

IN THE SUPREME COURT OF FIJI

Probate Jurisdiction

Action No. 16 of 1983

IN THE ESTATE of RAM ASRE SINGH
(son of Pran Singh) of Drasa,
Lautoka, Cultivator, deceased

Between:

VIDYA WATI (daughter of Ram Subhag)
as the Executrix and Beneficiary
under the Will of the said Ram Asre
Singh, deceased

PLAINTIFF

- and -

UDAY SINGH (son of Ram Asre Singh)

DEFENDANT

J U D G M E N T

On 10th August, 1983, a month and ten days before his death, Ram Asre Singh s/o Pran Singh (hereinafter called "the testator") executed a typewritten document purporting to be his last will and testament (hereinafter called "the will").

The defendant having entered a caveat, the plaintiff, as the person appointed executor and trustee, now propounds the will.

The defendant, in his statement of defence makes three allegations :

- (i) That the will "was not duly executed in accordance with the provisions of the Wills Act, Chapter 59".
- (ii) That the Testator "was not of sound mind memory and understanding" at the time of purported execution.
- (iii) That undue influence was "used" by the Plaintiff and the Testator's son Pratap Singh "in the execution of the said alleged will".

As to the first of those allegations, I have borne in mind that whereas the burden of proving due execution rests on the person setting up the will, proof that the will was duly executed may be assisted by the presumption which is expressed in the maxim omnia praesumuntur rite esse acta which applies where the will is regular on the face of it, with a proper attestation clause and the signatures of the Testator and witnesses in their proper places. See paragraphs 892 and 893, volume 17, Halsbury, 4th edition.

Evidence of the execution of the will was given by Mr. Surend Prasad, a barrister and solicitor, who impressed me as a mature person of common sense and sound judgment and a thoroughly reliable witness. I saw no reason to doubt a word of his testimony and I accepted as the truth everything he told the court.

According to Mr. Surend Prasad, the will was prepared in his office in accordance with instructions which he himself had received from the Testator and it was executed by the Testator in the joint presence of himself and his clerk, Sanmorgam Naidu, after he (Mr. Surend Prasad) had explained its contents in Hindustani to the Testator who appeared to understand and approve of what was explained to him. Mr. Surend Prasad also swore that, after the Testator had executed the will, he and the clerk signed as attesting witnesses in the presence of the Testator and of each other. Supreme Court Probate File No. 19576 was produced by the Court Officer and the witness identified the will contained in that file as the will in question. He also identified the signatures thereon of the Testator, the clerk and himself. Each of those signatures is in the usual and proper place and the signatures of the attesting witnesses follow an attestation clause which is in the usual and proper form except that (immaterially, in my view) the word "us" does not appear before the word "both" in the second line.

The evidence of a single attesting witness is sufficient. See para. 892, Halsbury (supra).

I am well satisfied (and would be well satisfied even without the assistance of the presumption to which I have referred) that the will was executed in accordance with the requirements of Part III of the Wills Act, Chapter 59.

As to the second allegation, I have borne in mind that the burden of proving testamentary capacity falls on the person propounding the will: para. 895, Halsbury (supra).

It is necessary for the validity of a will that the Testator should be of "sound mind, memory and understanding", words which have consistently been held to mean sound disposing mind: para. 897 Halsbury (supra). In order to be of sound disposing mind a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation in that property: para. 898, Halsbury (supra).

The sound disposing mind and memory must exist at the actual moment of execution of the will: para. 899, Halsbury (supra).

A will rational on the face of it and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. However, it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of fact: para. 903, Halsbury (supra).

Having heard Mr. Surend Prasad's sworn evidence in this regard, I am well satisfied that when the testator executed the will he was of sound disposing mind. Mr. Surend Prasad told the court that he personally took the testator's instructions on the terms of the will at the Testator's home,

where he had gone for that purpose at the Testator's request, a few days before the execution of the will. He had known the Testator personally, and well, for about 30 years before he died at the age of about 70 years. He was emphatic that, when he gave those instructions and when he executed the will, the testator appeared to be perfectly normal and of full testamentary capacity.

I am well satisfied (by Mr. Surend Prasad's evidence and regardless of any presumption) that the testator was at the time he executed the will of sound disposing mind.

The third allegation pleaded by the defendant is that the plaintiff (the Testator's wife) and the Testator's son, Pratap Singh, "used" undue influence "in the execution of the said alleged will" I take that to be an allegation that the execution of the will in the terms in which it was expressed was obtained by the undue influence of the plaintiff and Pratap Singh.

The burden of proof in this connection which is cast upon the person propounding the will is in general discharged by proof of capacity and the fact of execution together with proof of knowledge and approval of the contents of the will: Tristram and Coote's Probate Practice, 26th edition, page 641.

I am well satisfied by the evidence of the barrister and solicitor, Mr. Surend Prasad, to which I have already referred, that the deceased was of full testamentary capacity and that the will was duly executed in accordance with Part III of the Wills Act. I am also well satisfied by that evidence that, the will having been explained to the Testator in Hindustani, he knew, understood and approved of its

contents at the time of execution.

The defendant did not appear or adduce evidence. The only other witness was the son, Pratap Singh, who swore that he had no knowledge of the will until 12th September, 1983 (about a month after its execution and a week before the Testator's death) and that he had had nothing to do with its making. He was a convincing witness and I saw no reason to disbelieve him.

My findings of capacity, due execution, knowledge and approval are sufficient to discharge the burden initially cast on the plaintiff. As the defendant has not appeared or adduced any evidence at all I am bound to find in favour of the plaintiff on the issue of undue influence which was raised by the defendant in his pleading.

I therefore pronounce for the force and validity of the will, that is to say the will dated 10th August, 1983, annexed to the Oath of Executrix dated 28th October, 1983 filed in Supreme Court Probate File No. 19576 which Oath of Executrix I now further identify by signing at the foot thereof.

The defendant is to pay the plaintiff's costs of these proceedings, to be taxed if not agreed upon.

I order that the caveat be removed.

13th August, 1984.

Suva,

R.A. Kearsley
(R.A. Kearsley)
JUDGE