he agreed to pay \$500.00 for her personal use and he also said the Plaintiff told him she would take the income from her lands and \$500.00 from him. According to his evidence he has paid \$500.00 annually to the Plaintiff from 2000 till 2010 and the payment was made by depositing it with Solicitor Sahu Khan's office and the Plaintiff collects the money from there. The bundle of payment receipts from the year 2000 to year 2010 were marked as Defendant Exhibit I (should be corrected as Defendant Exhibit 11) and tendered to Court.
- 6.6 Answering cross-examination he said the Plaintiff would have been 85 – 90 years old when she signed the agreement and she was in good health, knew everything at that time.
- 6.7 Answering further he said that he made an effort to visit her after she left home but she did not want to see him.
- 6.8 When he was asked what happened to the grand father's farm, the Defendant said currently he is getting about 30 tons of cane from it and he is not working properly in cultivating cane because of this case. He also said he is planting some vegetable and feeding his three children. He also said that sometimes Mr. Deo blocks the road by putting stones or by putting a chain.
- 6.9 In his cross-examination he admitted that he had to administer the Estate and look after the beneficiary as he is the Executor and Trustee according to the Will of the deceased. He made executing an agreement to pay \$500.00 to the Plaintiff annually. He said this payment is for her pocket use.
- 6.10 When he was asked is it right to say it's a payment of \$41.00 for a day given for her expenses Defendant said it's not as her expenses she got 200 tons of cane from her own farm.
- 6.11 When he was asked whether he agrees that the Plaintiff did not get independent legal advice at the time of executing the deed he

said she went with her family to sign it and she was aware of what she was doing.

- 6.12 When it was put to him that the receipts he tendered in evidence shows payments for only few years he said he has lost some of the receipts. When it was suggested to him that he has defaulted payments he said payments are due from 2010 as he stopped paying due to this case. He said further that he is not paying \$500.00 from 2010 till a judgment is given in this case.
- 6.13 He admitted that the Plaintiff lived with him for 10 years after the grandfather's death. When he was asked whether he expected the Plaintiff to live with \$500.00 annual payment for those 10 years the Defendants said \$500.00 was for her expenses, but they were looking after her and paid for her food and everything within that period.
- 6.14 When he was asked whether he had to give accounts of the Estate to the beneficiary he said according to the deed there is no need for him to give accounts. He said further that he has not kept records of the Estate and the Plaintiff never requested for records while she was living with them.
- 6.15 When it was put to him that for 10 years the Plaintiff was suffering and she did not live the life in the way when her husband was alive the Defendant said she used to stay happily but the problems arose when the other family wanted her house.
- 6.16 He admitted having obtained a loan and spending that money. He also admitted that he did not inform about the loan to the Plaintiff.
- 6.17 When he was asked whether \$500.00 is enough for a year for the Plaintiff the Defendant said it's not enough, he wants the Plaintiff to come and stay with her and if she wants he can give some more as she is his grandmother.
- 6.18 In answer to re-examination the Defendant confirmed that the deed was explained to the Plaintiff at the Solicitor's office. It was revealed by him that his grandmother was given the opportunity of obtaining independent legal advice but she refused getting such advice saying it's a family matter and lawyers will take a lot of money.

7.0 **Analysis of Evidence**

- 7.1 Both parties admit that there was a will made by deceased Ram Swarup and the Defendant was made the sole Executor and Trustee of the Estate of Swarup by the said will. It is also admitted that the deceased devised and bequeathed all and singular personal property he had to his wife the Plaintiff for her life and after her death to his grandson the Defendant absolutely. The Plaintiff does not challenge the execution of the Will or the grant of probate to the Defendant in these proceedings
- 7.2 Though the Plaintiff states in the statement of claim that the Estate consists of a farm and a house in Crown Lease reference number LD 4/7/1741, in her reply to defence she has admitted currently there is no house on the said farm. She stated in her examination in chief that she had to leave the house situated on the farm. But in cross examination she admitted that the house they were living was situated in her land which she sold to Vijay Prasad.
- 7.3 From the reply to defence and the Plaintiff's evidence as mentioned above it is established that the Estate of Ram Swarup consists of a cane farm only and the house where the Plaintiff and the Defendants family lived was situated on the Plaintiff's land and it was sold by her to Vijay Prasad.
- 7.4 The Plaintiff states in her Statement of Claim that it was agreed for the Defendant to cultivate the said land and retain half of the monies from cane proceeds on behalf of the Plaintiff and to hold that money on trust for the Plaintiff. It is stated further that it was also agreed that the Defendant would in respect of the monies received from cane proceeds less expenses for the Estate, pay the Plaintiff her half share and provide to the Plaintiff all receipts and expense on the Plaintiff's behalf every year. In her claim she alleges that the Defendant did not provide or give half of the Plaintiff's monies from cane proceeds between 26 May 2000 and May 2010 or give any accounts and also failed to administer the Estate.
- 7.5 It is also alleged by the Plaintiff that in breach of the agreement and in breach of trust and wilful default as the trustee the Defendant borrowed substantial sums of money from the Sugar Cane Growers Fund for \$12,088.43 for his personal use and had given Securities over the said Estate farm and by way of Mortgage.
- 7.6 The Plaintiff in her examination in chief never revealed of any

other agreement other than the deed which she said was not explained to her. She admitted that the Defendant paid \$500.00 two or three times. She said she had to leave the house where the Defendant was living and go to her sister's place as the Defendant did not look after her.

- 7.7 Even in cross examination she never revealed of any other agreement other than the deed. She reasserted that she signed the said deed without knowing its contents as the Solicitor Mr Sahu Khan never explained the contents of the Deed to her.
- 7.8 She has admitted in cross examination that she was paid \$500.00 by the Defendant for two or three years. When she was shown receipts acknowledging payments for several years she admitted that the said payments were made. When she was shown a receipt issued for the year 2005 she said the Defendant would have deposited the money with the Solicitors but she never collected it.
- 7.9 The Defendant stated in evidence that he paid the Plaintiff \$500.00 annually from the year 2000 to 2010 and that he has not got receipts for some payments. He said further that he stopped paying when these proceedings were initiated against him by the Plaintiff.
- 7.10 He stated that the Deed was signed at Mr Sahu Khan's office and the contents was explained to the Plaintiff by the Solicitor. He said that the Plaintiff did not want to get independent legal advice saying it was a family matter and the lawyers costs are high. He revealed further that the Plaintiff signed the Deed after it was explained to her and her sisters were present at the time of signing it.
- 7.11 He admitted in evidence that no records of the Estate were kept by him and no accounts were shown to the Plaintiff as she never requested for accounts. He also said there was no need to give accounts to her according to the Deed.

8.0 **Determination**

- 8.1 From the evidence as analysed herein before I find that the Defendant has been paying \$500.00 to the Plaintiff till the year 2010 though some receipts are not produced. If the Defendant defaulted any payment within the 10 year period from 2000 – 2010 the Plaintiff could have given notice to the Defendant and initiated legal proceedings against him to recover the amount in

in default or to set aside the Deed. The Plaintiff has stayed with the Defendant for ten years without challenging the validity of the Deed and come to Court after selling her house where they lived together.

8.2 Based upon the evidence in this case I find that the Plaintiff has failed to establish that there was an agreement for the Defendant to cultivate the land and retain half of the monies from cane proceeds on behalf of the Plaintiff. Furthermore the Plaintiff has admitted keeping her thumb impression to the Deed wherein it was agreed that the Defendant will pay \$500.00 per annum for the Plaintiff's living expenses which will continue for the rest of the Plaintiff's life.

8.3 She has never disclosed about the said Deed in her Statement of Claim. It is only in her evidence she states that the contents of the said Deed was not explained to her by the Solicitors. She has not sought a declaration to set aside the Deed in her Statement of Claim. However, in the written submission filed the learned Counsel for the Plaintiff states that the Deed executed between the Plaintiff and the Defendant ought to be invalid since there was no legal advice obtained by the Plaintiff and it further appears the said document was only signed under undue influence of the Defendant.

If the Plaintiff wanted the Deed to be set aside upon those grounds she should have specifically pleaded the said grounds in her Statement of Claim and sought a declaration from Court to set aside the Deed accordingly. Having failed to do so and having not disclosed anything about the said Deed in her Statement of Claim it is not open for the Plaintiff to challenge the validity of the said Deed at the Trial stage of the proceedings.

8.4 The Defendant in his evidence revealed that the Deed was executed due to the problems that arose between him, his wife and the Plaintiff. He said further it was executed on the advice of the family members who came to their place when the problems arose. He also said that the Plaintiff's sisters were there with the Plaintiff when the Deed was executed.

8.5 In evaluating the evidence of the Defendant I find that his evidence is more credible and truthful. The Defendant's evidence which I accept as the truth revealed that the contents of the said Deed was explained to the Plaintiff at the time of its execution by the Solicitors and the Plaintiff's sisters were also present when the Plaintiff kept her thumb impression to it.

Therefore, I hold that the said Deed is valid and the Defendant has fulfilled his duties as the executor and trustee by paying \$500.00 to the Plaintiff annually as per the conditions of the said Deed. I also find that the Plaintiff is estopped from claiming any other benefit from the estate as she has relinquished her rights as the beneficiary and agreed to accept \$500.00 by entering into the said Deed with the Defendant.

8.6 Moreover, it is established in evidence that the Plaintiff has stayed with the Defendant for 10 years and accepted the annual payment of \$500.00 from him for several years. It is surprising to find her challenging the contents of the Deed after 10 years since its execution. Therefore I conclude that the Plaintiff's version lacked both credit and weight.

8.7 Whether it is fair to pay \$500.00 per annum is not a matter for the Court to look into as it was revealed in evidence that the Deed was executed to amicably resolve differences which arose between the Trustee and the Beneficiary. Accordingly, the Beneficiary has relinquished any other right in respect of the estate of the deceased. Therefore, the Court cannot set aside the Deed without the Beneficiary seeking an Order to that effect.

9.0 **Conclusion**

9.1 In conclusion I hold that the Plaintiff has failed to prove her case on the balance of probabilities. Accordingly I hold that the Plaintiff is not entitled to any of the reliefs claimed by her in her Statement of Claim.

9.2 The Defendant in his evidence stated that he has not paid the Plaintiff from the year 2010. One receipt attached to the bundle of receipts marked Defendant Exhibit 1 (correctly DE11) is dated 5th August, 2010 but the Solicitors have stated therein that it is a part payment for the Court case. Therefore I hold that he has to pay the Plaintiff the arrears due for seven years amounting to \$3500.00 from the year 2010 to 2016 and continue to pay \$500.00 annually thereafter till her life time.

10.0 **Final Orders**

- i) The Plaintiff's Claim is dismissed.
- ii) The Defendant to pay the Plaintiff Three Thousand Five Hundred Dollars (\$3,500) as arrears of the annual payment

due from the year 2010 to 2016.

- iii) The Defendant to pay Five Hundred Dollars (\$500.00) annually to the Plaintiff from the year 2017 till her life time.
- iv) The Plaintiff to pay the Defendant costs summarily assessed in a sum of Thousand Dollars (\$1000.00)
- v) \$1000.00 cost is to be defrayed by the Defendant from the amount of \$3500.00 to be paid to the Plaintiff as per this Judgment.



At Lautoka

1st June, 2016

**Lal S. Abeygunaratne
Judge**