

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No. ABU 11 of 2005
(High Court Civil Action No. HBC 499 of 2001S)

BETWEEN:

MOHAN LAL
(f/n Devchand)
and
NARENDRA REDDY
(f/n Krishna Swamy Reddy)

Appellants

AND

HAROON ALI SHAH

1st Respondent

AND

SEEMA RAJ

2nd Respondent

AND

GYANESHWAR RAO

3rd Respondent

Coram:

Gallen, JA
Ellis, JA
Scott, JA

Date of Hearing:

26 July 2006

Counsel:

R. Naidu for the Appellants
H.K. Nagin for the Respondents

Date of Judgment:

28 July 2006

JUDGMENT OF THE COURT

- [1] On 14 March 2003 Mrs. Rambai Sadal (f/n Lalji) died. She was survived by her husband Sarvada Nand Sadal (f/n Sadal). Immediately prior to her death Mrs. Sadal had been living with her husband at Government Quarters 227, Stoddart Road, Muanikau, Suva. Her husband (Sadal) is a retired judge of the High Court of Fiji and at the time of his wife's death held appointment with the Fiji Military Forces as a Judge Advocate.
- [2] On 16 May 2003 Sadal obtained a grant of Probate of the will of Mrs. Sadal from the Supreme Court of Victoria, New South Wales. The will annexed to the grant shows that it was executed by Mrs. Sadal on 8 March 2003.
- [3] On 23 June 2005 the Appellants issued a writ out of the Probate Registry in the High Court of Fiji at Suva. The Appellants claimed to be the executors and trustees of an earlier will executed by Mrs. Sadal in January 2001.
- [4] Very serious allegations are made in the Appellants' Statement of Claim. They state that the first two Defendants, a legal practitioner and his clerk, together with the third Defendant, a medical practitioner, had been guilty of fraud. It is alleged that the first two Defendants did not witness Mrs. Sadal signing her will on 8 March 2003 and that the third Defendant did not attend upon Mrs. Sadal on 8 March 2003 or see her sign any will on that date.

[5] Relief was sought:

- “(a) that the Court shall pronounce against the validity of the alleged will dated 8 March 2003;
- (b) that the Court shall pronounce in solemn form for the true last will of the deceased dated 11 January 2001;
- (c) an Order that any grant of probate made under the alleged will dated 8 March 2003 be declared a nullity;
- (d) an Order that probate of the deceased’s will dated 11 January 2001 be granted to the Plaintiffs;
- (e) special damages against the first, second and third Defendants jointly and/or severally in the said sum of A\$466,906.42 or such other sum as to be approved by the Court;
- (f) general damages against the first, second and third Defendants for fraud;
- (g) an Order that an inquiry be made against the first, second and third Defendants by the Director of Public Prosecutions Office;
- (h) costs;
- (i) further or other reliefs.”

[6] It will be noted that Sadal himself, although the named executor and trustee of the will dated 8 March 2003 was not joined by the Appellants.

[7] In July 2005 the Defendants (the Respondents herein) filed an application for the dismissal of the action commenced in June 2005 on the ground that the High Court of Fiji had no jurisdiction to revoke a grant of probate by the Supreme Court of Victoria.

[8] On 4 October 2005 the Appellants' action was struck out. The High Court took the view that, probate having been granted by the Supreme Court of Victoria, it was that Court which:

“ is the proper forum to make a contrary declaration of invalidity”.

[9] The High Court also pointed out that, in apparent breach of RHC O 76 r3, Sadal had not been made a party to the action. In response to the suggestion that revocation of the grant was not being sought and that therefore the rule had no application, the Judge stated:

“one only has to look at the prayers in the statement of claim and consider their overall effect to see that the Plaintiff is really asking the Court to revoke the grant”.

That, in the Judge's view, was outside his jurisdiction.

[10] Six grounds of appeal were filed. It was argued that most of the relevant considerations suggested a trial to establish the validity of the will of 8 March 2003 being held in Fiji. It was pointed out that the will was purportedly made in Fiji where Mrs. Sadal was residing at the time of her death and that both the Defendants and the Appellants are also residing in Fiji.

[11] It was also suggested that the High Court erred in taking the view that if the Appellants succeeded in their action then this entailed a revocation by the High Court of Fiji of an order made by the Supreme Court of Victoria; an application to revoke would

indeed be made in Victoria in due course but no order of revocation would be made by the High Court of Fiji. Therefore questions of judicial comity did not present any difficulty. It emerged from discussion of this submission that paragraph (c) of the prayer in the Statement of Claim could not succeed and this was conceded by Mr. Naidu.

[12] The final ground of appeal was that the High Court, rather than relying on the Appellants' failure to join Sadal as providing support for the decision to strike the action out, should have joined Sadal of its own motion, under the provisions of RHC O 15 r6.

[13] In our view, it was obviously incumbent upon the Appellants to join Sadal in their action. Apart from anything else, it is Sadal who is the executor and trustee of the will which the court was being asked to pronounce as invalid. The fact that Sadal is also the principal beneficiary of the will and that there is some evidence tending to suggest his involvement in its making is also relevant. As we see it, at this stage of the litigation, the importance lies in the fact of Sadal being joined, not in the manner of his joining.

[14] The factors advanced by Mr. Naidu as favouring the trial taking place in Fiji are compelling but do not assist the Appellants to overcome the principal difficulty lying in their path which is the existence of a valid undischarged, unrevoked or stayed order made by the Supreme Court of Victoria.

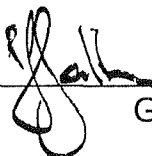
- [15] While we agree that following the successful conclusion of an action in fraud in the High Court of Fiji, application would have to be made to the Supreme Court of Victoria for the revocation of its grant, we do not share Mr. Naidu's optimism that a revocation would inevitably follow, almost as a mere formality, particularly when no notice of the proposed action in the High Court of Fiji had previously been given. There is at least a possibility that the matters at issue between the parties would have to be re-litigated in Victoria with severe consequences for the estate in terms of delay and further expense.
- [16] Mr. Naidu and Mr. Nagin were in general agreement that the very serious issues raised in this case had to be disposed of as soon and as conveniently as possible. Not only should Sadal have an early opportunity to clear himself of any suggestion of impropriety but the Appellants also needed a chance to refute the allegations made against them. The principal difference between counsel was in the best method to achieve the agreed aim.
- [17] In our view the Judge's careful analysis of the problem before him was broadly correct. In particular, he was right to point out that Sadal should have been joined and that the grant by the Supreme Court of Victoria could not simply be left in limbo while the action proceeded in Fiji. Where we differ from the Judge is in his conclusion that these considerations indicated that the action which included a discrete claim for damages for fraud should therefore be struck out.

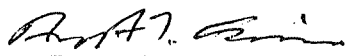
[18] We conclude that the action should be restored (minus prayer (c) referred to in paragraph 11 above) but it should be stayed until (i) Sadal is joined as a co-defendant; and (ii) steps are taken in the Supreme Court of Victoria to revoke the grant or at least stay further administration of the estate pending disposal of the action. In Vosaholo v. Kantor [2003] VSC 81 the Supreme Court of Victoria explained the procedure to be followed in this type of case.

RESULT:

1. Appeal allowed.
2. High Court action restored subject to grant of interim stay.
3. Prayer (c) in the Statement of Claim is struck out.
4. Appellant's costs assessed at \$500 plus disbursements.




Gallen J.A.


Ellis J.A.


Scott J.A.

Solicitors:

Jamandas & Associates for the Appellants
Sherani for the the Respondents