IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 26 of 2016

BETWEEN: **ROZINA BEGUM** of Sunnyvale, Henderson, Auckland, New Zealand.

PLAINTIFF

AND: **UMESH CHAND** of Lot 12 Lekutu Street, Samabula, Suva.

DEFENDANT

Counsel: **Plaintiff: Mr. Naidu P.**
Defendant: Mr. Nand A.
Date of Hearing: 27.01.2021
Date of Judgment: 12.06.2023

Catch words
Testamentary Capacity- medical opinion- expert evidence – evidence of medical officer in charge – time of making last will- mental capacity – physical rehabilitation- reading – understanding- giving instructions.

JUDGMENT

INTRODUCTION

1. Plaintiff is the widow of late Parmesh Kumar who died after brief illness and she is challenging the last will of her late husband made on 3.6.2016, and also another will disclosed in the counterclaim made on 30.5.2016. Defendant had counterclaimed and sought to propound the last will made on 30.5.2016 if the court finds that 3.6.2016 last will cannot be accepted. Deceased had executed a last wills while he was under Rehabilitation Medicine Hospital after a brain tumor surgery, undergoing a rehabilitative programme for movement of limbs. No medication or therapy administered for any deficiency in mental capacity. He had little movements of his upper and lower limbs after a brain surgery. According to the doctor in charge of Rehabilitation Medicine Hospital, deceased was transferred to their hospital, on 17.5.2016 and 'communicated well' and he had specifically told the doctor not to allow his wife (Plaintiff) to visit him during his stay there and or to provide information about his condition to her. Plaintiff had made no attempt to visit him or seek information from the said Doctor, till his death. Deceased after the surgery became

totally dependent of caregiver for physical activities. At rehabilitation hospital he had good mental condition till 3.6.2016 Even from 3.6.2016 his mental status had not altered completely but there is evidence that he was 'drowsy' and developed 'spiking temperature' which could affect mental alertness intermittently. So on the balance of probability last will made on 3.6.2016 is not proved, but the last will made on 30.5.2016 is accepted as last will of the deceased. His mental alertness was not an issue at that time and he was even able to detect a typographical error which led to subsequent last will to correct it. The two last wills are identical except to one correction as to the name of Plaintiff.

2. Plaintiff had initially refused to give consent for the surgery, though she had changed her mind and granted consent for the operation, she had not come to take care or see him after the operation till his death. She had not even conducted funeral rights or contributed money for funeral rights though she came to Fiji to claim his property and money. So the reason to disinherit her and child in both last wills cannot be considered as unusual or suspicious considering the circumstances of the case.

3. Deceased could understand the contents of his last will which was simple and he was on proper state of mind on 30.5.2016 when he executed his last will. His condition had deteriorated from 3.6.2016 and this last will was executed to correct a typographical error relating to his wife's name which he had insisted to correct. This also shows the mental state of deceased when the 30.5.2016 was executed. Since there are some doubt as to the mental status of deceased from 3.6.2016 till he died, the will made on 3.6.2016 is declared invalid. The will made on 30.5.2016 is proved as the valid last will.

FACTS

4. Following facts are admitted in the pretrial conference

   a. Plaintiff was the legal wife of late Parmesh Kumar and they had one child.
   b. Late Parmesh Kumar died on 9.6.2016.

5. In the statement of claim Plaintiff is denying the validity of last will dated 3.6.2016 of late Parmesh Kumar.

6. Plaintiff and the child had left the deceased for New Zealand in 2007.

7. Defendant was a distant cousin of deceased and he was living with the deceased after Plaintiff left to NZ. Apart from brother of the deceased, only Defendant visited the deceased while he was in hospital, and attended to his needs.

8. In the counterclaim Defendant is seeking pronouncement of last will made on 30.5.2016 by the deceased be admitted as last will, if the will made on 3.6.2016 is not accepted by the court.

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9. Plaintiff is seeking a pronouncement from court as invalidity of last wills made on 30.5.2016 and 3.6.2016.

10. Plaintiff is also seeking determination to the effect that estate of late Parmesh Kumar to be distributed subject to rules of intestacy as there were no other last wills discovered.

ANALYSIS

11. It is trite law that onus of proving last will be on the propunder and in this case the Defendant.

12. Supreme Court decision of *Sharma v Sharma* [2019] FJSC 20; CBV0010.2018 (30 August 2019) held,

> "We may add that in the case of proving a Will, unlike in other disputes regarding proving a document, the onus is always on the propounder of a Will to prove its validity to the satisfaction of the Court. Even if no plea is taken, but suspicious circumstances emerge that cast some doubt on the authenticity of a Will (as in the present case), the propounder is obliged to satisfy the conscience of the Court on the genuineness of the Will.

13. The main issue before the court is testamentary capacity of the testator who had undergone a removal of brain tumor. This surgery was successful and no dispute as to that fact contained in P2 and also in Dr Birbo's evidence on the success of surgery.

14. In *Blackman and others v Man and others*, [2007] EWHC 3162 (Ch) held,

> "[98] It is common ground that the test of testamentary capacity is still that formulated in *Banks v Goodfellow* (1870) LR 5 QB 549 at 549, 39 LJQB 237, [1861-73] All ER Rep 47. This was helpfully expressed by Miss Reed, counsel for Mr and Mrs Man, in her closing submission as follows:
>
> "The testator:
>
> 1. Needs to understand that he is making a will and that it will have the effect of carrying out his wishes on death.
> 2. He must understand the extent of the property he is disposing of.
> 3. He must recall those who have claims on him and understand the nature of those claims so that he can both include and exclude beneficiaries from the will.

[99] However, Miss Reed also rightly reminded me that it is clear from the decision of the Court of Appeal in *Hoff v Atherton* [2005] Wills & Trusts Law Report 999, and in particular per Peter Gibson LJ at para 33, that the court has to be satisfied that a would-be testator had the **capacity to understand and recognise the matters referred to under the *Banks v Goodfellow* test, not that he actually did understand or recognise them.**"(emphasis is mine)

15. So the scope of this hearing is whether deceased had capacity to understand and recognize the matters referred in the said decision when the he made last wills on 30.5.2016 and also 3.6.2016. If it is proved on balance of probability that deceased lacked mental capacity when he made both wills, his estate should be devolved as intestate.

16. Following facts are not in dispute.

    a. Deceased got suddenly ill and he was taken to hospital by the Defendant.
    b. Plaintiff was not informed about the hospitalization of deceased by Defendant or his brother until the issue of consent for operation arose.
    c. Deceased was hospitalized and his brain was scanned and diagnosed with a tumor and he could not give consent to such surgery and issue of consent to surgery arose.
    d. Deceased was hospitalized on 24.5.2016 after he suddenly fell down in the flat owned by Defendant and he had taken him to hospital.
    e. Plaintiff left for New Zealand in 2007 and deceased became a tenant of Defendant in his flat.
    f. Deceased was diagnosed with frontal lobe brain tumor and at the time of diagnosis he was not in a state of mind to give consent hence Plaintiff's consent was obtained on 28.5.2016 via an email.
    g. After consent was obtained, surgery was conducted by a group of doctors on 3.5.2016.
    h. According to P2 (not disputed)
        i. "The procedure went ahead without any complications "and "were able to completely resect the tumor".
        ii. Deceased had "uneventful covalescence period, recovering from his pneumonia and regaining function of his right arm and leg. He was also more alert and able to obey commands."
        iii. Transfer to Tamavua Rebab Unit on 17.05.2016

17. Defendant relied on D1 which was a Medical Report prepared on 8.8.2016 by Dr. Pratima, and also viva voce evidence of same, Medical Officer who was in charge of Tamauva Rehabilitation Medicine Hospital. Deceased was transferred from CWM Hospital after removal of brain tumor through a surgery and post-surgery recovery period, on 17.05.2016 for rehabilitation due to weakness of upper and lower limbs.

18. Plaintiff also relied on P1 which was a letter of Dr. Pratima Singh written to FNPF, which is supersaturation fund where deceased had some funds as a member. This letter does not state deceased had any mental impairment or lack of understanding.

19. Plaintiff led the evidence of Dr. Birbo who was the consultant that performed the removal of brain tumor on 3.5.2016. He had expressed a medical opinion about the mental status of deceased. Deceased was in his care from 24.4.2016 till he was discharged on 17.5.2016 for physical rehabilitation under Dr. Pratima's care. After17.5.2016 he could not assess the mental status of deceased till he was transferred back to the hospital due to infection from a wound in back side.

20. Dr Pratima Singh who is presently Registrar Consultant in Rehabilitation Medicine said that when late Parmesh Kurmar was transferred to her care on 17.5.2016 he communicated well though his upper and lower limbs were of power 2-3 out of 5. She had also recorded that there were no 'facial weakness'. Deceased had a 'sacral area pressure sore'. His bowel and bladder functions were 'incontinent'. It is to be noted there was no impaired mental status or any other condition regarding his mental status recorded. If there was any such condition there was no reason not to record it at the time of admission as that needs to be monitored and referred for further treatment. Dr. Pratima had communicated with the deceased and had extracted vital information about his family as his wife did not attend this conference, though she was aware of the brain surgery by this time.

21. When deceased died Plaintiff had arrived immediately but did not do so when she provided consent to brain surgery on 28.4.2016 though this was requested by brother of deceased for several days. This shows that Plaintiff and deceased had strained relationship and deceased did not want to see her or child. This also corroborate Dr. Pratima's evidence that deceased instructed her not to give any information about his health condition to Plaintiff or allow her to visit him at hospital. There was no evidence that Plaintiff attempted to do so before his death.

22. Plaintiff had left Fiji in 2007 with a child and there was no evidence of that she had visited him regularly and or had contact with him at all. There is evidence that Plaintiff had initially refused to consent to the surgical intervention to remove the brain of Plaintiff when he was unconscious and had told "let him die" and she would come to Fiji the day he died. Brother of the deceased told that Plaintiff even objected to release of dead body for final rites to him but consented to the release of dead body from hospital in exchange for money. Brother of the deceased is not a beneficiary of the estate of the deceased and a disinterested witness in the analysis of evidence and more weight can be given for such evidence.

23. Brother of deceased in cross examination said that Plaintiff did not care about the deceased and when requested her consent said "let him die". So when deceased died he did not bother to inform her, but she came and even fought for dead body.

24. Deceased and instructed his brother to make a last will and before that they had discussed about it. He had asked Defendant to find a lawyer for it. He was a witness to will made on 30.5.2016.

25. Deceased had communicated with Dr Pratima Sing well and to request her not to allow Plaintiff any information of his status indicating deceased and Plaintiff has strained relationship even at the time of making last wills in the rehabilitation hospital's care.

26. Deceased was with Dr. Pratima's care from 17.5.2016 till he was transferred to CWM hospital again for treatment on 8.6.2016. So, she had the opportunity of examining the mental state of deceased more than any other doctor including Dr. Birbo who was consultant neuro surgeon the leader of surgeon. After transfer of the deceased on 17.5.2016 Dr. Birbo did not have the opportunity to examine the deceased and deceased was in the care of Dr. Pratima. It was not clear as to when he saw the deceased last before he was transferred to Rehabilitation Hospital on 17.5.2016. The removal of brain tumor was on 3.5.2016 and deceased remained for nearly two weeks with the same hospital before he was transferred to rehabilitation.

27. More importantly Dr Pratima took care of deceased during the entire period where deceased made two last wills. So there was no need to speculate or obtain expert opinion as to the mental status of deceased as Dr. Pratima had dealt with the deceased from admittance to Rehabilitation Medicine Hospital till deceased was transferred on 9.6.2016.

28. Dr. Pratima in her Medical Report of 8.8.2016 stated that on admission deceased was "cooperative" and "communicated well". She had indicated that his "physical condition" deteriorated from 3.6.2016. She had also reported 'drowsy, lethargic and uncoopreative' conduct from 3.6.2016, but oral antibiotics were administered. This indicate that even from 3.6.2016 deceased had proper mental status to swallow antibiotics and doctors had no issue with the continuation of such treatment , indicating his drwosyness and uncooperative behavior was 'intermittent' and not permanent. So in such a situation it is difficult to gauge the mental status at the time of making of last will without more evidence as to the mental status at the moment of making last will on 3.6.2016.

29. So on the balance of probability it is not proved will made on 3.6.2016 as proper last will considering intermittent high temperature and 'drowsiness' and 'uncooperative' conditions reported from 3.6.2016. This mental condition has no application to last will made on 30.5.2016.

30. First last will was made on 30.5.2016. It is the evidence of Dr. Pratima that the deceased was communicative and provided her with family history irrespective of weak upper and lower limbs and there was no deterioration of the condition till 3.6.2016.

31. Brother of deceased and also Defendant also witnessed that deceased was talking with them whenever they visited him though his limbs were week in power. He had visited deceased regularly and was with the deceased when he died.

32. According to evidence of brother of the deceased he was instructed by deceased to make a last will and he had entrusted that task to Defendant.

33. A law clerk by the name of Etute Vuluca was a witness to this will as well as to the subsequent last will made on 3.6.2016.

34. There was no consent of a doctor needed to make a last will as a patient is free to do it at any moment with or without the consent of any medical officer. It would be totally unfair and unjust to place such a condition as last will is free will of a person over age of eighteen years in terms of Section 4 of Wills Act 1972.

35. Dr. Birbo had indicated deceased did not 'fully regained normal mental function' under his care. And in his evidence at hearing provided a medical opinion based on his experience and condition, but in contrast to this Dr. Pratima and other witnesses who daily met the deceased since 17.5.2016 expressed that deceased was not only communicative but also shows the mental alertness in his communications with Dr Pratima and others who visited and talked with deceased since 17.5.2016 till 3.6.2016.

36. In *Blackman and others v Man and others*, [2007] EWHC 3162 (Ch), it was held,

> " [114] In my judgment, the court must be wary of placing much reliance on the theoretical conclusions of medical witnesses, however eminent, who have not seen the testatrix but base their views on inferences from other evidence – inferences as to which ultimately it is for the court and not an expert witness to decide whether they should be drawn"

37. In the analysis of evidence of both Dr. Birbo and Dr. Pratima, in my judgment deceased could understand the content of the last will made on 30.5.2016.

38. The issue of 'capacity' fairly and squarely the state of mind of testator when he made last wills. In this action Dr. Pratima who had taken rehabilitative care of the deceased had indicated that deceased "communicated well" with her in her Medical Report written on 8.8.2016. In her evidence she gave more details as to specific instructions given to her regarding Plaintiff. She stated that deceased stated that Plaintiff and deceased were 'separated' at that time.

39. Plaintiff had no issue with independence or ruefulness of Dr. Pratima and had relied on her letter to FNPF written on 2.6.2016. In that letter there was nothing stated about the mental

status of the deceased and if there were any abnormal condition it should be stated. This letter is marked as P1 and Plaintiff relied on it.

40. It is also noted that deceased was administered antibiotics orally and this indicate a level of coordination and also understanding to swallow them timely. This also substantiate the statement of Dr. Pratima and brother of deceased that deceased was in proper state of mind to understand the content of the last will executed on 30.5.2016.

41. Brother of the deceased who was addressed as Jack gave evidence confirming the status of mind of deceased at the time execution of the last will on 30.5.2016. He is not a beneficiary of any of the last wills but was a witness. So he is a disinterested party and his evidence is analyzed as an independent witness. So it has more evidential weight attached to it than the Defendant who is the sole beneficiary of the last will or Plaintiff who will be a beneficiary if wills are declared invalid in law.

42. Apart from Dr. Pratima and brother of the deceased, there is evidence of law clerk and also Defendant to confirm that deceased was in proper state of mind when the last will was executed on 30.5.2016.

43. Upon the analysis of all the evidence before me on the balance of probability it is proved that the last will made on 30.5.2016 was made with proper testamentary capacity and mind of the deceased and it was his free will. He had read the same after execution and spotted typographical error that led to second or subsequent last will. This also indicate high mental alertness of deceased on or around 30.5.2016.

44. Section 6A of Wills Act 1972 allows a last will to be accepted even if the formalities contained in Section 6 of Wills Act 1972 not fulfilled. This shows that the intention of the legislature was not the formality but the intention of the testator. So the issues as to Defendant who was beneficiary engaging a law clerk to execution and his presence at hospital when last wills were made , are not reasons to reject the last will made on 30.5.2016. Deceased not only had the opportunity of reading the will and understood the content, but had detected a typographical error and had also stated the danger or risk of having even a slight error as it related to the name of Plaintiff. All these indicate high mental alertness on the part of deceased on or around 30.5.2016 till 3.6.2016 where his physical conditions deteriorated.

45. From the evidence before me it is clear that deceased did not want Plaintiff and or child to see him or communicate with him even he was seriously ill and had also thought of making a last will in the hospital. This indicate that deceased was aware of the serious health condition he was going through after the surgery and last will made on 30.5.2016 was his wish.

46. Deceased had mental capacity not only to advise Defendant to engage a lawyer to make a last will, but also he had executed it in his free will. After execution again deceased hat read it and spotted the typographical error in the name of his wife. This shows high level of alertness and also his desire to make the last will perfect so that Plaintiff could not challenge it even on a trivial thing.

47. After discovering a trivial typographical error in the name of his wife deceased thought of possibility of Plaintiff making a mountain out of molehill, which again show the analytical capacity of the testator and the approval of everything on the said last will dated 30.5.2016

48. Without stopping, at discovering the error on the name of Plaintiff in the said last will and also what may happen to his last will of 30.5.2016 due to the said error, deceased had instructed Defendant to correct the same. This indicate deceased could properly read, understand, predict, and also instruct others, to correct the name of Plaintiff wrongly stated therein. He did not want to take any risk of his last will being challenged knowing the qualities of his wife. His predictions were not without a base, considering the conduct of Plaintiff as to what had happened since the death of her husband.

49. Deceased had instructed only to change the name of Plaintiff stated in the last will of 30.5.2016, and comparison of the two wills show this.

50. This shows on balance of probability that deceased approved last will of 30.5.2016 and on or around that time he had the capacity to make a last will and also understand it and also had mental alertness to read it carefully to detect trivial mistakes. These evidence outweigh medical opinion of Dr. Birbo who had not seen the deceased or assessed the mental status of deceased after deceased was discharged from CWM hospital on 17.5.2016 until death on 9.6.2016. There was no evidence even after operation deceased behaving in an abnormal manner indicating some mental impairment.

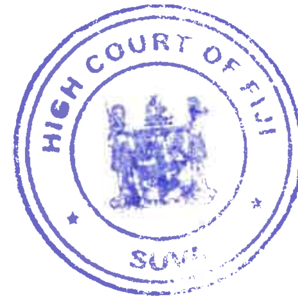
CONCLUSION

51. Deceased had testamentary capacity when he made the last will on 30.5.2016 and it to be considered as last will of the deceased. There is no suspicious circumstance at that time and the manner in which the testator had disposed his estate considering the circumstances of this case. Estranged wife of deceased never came to see the deceased till his death. Plaintiff had not even conducted and or contributed to last rites of the deceased, but filed this action to challenge the last will. 3.6.2016 last will is not accepted as the last will of deceased. Since both parties are successful partially no cost awarded.

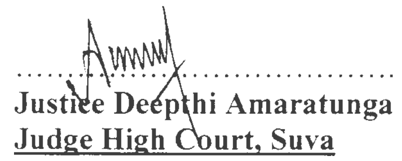
FINAL ORDERS

a. Last will dated 30.5.2016 made by the deceased, is the last will of deceased.
b. Accordingly, will made on 3.6.2016, by deceased, is declared invalid.

c. No costs.



DATED this 12th day of June 2023.



Justice Deepthi Amaratunga
<u>Judge High Court, Suva</u>