

IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0051 OF 1998S
(High Court Civil Case No. L/A(DBN) 33744)

BETWEEN:

PHILIP JAGDISHWAR SINGH

Appellant

AND:

UMA KIRAN KRISHNA

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Justice Sarvada Nand Sadal, Judge of Appeal

Hearing:

Monday, 10 May 1999, Suva

Counsel:

Dr. M. S. Sahu Khan for the Appellant
Mr. V. Mishra for the Respondent

Date of Judgment:

Friday, 14 May 1999

JUDGMENT OF THE COURT

The appellant is an administrator de bonis non of the Estate of his late father Ram Sukh pursuant to a grant made to him in the High Court at Suva on 20 February 1997. On 27 March 1998 his sister Uma Kiran Krishna (the respondent) was appointed an additional administrator and he appeals against that appointment. The respondent's appointment was made by Fatiaki J. after a defended hearing on an originating summons issued in the Probate jurisdiction of the Court, with affidavit evidence on which there was no cross-examination.

The appellant had raised a preliminary objection in the High Court, submitting that under 0.76, r.2 this matter, being a "probate action", should have been commenced by a writ of summons. His Lordship over-ruled this objection and after hearing submissions from counsel

made the order appealed against, with a note that reasons would be delivered on notice. No reasons are on record, so we do not have the benefit of his considered judgment.

This objection constituted the first ground of appeal and after discussion with counsel they agreed that it should be considered as a preliminary matter and that, if successful, the appeal would have to be decided in the appellant's favour, and there would then be no need to consider the remaining grounds. (This agreement was made without prejudice to any further rights.) We indicated at the end of argument on the point that we favoured the appellant's submission and reserved the appeal for judgment, without hearing argument on the other grounds but we did hear submissions on costs.

Under the general heading of "Probate Proceedings", 0.76, rr.1 and 2 of the High Court Rules 1988 state:

Application and interpretation (0.76,r.1)

1-(1) This Order applies to probate causes and matters, and the other provisions of these Rules apply to those causes and matters including applications for the rectification of a will subject to the provisions of this Order.

(2) In these Rules "probate action" means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business.

(3) In this Order, "will" includes a codicil".

Requirements in connection with issue of writ (0.76,r.2)

2 - (1) A probate action must be begun by writ, and the writ must be issued out of the Registry.

(2) *Before a writ beginning a probate action is issued it must be indorsed with -*

(a) a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates; and

(b) a memorandum signed by the registrar showing that the writ has been produced to him for examination."

The sole question argued by counsel was whether the application for the respondent's appointment as administrator along with her brother is to be regarded as "non-contentious or common (2 words) form probate business" within the meaning of those words in r.1(2) above. It is plain from the contents of the summons that it was contentious at the time it was issued, because the respondent sought, in addition to her appointment, her brother's removal as administrator. That part of the application was adjourned by Fatiaki J. when he made the order for her appointment, and was subsequently dismissed without objection by her, but its inclusion at the outset demonstrates an ongoing dispute between them concerning this estate.

According to the affidavit of Savitri Devi Narayan filed on respondent's behalf, the respondent is also suing the estate and alleges that the appellant is not a fit or proper person to administer it. The respondent claims a major share in it by virtue of her late mother's interest bequeathed to her under her will. In his affidavit in reply the appellant challenges the validity of that will, and believes the respondent is acting vindictively. He also made the point that she resides out of the jurisdiction.

Against this background it is not appropriate to call this a non-contentious or common-form application. Respondent's counsel referred us to Rule 25(2) of the Non-

Contentious Probate Rules (U.K.) 1954, which stated that a dispute between persons entitled to a grant in the same degree should be brought by summons before a Registrar. (Those Rules were amended in 1987 but Rule 27(6) thereof is essentially the same). However, we are satisfied that the UK Rule 25 and its successor cannot avail the respondent.

Probate practice in Fiji is now governed by Order 76 of the High Court Rules 1988 made by the Chief Justice pursuant to his powers under s.25 of the (then) Supreme Court Act (Cap.13). The reference to non-contentious business in rule 1 of the Order does not include a dispute over a grant of administration between next of kin of the same entitlement, which clearly must be a contentious matter. English practice with non-contentious business is recognised to some extent in our O.1,r.11 which states:

Non-contentious probate rules (O.1r.11)

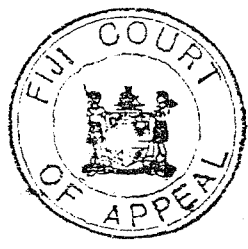
11. The Rules for the time being in force in Her Majesty's High Court of Justice in England, and the practice and procedure of that Court with respect of non-contentious probate business shall apply so far as they are applicable, with such modifications as may be necessary, to grants of probate and administration issued in common form from the Registry of the High Court.

It will seen that this provision is limited to non-contentious probate business in common form, so that current English practice reflecting their former Rule 25 can have no application. Accordingly the appeal must succeed. As it involved a highly technical point and did not address the merits, we do not think any award of costs is appropriate.

Result:

1. Appeal allowed.

- 2. Order of the High Court entered on 3 April 1998 appointing Uma Kiran Krishna Administrator/Personal Representative de bonis non of the estate of Ram Sukh is set aside. The letters of Administration issued to her are recalled and are ordered to be delivered forthwith to the High Court at Suva.
- 3. The respondent is at liberty to apply for Letters of Administration through the appropriate process.
- 4. We make no order for costs.



Moti Tikaram

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 Sir Moti Tikaram
 President

Maurice Casey

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 Sir Maurice Casey
 Justice of Appeal

Sarvada Nand Sadal

.....
 Justice Sarvada Nand Sadal
 Judge of Appeal

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant
 Messrs. Mishra, Prakash and Associates, Ba for the Respondent