

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 28 of 2018

IN THE ESTATE of MOTI CHAND aka
LVDUR late of Wainibokasi Road Nausori in
the Republic of Fiji, Bus proprietor, Deceased,
Testate.

BETWEEN: CHATTUR LAL Wainibokasi, Nausori in the Republic of Fiji, Bus Operator

PLAINTIFF

AND: MANI LAL of Ratu Kadavulevu Road, Muana near Nausori in the Republic of Fiji,
Businessman

1ST DEFENDANT

BRIJ LAL aka BRIJU PRASHAD of 39A Leeds Street, Milson Palmerston North,
New Zealand, Retired.

2ND DEFENDANT

FIJI PUBLIC TRUSTEE CORPORATION LIMITED a limited liability company
having its registered office situated at 83-85 Amy Street, Taorak, Suva in the
Republic of Fiji.

3RD DEFENDANT

BEFORE: Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Singh R for the Plaintiff

Mr. Chand A with Ms. Nand S, for the 1st Defendant

Non Appearance of 2nd Defendant

Non Appearance of 3rd Defendant.

DATE OF JUDGMENT: Thursday 27th April 2023 @ 9-30am.

JUDGMENT

[Validating Codicil as a Supplementary to Deceased's Will - and Grant of Probate]

Introduction

- (1) The Plaintiff filed a Writ of Summons on 25th April 2018 and sought for the following relief:
 - (i) AN ORDER validating the Codicil and its contents therein executed by the deceased on the 12th of August, 1966 to be a supplementary of the Last Will and Testament of MOTI CHAND aka LUDUR dated 4th of March, 1966.
 - (ii) A grant to be issued pursuant to the Last Will and Testament of MOTI CHAND aka LUDUR executed on the 4th of March, 1966 and Codicil executed on the 12th of August, 1966 to the Plaintiff.
 - (iii) AN ORDER removing the 2nd Defendant as the nominated trustee MOTI CHAND aka LUDUR under the will dated 4th of March, 1966.
 - (iv) AN ORDER restraining the 1st and 3rd Defendant from applying for Letters of Administration Grant on the estate of MOTI CHAND aka LUDUR and the Plaintiff be appointed in the Place of the Defendant under provisions of Section 35 of the Succession, Probate and Administration Act of Fiji Cap 60.
 - (v) AN ORDER for the 3rd Defendant to release to the Plaintiff all documents pertaining to the estate MOTI CHAND aka LUDUR
 - (vi) AN ORDER for stay on Civil Action No 75 of 2017 under the Probate Jurisdiction
 - (vii) AN ORDER that cost of this action be paid by the Defendant on indemnity basis
 - (viii) ANY OTHER ORDER that this Honourable Court may deem fit, just and expedient.
 - (ix) THE total amount claimed is limited to the jurisdiction of this court.
- (2) The 1st Defendant filed its Statement of Defence on 11th June 2018 and later amended the Statement of Defence together with a Counter-Claim on 09th December 2019.
- (3) Reply to Amended Statement of Defence and the Counter was filed by the 1st Defendant on 18th December 2019.
- (4) 1st Defendant's Reply to Defence and Counter Claim was filed on 09th January 2020.

Evidence

Plaintiff's Case

- (5) The Plaintiff called two witnesses.

[PW1] Meli Vakacegu

(6) This witness gave evidence in his capacity as the Senior Court Officer in Charge of the Principle Probate Registry based in Suva.

(7) His evidence in summons was as follows:-

Referred to file in his possession. Probate no. 21139 filed on 9th August 1985 by the Executors (ix) Dhanpat, Dhurup Lal, Brij Lal, Chattur Lal and Prahalad Ram Kheiwani. The file had the deceased's original will dated on 4th March 1966. Has Testators and witnesses signature. No issue with deceased's will. [Exhibit P1] There is a codicil on Probate file. It is not signed by the Testator but had the impression of his and Dhanpat's left thumb print together with the signatures of the other Executors (ix). No probate grant was issued on Probate Application No. 21139. There was a Caveat lodged by Chattur Lal (Plaintiff) Caveat no 32/1994 lodged on 11th August 1994. [Exhibit P3]

(8) Original affidavit of Shaukat was filed together with Probate documents for grant. His affidavit tells the Court the circumstances in which the Codicil was made.

(9) At this stage of the proceedings, the 1st Defendant objected to Shaukat Ali's affidavit to be tendered into evidence on the grounds that Deponent Shaukat Ali has already taken demise.

(10) However, Counsel representing the Plaintiff submitted that Shaukat's affidavit taken about the Codicil, it was raised at paragraph 7 of the Pre-Trial Conference minutes and it is for this court to decide as to what weight to be placed on Shaukat's affidavit.

(11) The Court ruled that Shaukat Ali's affidavit to be marked and tendered into evidence is Exhibit P5.

In Cross Examination

(12) The witness testified that the will needs to be dated otherwise it will be refused. He had previously dealt with Codicils. Codicils also needs to be dated.

(13) The witness (PW1) looked at the Codicil and said: written with a pen, it is damaged, he will not accept this codicil in the present form. He cannot say when this codicil was signed or when the thumb print was impressed witnesses signature appears with the dates.

(14) The Testator signed the will on 04th March 1966.

(15) The Codicil has a thumb print, it will raise a doubt if one document (will) signed and [codicil] has a thumb print.

(16) Probate registry will not accept this codicil since it is undated, will not seek verification on signatures and thumb print. He can read part of the codicil; whole codicil is illegible and not be accepted as part of the will.

(17) Shaukat Ali's affidavit was filed together with the oath. Probate application is still pending issuance of Probate grant since Plaintiff's Caveat No. 32 of 1994 filed in 1994 appears on Court file.

- (18) Witness referred to Court's Correspondence of 13th November 1985 written to Parshotam & Company [Exhibit P9] - application not in order comply to certain requirements and that codicil is seeking to remove beneficiary Lata Devi.
- (19) There was an issue with the Codicil - issues with witnesses to provide affidavits, Beneficiary is removed Hence, grant of probate on hold.
- (20) He confirmed to Court that he would not have accepted this codicil in the form since it was undated, had torn edges and contents cannot be read. Supplementary affidavit of Shaukat Ali was filed to rectify the codicil.

[PW2] Chattur Lal

- (21) Mani Lal, [Defendant 1] is my younger brother. Further, [Mati Chand] passed away in 1966. He saw fathers Will made on 04th March 1966. He was unaware of this Will until Solicitor Messr Sherani told him about the Will in 1968. Dhan Pat was his mother, Dhurup Lal younger brother and Brij Lal also a younger brother.

Codicil

- (22) Unaware that his father made this codicil in 1966. Not ware if any lawyer came to his house. Father died in September 1966 because of diabetes
- (23) In 1966 Mani Lal [1st Defendant] was 14 years old. Did not see fathers Codicil when he was alive. His father and mother did not tell him about the Codicil. Sherani Lawyers told him about the codicil since after his father's death he told me that I will have to apply for Road Licence. My Cousin Prahalad Ram Khelawan gave instructions to Sherani & Co. His mother was alive then.
- (24) He knows Shaukat Ali, Sherani's Clerk. Unaware if Shaukat came home in 1966, not aware if he had orchestrated the preparation of this codicil. He did call Sherani & Co to come home to make his codicil.
- (25) When asked why he waited until 2018 to file this case? His answer was the court made no decision and application for probate grant remained pending.

Affidavit of Shaukat Ali

- (26) Witness saw this affidavit in 1985. His signature appears in the Probate Application lodged by Parshotam Lawyers.
- (27) Asked if he know why Probate Grant pending?

Answer was: lawyers know why not granted. I lodged a caveat through Sherani & Company because he was aware of the Codicil and that the brother was seeking a Probate Grant. Parshotam's file had the deceased's will and codicil.

Question: When asked what did he want from Court?

Answers: Distribution in terms of the Will including the Codicil.

Question: Do you know the contents of the codicil?

Answer: Apart from Will, Ram Khelawan, Dhurup Lal, Brij Lal and his name (Chattur Lal) appears and delete name of sister Lata Devi from the will.

Brother and sister did not get their share from the father's estate. I want to apply for Probate grant, if court allows to do so.

In Codicil, I had shares in Bus Industry.

1st Will

(28) Read the Deceased's will long time ago. Refers to paragraph (g) - father gave mother 1/3 share and Dhurup Lal, Brij Lal, Lata Devi, Mahendra and Mani Lal to get 2/3 shares.

Codicil Part 3

(29) I Direct Chattur Lal also to be a beneficiary in 2/3 of the Deceased's Estate together with the Deceased's sons Dhurup Lal, Brij Lal, Mahendra Lal and Mani Lal

(30) Codicil included my name (Chattur Lal) and excluded Lata Devi.

In Cross Examination

(31) Chattur Lal (Plaintiff) is the elder brother of Mani Lal (Defendant 1) and 2nd eldest child of Deceased, Moti Chand.

Will and Codicil

(32) Unaware father made a will dated 04th March 1966, nor aware of its content.

(33) Did not know will was made in 1966.

(34) Unaware of codicil.

(35) Did not transfer Route No. 12726.

Codicil

(36) When Codicil was signed I was not present. First time I came to know about deceased's will and codicil in 1968. Sherani explained the Contents of Codicil that I was a trustee and one beneficiary. He said that he will apply for a Probate Grants under the will and codicil.

(37) From 1968 after receiving knowledge of the will and Codicil, why probate grant not given, lawyers know about it and Prahalad was handling it I placed a Caveat because my brother (Plaintiff) and mother were applying for the Probate Grant on deceased's will.

(38) I was aware of the Letter dated 13th November 1985 or brought it to the attention of Prahalad. Question was put - 'you failed in your duty to obtain Probate Grant and administer the Deceased's Estate in terms of the Codicil (you were trustee).

Answer was - 'Handled by Lawyer.

Question: In Moti Chand's Estate. Any Assets left?
Answer: only Permit i.e. Route 12726.

After 2 years, he read the Will and Codicil.
Reads - "I appoint Chattur Lal [Plaintiff] to be the Executor and trustee."
Father could not read English

Question: was father able to sign?

Answer: In Codicil he impressed thrum print. Father was fit when he made the will and he resided with parents and siblings.

Statement of Defence and Counter Claim

(39)

Question: Why is there an objection to allow 1st Defendant [Mani Lal] to be appointed as an Administrator in deceased's will?

Answer: He is not recognizing the Deceased's Codicil

Question: Did you stop Mani Lal [1st Defendant] from operating the route?

Answer: Mother told Mani Lal [1st Defendant] Route 12726 to be looked after by Mani Lal (verbally) and after mother's demise distribute the Assets. In 1989, mother looking after Route 12726 with Mani Lal [1st Defendant] and myself

(40) No Probate Issued in the Estate of Moti Chand

The Defence Case

(41) The Defence Called the 1st Defendant as there only witness.

[DW1] Mani Lal:

(42) He was the Managing Director of Wainibakasi Transport Company. All the time mother saying to Deceased/ Father why don't you give some security to Chattur [Plaintiff] to look after and share. Does not know about the Company Re-Structure. He doesn't see the Deceased's will.

Question: When asked if he was aware of Codicil made in 1966.

Answer: I know paper not codicil.

In 1966 father got bed ridden, mute and not in good condition. I was there when 2-3 people come. My mother and Aunt was there too.

Question: mother said 'have you made the paper or drought it

Answer: They said, Auntie we will write here, what to write?

In reply mother said-

"My husband [deceased] has not given anything to Chattur Lal [Plaintiff] why not my small daughters 'Lata Devi's' share be given to Chattur Lal?"

She said: 'no, not Will but make another paper.'

Question: What did these people say?

Answer: to make trustee and take away Lata's share.

The content written down by them was not read to the father. I was sitting 3 meters away from them. Mother and Aunty telling father to sign the paper. 'Raise his hand and take the thumb print and do something.' The two men said, they can't do that.

I do not know when lift fathers hand and put the impresses. In the afternoon mother was saying husband has not signed the paper.

Codicil

- (43) *The contents of paper Apetia Seru Lawyer told me a paper codicil made. He told mother about the paper, mother said the paper not right, father put thumb print. Do not worry go with Will only to LTA. My mother said paper not worth. We all put father's thumb print.*

Counter Claim

- (44) *I want to be appointed as the Administrator because business going down and Public Trustee to see Grant given on Will.*

I don't want Plaintiff to be appointed as Administrator because not looking after the business.

Question: *If Chattur Lal (Plaintiff) is appointed as Administrator, what would be the disadvantage to you?*

Answer: *He will sell whole business.*

- *He was shown paragraph 2 of Codicil.*

- *He did not agree with the content.*

Cross Examination

- (45) *He did not see the Codicil in 1966. Father became bed-ridden in 1966. He did not see father's will before. Will shown to witness:*

I did not see this will until 1985. It is my fathers will.

Date is 04th March 1966.

Father was sick and could not look after property in 1966, but I have no documentation to support this.

I saw the Codicil in 1987.

In 1985 had the will, then got Codicil.

Wainibokasi is owned by 2 people, father and Chattur Lal (Plaintiff).

Now, if Chattur Lal becomes the Executor, he will sell the Assets and permits.

I can't say if Chattur Lal orchestrate this Codicil.

I am not calling any witnesses to support the Defence that Chattur Lal (Plaintiff) was not there at the time of the Codicil because both mother and Aunty are deceased.

I do not know who called Lawyers.

I saw someone lifting father's hand, mother yelling, Aunt saying brother.

Question: *If Court says that Codicil is valid, do you know that whether you nor mother will be deprived of the share.*

Answer: *I am not happy.*

- Question:** According to the will, mother will have 1/3 share, you will get mother's shares. If Codicil is valid, it will go to Mani Lal, Chattur Lal, Brij Lal, Dhurup Lal and Mahendra Lal as their shares under law, you will get your share.
- Answer:** Entire Dispute is about Route.
- Question:** Codicil says take out Lata but you will get your share and Plaintiff Chattur Lal to be appointed as the Executor and transfer the Assets of the Estate.
- Answer:** I have objection to Codicil because I know, hez (Plaintiff) will sell it. Chattur Lal in Law has 50% shares

In Re-Examination

- Question:** What is your fear that you may lose if Codicil is admitted into evidence and made valid?
- Answer:** Partner will sell, Chattur Lal has 50% shares.
- Question:** Why do you say Route will be sold?
- Answer:** Since in past he was selling, Only Road Service Licence operated by me left in Deceased's Estate.

Determination

(46) Following are the issues before this Court that needs determination:

1. **Whether** the Codicil made and executed by the deceased on the 12th day of August 1966 is valid and enforceable?
2. **Who** is the rightful Trustee and Beneficiary of the Deceased Estate?
3. **Should** the Plaintiff be declared to have share in the Deceased's Estate?
4. **Should** the Plaintiff's Statement of Claim be upheld or the Defendants Counterclaim?
5. **Whether** 1st Defendants Civil Action No. 75 of 2017 under the Probate Jurisdiction is procedurally incorrect?
6. **Should** the 3rd Defendant release all documents pertaining to the estate of Moti Chand aka Ludur to the Plaintiff or the Defendant?
7. **Whether** the Affidavit of Shaukat Ali being one of the attesting witnesses of the said Codicil filed on behalf of the Plaintiff is valid?
8. **Whether** the said Codicil was executed under duress?
9. **Whether** the Plaintiffs age should be of any consideration in granting him to be the Administrator of the said estate?
10. The residue of the estate left which is controlled by the 1st Defendant, **whether** the Plaintiff has any shares towards it?
11. **Whether** the Plaintiff and other biological children and beneficiaries have obtained their shares from the estate of M Chand?
12. **Whether** plaintiff is entitled to any of the shares from the bus company?

(47) The Plaintiff Chattur Lal is the son of the Late Moti Chand aka Ludur.

(48) The Plaintiff, 1st and 2nd Defendants are all biological children of the Deceased, Moti Chand.

- (49) The Deceased died Testate on 26th September 1966 and had executed his will on 04th March 1966.
- (50) The Deceased's late wife Dhanpat and the 2nd Defendant Brij Lal and Dhurup Lal were appointed as Trustees, Executrix and Executors of the Deceased's Estate.
- (51) The Plaintiff's Contention is that the Plaintiff Chattur Lal is also one of the beneficiaries to the Deceased's Estate.
- (52) The Plaintiff's further Contention is that before the demise of the Deceased, Moti Chand through the help of his solicitors from Sherani and Company, the Deceased made and executed a Codicil on the 12th August 1966 at the presence of Faiz Mohammed Khan Sherani and Shaukat Ali which was to amend, modify or revoke parts of the said Deceased's Will.
- (53) That under the Codicil, the Deceased Moti Chand also appointed the Plaintiff as the Executors and Trustees of the Estate and displaced his late wife and 1st Defendant of their appointed positions as Executors/ Executrix and Trustees from the Original Deceased's Will.
- (54) The issue of who is the rightful Executor and Trustee of the Deceased's Estate has been an ongoing issue amongst the Plaintiff, 1st Defendant and 2nd Defendant as the 1st Defendant and 2nd Defendant do not wish to recognize the validity of the Codicil.
- (55) The Plaintiff now seeks for the following substantive orders:
- (i) The Codicil dated 12th August 1966 be recognized as a Supplementary to the Deceased's Will dated 04th March 1966.
 - (ii) A Probate Grant be granted to the Plaintiff for the mentioned Codicil and the Will.
- (56) However, the Defendant's Contention is that the Estate of Moti Chand aka Ludur remains un-administered for the past 60 years.
- (57) The Deceased Moti Chand was unaware of any Codicil and was unconscious as to what was happening and why the Representatives from Sherani and Company came to the house and forced the deceased to affix left thumb by lifting the deceased left hand and affix the left thumb mark on the document.
- (58) The 1st Defendant in his Statement of Defence at paragraph 5 stated that he is unaware of any contents of the said alleged Codicil and that the Plaintiff himself engaged the Lawyers to draw up the Codicil and have the Deceased's left thumb print affixed on the Codicil when the deceased was seriously ill lying on the bed unconsciously.

- (59) That the said Codicil shall not at any time be recognized by the Court since the Codicil was not made in accordance to the proper knowledge of the deceased. The Deceased was made to affix his left thumb on the documents without his knowledge, where in fact the deceased at all times had been placing his signatures on all documents.
- (60) That the Court to recognize the Deceased's Will only and not the Codicil.
- (61) That all the Deceased Estate Assets have been disposed off.
- (62) That in Deceased Moti Chand's Estate, the grant still remain impending because the Plaintiff and the 1st Defendant had put in Caveats obstructing issuance of grants.

Whether the alleged Codicil made and Executed by the Deceased, Moti Chand on 12th day of August 1966 is Valid and enforceable?

- (63) To be valid, a codicil must be executed with the same legal formalities as a will. It must be in writing, signed at the end by the person making it, and witnessed by two disinterested witnesses who saw the person sign or heard the person acknowledge his signature.
- (64) The Question that needs determination is whether the alleged Codicil herein in fact was executed with the same formalities as that of the deceased's will?
- (65) It should be apparent on the face of the alleged Codicil that the Deceased, Moti Chand is the testator intended by such signature (thumb print) was to give effect to the writing ad his codicil.
- (66) Is the document marked and tendered into evidence as Exhibit - P2 the Codicil of the Deceased made and executed after the deceased's executed his Will dated 04th March 1966?
- (67) It will be noted that the Deceased executed his Last Will and Testament on 04th March 1966. The alleged Codicil was dated 12th August 1966, some 5 months after the Execution of the Deceased's Will.
- (68) The Deceased took demise on 29th September 1966, some 6 months after the Execution of his Will and some 6 weeks after the alleged Codicil.
- (69) In his Will, the Deceased endorsed his signature and whereas in the Codicil, the Deceased had affixed his left thumb impression.
- (70) It has not been explained to Court either by the Plaintiff and/or the 1st Defendant as to why the Deceased had endorsed his signature on the Will and thumb Print in the Codicil and why did he not sign the Codicil?
- (71) The Deceased's Will appointed his wife Dhanpat and his Sons Dhurup Lal and Brij Lal to be the Trustee and Executrix and Executors f his Estate.

- (72) The Deceased's Will is witnessed by two witnesses.
- (73) The Deceased gave Devise and Bequeath the whole of his Estate unto his Trustees and Executrix and Executors upon trust.
- (74) He further devised and bequeathed all his real and personal property unto his wife and children. The wife to receive 1/3 share and the balance of 2/3 share to his children: Dhurup Lal, Brij Lal, Lata Devi, Mahendra Lal and Mani Lal in equal shares and shares alike.
- (75) However, the alleged Codicil in question appointed his son Chattur Lal [Plaintiff] and Prahalad Ram Khelawan to be the Executors and Trustees together with the one named in his said Will.
- (76) The alleged Codicil directed that the beneficiary Lata Devi mentioned at paragraph (g) to be deleted except for her maintenance, education and in paragraph (c) with Will not to be included as a beneficiary in his Will.
- (77) The Deceased further directed that his son Chattur Lal [Plaintiff] be also a beneficiary in the 2/3 share of his Estate together with his sons Dhurup Lal, Brij Lal, Mahendra Lal and Mani Lal.
- (78) According to the 1st Defendant, in his presence the Deceased alleged thumb print impression on the Codicil was taken by force by the Representatives from Sherani and Company when the deceased's left hand was lifted and his left thumb print affixed on the document.
- (79) In his evidence, the 1st Defendant was asked if he was aware of a Codicil was made in 1966? His answer was that he knew a paper and not Codicil. He was present when 2-3 people came home. He didn't know them. His mother and Aunt were there and mother asked them "If they had made the Paper or brought it." The Answer was we will write down here.
- (80) They asked mother what to write. In Reply, mother [Dhanpat] said-
- "My husband has not given anything to Chattur Lal. Why not her small daughter - Lata Devi's share be given to Chattur Lal."
- (81) These people present said to make Chattur Lal as Trustee and take away Lata Devi's share. Mother was communicating only. Mother and Aunt telling father to sign the paper.
- (82) However, according to the Plaintiff Chattur Lal, he was not aware if the father had executed a Will and/or aware if a Codicil was prepared.

- (83) On 09th August 1985, Dhanpat, Dhurup Lal, Brij Lal, Chattur Lal and Prahalad Ram Khelawan filed an oath and sought for the grant of Probate in the Deceased Estate of Moti Chand in terms of the Deceased's Will executed on 04th March 1966 and the alleged Codicil accordingly. Probate File Reference No. P21139 refers.
- (84) The fact cannot be denied by either the Plaintiff [PW1] - Chattur Lal, and/or the First Defendant [DW1], Mani Lal that a document in the alleged form of a Codicil was executed and filed together with the Deceased's Will into the High Court seeking for the grant of Probate in the Estate of Moti Chand - file Reference 21139 confirms the same and is referred hereto.
- (85) However, I reiterate that this Court needs to determine *whether the alleged Codicil was in fact prepared and executed with the same formalities as the Deceased's Will?* Further, it should be established and be apparent in the face of the alleged Codicil that the Deceased, Moti Chand as the Testator intended by such signature and/or Thumb Print was to give effect to the writing as his Codicil.
- (86) Subsequent to the filing of the Probate Application for a Grant, the Plaintiff Chattur Lal also filed a Caveat registration No. 32 of 1994 on 16th August 1994 which has now expired.
- (87) The Registry upon perusal of the Application seeking for a Probate Grant in File No. P21139, found that the application was not in order and wrote back to Messrs. Parshotam & Co [Lawyer acting for Applicants] on 13th November 1985 informing that before the Will and the Codicil is admitted to prove for a Grant of Probate, the following necessities needs to carried out:
- (1) The other attesting witness to the Codicil is now deceased, if possible, another affidavit of due execution of the instructions to draw of Codicil from any other person [other than the beneficiary substituted] who was present at the time of its execution is required.
 - (2) ...the explanation given in paragraph 10 of the Executors oath is insufficient. How can the Executors offer any evidence in the matter, as the said Codicil was not in there custody? An affidavit of right and condition is needed from the Solicitors who retained custody of the Instructions to draw up Codicil that one beneficiary has been removed and another substitutes - in this case Order 15 Rule 6 (2) (b) of the Rules of the Supreme Court apply, at least in spirit.
 - (3) I have been directed by the probate Judge to instruct the Solicitors to serve.
 - (4) Kindly attend.....
- (88) It is notable that whatever queries were raised by the Probate Office in the letter of 13th November 1985 was neither adhered to nor complied with. Thus the Application seeking for a Probate Grant in File No. 21139 remained impending.

- (89) The Senior Court Officer, High Court Probate Registry Meli [PW1] never said that Shaukat Ali's affidavit made the Codicil valid.
- (90) What Meli [PW1] said in his evidence was that - 'The Supplementary affidavit by Shaukat Ali was received to rectify certain things. He said further that the Registrar or Court will determine the Validity, he cannot reject a document. He confirmed he would not have accepted the Codicil because:
- (i) It was undated
 - (ii) It had torn edges and contents and cannot be read.
- (91) Upon a careful perusal of the document (alleged Codicil) tendered into evidence as [Exhibit - P2], the subject matter of the document reads as follows-

"Instruction and Memorandum of Agreed....." (Page partially torn).

*I/We the undersigned-----in the colony of Fiji, instruct and re--
Sherani & Company, Barristers and Solicitor to act for me/us and ---such
matters and things which our solicitors shall in their absolute discretion think
fit and proper in the following matters-*

'Instructions to Draw up Codicil'

- (92) If one carefully examines the top part of the instruction to draw up Codicil [Exhibit P2], as hereinabove, the left thumb print impression of Dhanpat and signatures of Brij Lal, Chattur Lal and Prahalad Ram Khelawan appears since they have deposed the oath therein seeking for a Probate Grant witnessed by Suruj Prasad Sharma as the Solicitor witnessing their signatures and thumb print in the Execution of this very document "Instruction to Draw up Codicil", so that it can be admitted into evidence in Court together with the deceased Will in the Probate Application for consideration and issuance of the grant of Probate in the Estate of Moti Chand to Dhanpat, Brij Lal, Chattur Lal and Prahalad Ram Khelawan to administer the deceased Estate of Moti Chand accordingly.
- (93) Although the impression of the Left Thumb print of deceased Moti Chand appears at the bottom of the Instruction to draw up codicil together with two other signatures, it is unclear and ambiguous to ascertain as to who is instructing Sherani and Company to draw up the said Codicil.
- (94) Further it cannot be ascertained from this document [Exhibit 2] as to the date on which the deceased Moti Chand impressed his thumb print.
- (95) Also who are the two witnesses signing the said Document, no names have been printed or shown therein as to ascertain their identities.
- (96) The Document and/or the alleged Codicil [Exhibit - P2] has not been drawn up and executed with the same legal formalities as that of a will. Maybe, the document has the Testator,

Moti Chand's thumb print and signatures of the 2 witnesses. However, the contents herein clearly gives instruction to Sherani & Co. to act in the absolute discretion as they think fit and proper in 'Drawing up the Deceased's Codicil as per the instructions set out and enumerated therein at paragraphs and/or clauses 1, 2, 3 and 4, [whilst it is blank], accordingly.

- (97) In light of the above, the Document and/or the alleged Codicil herein marked and tendered into evidence as Exhibit P2, cannot be classified and recognized as the Deceased's Codicil and admitted to prove for a Probate Grant, rather it is only an 'Instruction to draw up Codicil' for the deceased, Moti Chand.

Whether Shaukat Ali, who had deposed an affidavit [Exhibit - P5], is a witness to this document [Exhibit P2] - Instruction to Draw up Codicil.

- (98) It is also noted that the Deceased, Moti Chand signed the Will at the time of its Execution on 04th March 1966.

- (99) However, in this document [Exhibit - P2]-Instructions to draw up Codicil-

In the 'Instructions to Draw up Codicil' - for one reason or the other the Deceased's left Thumb print appears.

Why? This has not been explained by the Plaintiff. However, the 1st Defendant explained that the deceased at that time was not in his good health and was unaware of what was happening

- (100) Therefore, bearing above in mind, I find that the Codicil referred to herein [Exhibit - P2] is only an 'Instruction to draw up Codicil' on 12th August 1966, and is not valid and recognized in law and unenforceable for the following reasons:

- (1) It is undated by the Deceased.
- (2) Written in ink
- (3) Has a left thumb print impression of the Deceased Moti Chand whereas the Deceased's Will is dated and signed by the Deceased
- (4) Whether Shaukat Ali whose affidavit has been filed into court is in fact one of the two (2) witnesses in this Document?
- (5) It has not been executed with the same legal formalities as a Will.

Whether the said Codicil was executed under Duress?

- (101) Firstly, the document [Exhibit - P2] is a fact is an 'Instruction to draw up Codicil' and instructs what the contents and the format of the Deceased's Codicil should be. Further, it is not in the form of a Codicil.

- (102) What was allegedly executed by the Deceased was not a Codicil per se.

- (103) There is no concrete Evidence before the Court to establish the allegation that the Instruction to draw of the Codicil was obtained by Duress and/or in anyway orchestrated by the Plaintiff, Chattur Lal.
- (104) The 1st Defendant only stated in court that in his presence the Deceased alleged thumb print impression on the Codicil was taken by force by the Representatives from Sherani and Company when the deceased's left hand was lifted and his left thumb print affixed on the document.

Whether Shaukat Ali's affidavit being one of the attesting witnesses of the said Codicil filed on behalf of the Plaintiff is valid?

- (105) The 'Instructions to draw up Codicil' [Exhibit P1] has a thumb print impression and witnessed by 2 witnesses.
- (106) It cannot be ascertained from Exhibit - P2 whether Shaukat Ali is one of the witnesses to the said Document since there is no name printed out therein to confirm the same.
- (107) Further, the Defence did not have the opportunity to cross examine Shaukat Ali on the contents of his affidavit filed into Court, since he had already taken demise.
- (108) However, Shaukat Ali's affidavit was filed together with the Probate application no. 21139 and the oath seeking for a grant, but the Court Registry in his correspondence of 13th November 1985 wrote to Parshotam & Co. informing that -

"As the other attesting witness to the Codicil is now dead, if possible, another affidavit of due execution of the Instruction to draw up Codicil from any other person (other than the beneficiary substituted) who was present at the time of its execution is required."

- (109) It is noted from the file records, that above was not done and/or attended to. There was a purposes as to why the Court wrote this correspondence and sought for another affidavit. *Why wasn't an affidavit deposed by the other witness and/or any other person as sought for by the Court then?*
- (110) In absence of another affidavit not being filed into Court of another person present at that time who was aware of the 'drawing of the Codicil' - than the probative value to be placed, if any, of Shaukat Ali's affidavit, would have been rightfully determined depending on the credibility of the other affidavit.
- (111) Having said above, at this stage, Shaukat Ali's affidavit tendered into evidence as Exhibit P5. However, the affidavit above cannot be said to be of any probative value in the given circumstances and admit the alleged Codicil to prove into evidence for consideration of a grant in the Deceased Estate of Moti Chand.

- (112) I hold that the "Instruction to draw up Codicil" is only an Instruction to draw up and formalize a Codicil, and not a formal Codicil per se.
- (113) Therefore, I find that the deceased late wife Dhanpat, sons - Dhurup Lal and Brij Lal are the appointed Trustees and Executors (ix) of the deceased's Will dated 04th March 1966.
- (114) However, upon a further perusal of the impending application Probate File Referenced 50992, filed on 21st September 2010, the surviving Executor and trustee Brij Lal has renounced his rights and title to grant of Probate to the Fiji Public Trustees Corporation Limited.
- (115) It is also noted at the current time that two Executors (ix) and Trustees Dhanpat and Dhurup Lal are now deceased. The evidence before the court does not substantiate the whereabouts and existence of the Executor/Trustee Brij Lal.
- (116) Therefore, it follows that Public Trustee Corporation Limited is at liberty to proceed with the pending probate application no. 50992 and seek for a Probate grant and complete the administration of the Deceased Estate of Moti Chand in accordance of the Deceased Will dated 04th March 1966 and the renunciation of Brij Lal accordingly.
- (117) However, if the Fiji Public Trustee Corporation Limited is of the view not to proceed with their Application No. 50992 for a Grant of Probate in terms of the Deceased's Will dated 04th March 1966 for one reason or the other, then the surviving beneficiaries will be at liberty to file an application and seek for a Letters of Administration with Will Grant accordingly.
- (118) The rightful beneficiaries of the Deceased Estate in terms of the Deceased's Will and the renunciation filed with the Public Trustee Corporation Limited are the following:-
- (1) Dhanpat - Deceased
 - (2) Dhurup Lal - Deceased
 - (3) Lata Devi - Living
 - (4) Mahendra Lal - Living and
 - (5) Mani Lal - Living[1st Defendant]
 - (6) Brij Lal - Renounced his right and title to grant of probate
- (119) The Question of Residue of the Estate left which is controlled by the 1st Defendant Mani Lal and whether the Plaintiff is entitled to any shares towards the same? Whether clause (g) of the Deceased Will dated 04th March 1966 is relevant and clearly sets out how the Deceased had devised and Bequeathed all his real and personal property are to be determined by the Deceased's Will accordingly.
- (120) The Deceased's Will clearly spells out that the Deceased's wife Dhanpat to received 1/3 [one third] of the residue and the remainder and balance of 2/3 [two third] to all Deceased's children namely - Dhurup Lal, Brij Lal, Lata Devi, Mahendra Lal and Mani Lal in equal shares and shares alike.

(121) Since Dhanpat and Dhurup Lal are deceased and Brij Lal had renounced his rights and title to grant of probate, their shares will be distributed in accordance with the relevant **Succession Probate and Administration Act** after the respective Grant of Probate in the Estate of Moti Chand.

(122) Hence, the Plaintiff Chattur Lal would then become aware if he is entitled to any share in the residue of the Deceased's Estate and the Bus Company.

Whether the Plaintiff and the biological children and beneficiaries have obtained their shares from the Estate of Moti Chand?

(123) Once the grant is issued and obtained in the Deceased's Estate of Moti Chand, then only it can be ascertained if the Plaintiff and any of the beneficiaries have already obtained their shares from the Deceased's Estate or not. Otherwise the assets in the Deceased's Estate would be distributed and the disposition carried out accordingly.

(124) The Counsels and the litigants to this proceedings must understand the fact that there two[2] application impending in Court seeking for determination of Probate Grant:

(1) *Probate Application No. 50992 filed by the Public Trustee Corporation Limited in 21st March 2011 terms of the Deceased's Will dated 04th March 1966 and*

(2) *Probate Application No. 21139 filed by Dhapat, Dhurup Lal, Brij Lal, Chattur Lal and Prahalad Ram Khelawan on 09th August 1985 in terms of the Deceased's Will dated 04th March 1966 and together with the alleged Instructions to draw up a Codicil.*

(125) Some 39 years and 11 years respectively have lapsed since the two applications for the Grant was filed into court and to the current date both applications hereinabove have remained impending issuance of Probate grant by the Court.

(126) I reiterate that once Probate Grant is issued and obtained then only it can be ascertained **what were the Assets in the Deceased's Estate, whether any Assets have been disposed off and/or whether any assets remain to be disposed and distributed to the beneficiaries so that the Deceased's Estate can be administered in full and disposed off.**

(127) It should also be understood that determination and disposition of any assets within the Deceased's Estate cannot be just done in a haphazardly manner since beneficiaries and their just entitlements are involved to be distributed in terms of the Deceased's Will.

In Conclusion

(128) The Deceased will was executed on 04th March 1966. Subsequently, an Instruction to draw up Codicil was allegedly prepared supporting Prahalad Ram Khelawan and Chattur Lal (Plaintiff) as Executor/ Trustees with the Deceased's Will.

- (129) The Instruction to draw up Codicil also directed that beneficiary at Clause (g) of the Deceased's Will i.e., *Lata Devi* be deleted and not be a beneficiary in the Deceased's Will.
- (130) Further, the document directed that *Chattur Lal* (Plaintiff) be also a beneficiary in the 2/3 of his share in the Deceased's Estate together with his sons *Dhurup Lal*, *Brij Lal*, *Mahendra Lal* and *Mani Lal*.
- (131) The alleged Codicil is only an Instruction to draw up Codicil and not a Codicil. It cannot be given validity and be a supplementary of the Last Will and Testament of the Deceased *Moti Chand* aka *Ludur* dated 04th March 1966 and is also therefore unenforceable for the reasons as outlined above in my Judgment hereinabove.
- (132) The Deceased's Will Executed on 04th March 1966 is given recognizance by Law and accordingly a Probate Grant needs to be granted on the said Will.
- (133) *Shaukat Ali's* affidavit although tendered into evidence as Exhibit - P5, his affidavit alone cannot be said to be valid and admitted to prove for consideration of a grant in the Deceased's Estate of *Moti Chand*.
- (134) The Rightful Executor/Trustees. Beneficiary in the Deceased's Estate are - *Dhanpat*, *Dhurup Lal*, *Lata Devi*, *Mahendra Lal*, *Brij Lal* and *Mani Lal*.

It will be noted that *Brij Lal* renounced his right and title to grant of Probate whilst *Dhanpat* and *Dhurup Lal* have now taken demise.

- (135) The Plaintiff *Chattur Lal* would become aware if he has any shares in the residue of the Deceased's Estate and the Bus Company, upon grant of Probate and then ascertain the distribution of the Deceased's Assets if any remaining to be distributed and administered accordingly to the Deceased's Will and the law.

Counter Claim

- (136) The First Defendants Counter Claim in part succeeds otherwise the rest enumerated therein are statements and not the disputed facts. That is-
- That Late *Moti Chand* was 1st and 2nd Defendants and Plaintiff's father who passed away in 1966.
 - That *Moti Chand* left his Last Will and Testament dated 04th March 1966 appointing *Dhanpat*, *Dhurup Lal* and *Brij Lal* as Executors (ix) and Trustees
 - That *Dhanpat* and *Dhurup Lal* and *Prahalad Ram Khelawan* have taken demise.
 - That the 1st Defendant is one of the beneficiary of the Deceased's Estate
 - Other Trustee *Brij Lal* is still alive
 - That Estate of *Moti Chand* remains un-administered to date.

- (137) However, the alleged Codicil is only an Instruction to draw up Codicil and not a Codicil per se.
- (138) There is no evidence of Dhurup Lal's Estate pending for grant or otherwise not administered.
- (139) The 2nd Defendant Brij Lal has renounced its right and title to grant of Probate and authorized Public Trustee Corporation Limited to apply for a grant file reference P50992 and at the current time pending for issuance of grant.

Caveat No. 32 of 1994

- (140) Caveat had lapsed 6 months after its filing and registration. At the current time, there are no caveats on court obstructing issuance of the Grant in the Estate of Moti Chand.

Costs

- (141) The matter proceeded to full trial and the Plaintiff and the First Defendant gave evidence and the Plaintiff called one (1) witness.
- (142) Written submissions were also furnished to Court.
- (143) It is only appropriate and fair that the Plaintiff pays the First Defendant a sum of \$1,000 as summarily assess costs. 2nd and 3rd Defendants were not present at the trial and therefore are not entitled to any costs at the discretion of this Court.
- (144) Following are the orders of this court.

Orders

- A. The alleged Codicil dated 12th August 1966 is only an 'Instruction to draw up Codicil' and not a Codicil per se and therefore is invalid, unenforceable in Law and cannot be admitted to prove for a grant of Probate in the Estate of Moti Chand.
- B. The Codicil dated 12th August 1966 cannot be recognized as a Supplementary to the Deceased's Will dated 04th March 1966 as sought by the Plaintiff.
- C. The application seeking for a Probate Grant in terms of the Deceased's Will and Codicil in the pending File referenced 21139 is dismissed in its entirety.
- D. The Deceased's Will and Testament Executed on 04th March 1966 is valid and admissible to prove for a grant of Probate in the Deceased Estate of Moti Chand.

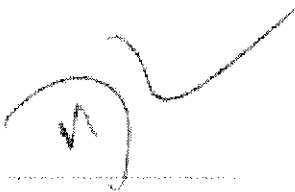
- E. Any grant to administer the Deceased Moti Chand's Estate to be carried out in terms of the Deceased's Will executed on 04th March 1966 and in accordance to the set down law.
- F. The Public Trustee Corporation Limited is at liberty to proceed with their application for a Probate Grant in File Referenced No. 50992 in terms of the Deceased's Will dated 04th March 1966 accordingly and distribute the Assets in the deceased estate of Moti Chand, unless decides otherwise.
- G. The Plaintiff to pay the First Defendant a sum of \$1,000 as Summarily Assessed Costs.
- H. Caveat Registration No. 32 of 1994 has lapsed and is dismissed.

Counter Claim

- I. The Defendants Counter Claim succeeds in part. That is the Estate of Moti Chand currently remains unadministered since his demise as it awaits issuance of a Grant in terms of the Deceased's Will executed on 04th March 1966 accordingly.
- J. That the First Defendant Mani Lal is entitled to share in terms of the Deceased's Will executed on 04th March 1966.

Dated at Suva this 27th day of April, 2023.




Vishwa Datt Sharma
JUDGE

CC: K.S.Law, Suva
Amrit Chand Lawyers, Suva.