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

CIVIL APPEAL NO. ABU 0010 OF 2009
(High Court Civil Action No: HBC 296/03)

BETWEEN: DHARMA WATI

Appellant

AND:
1. SAT NARAYAN
2. ASHOK NAIDU

Respondents

Coram: Khan Izaz JA
Marshall William JA
Chitrasiri Kankani T JA

Hearing: Tuesday, 31st August 2010

Counsel: Mr Shelvin Singh for the Appellant
Mr Ramesh Prakash and Mrs Pemila Kenilorea for 1st Respondent
Second Respondent – N/A

Date of Judgment : Friday, 17th September 2010

JUDGMENT

1. This is an appeal from a decision of His Lordship C. Datt.

2. The appellants had 14 grounds of appeal of which the most relevant and significant, in our view, to be noted are as follows:

Ground 1

That the learned judge erred in law and in fact in dealing with the application before him in that he exceeded his jurisdiction in going beyond what was asked of him to rule upon.

Ground 2

That the only application before the learned judge was to decide whether the testator meant to devise the lands mentioned in paragraph 3 (d) (of the will) to his daughter-in-law Dharma Wati or his grandson Ashok Naidu and nothing more but the learned judge erred in law and in fact when he went beyond that and in fact set aside the whole of the Will itself.

Ground 4

That the learned judge in invalidating the Will dated 16/06/1999 stated that the Will was not executed in accordance with the provisions of Section 6A of the Wills Act and therefore was invalid, but by the same token in holding that the Will dated 04/05/1999 was valid, he completely forgot about that Section 6A of the Wills Act and in fact validated the same when there was no such application before him and also no evidence as to how it was executed by the testator.

3. Before His Lordship was the will dated 16th June 1999 of the deceased named Latchmaiya. Probate was granted on 22nd June 2001.

4. The testator had appointed his son Sat Narayan as a Trustee of his will and he had filed summons in the High Court at Lautoka for the interpretation of Clause 3 (d) (iii) by which the testator had purported to give ***Lot 4 - 3 acres together with dwelling house thereon situated as worked and cultivated by my grandson Dharma Wati (f/n Ram Sami) to her absolutely.***

5. It was argued by the appellant that as Dharma Wati was a female and the mother of the second respondent Ashok, the words "**grandson Dharma Wati**..."made no sense.

6. During the course of consideration of the question of interpretation of the will, by his own motion, His Lordship began to look at the validity of the will of 16th June, 1999.

7. In dealing with this question, His Lordship, the trial judge made the following observations at paragraph 50 of his judgment, ***"I considered the formal requirements of executing a will under Section 6A (1) of the Wills Act. After considering all evidence I came to the conclusion that the testator's last will of 16th June 1999 was not executed with full knowledge and consent of the testator, for the reasons that Ram Nand Nair, who completed the attestation clause contained in the will stated in his evidence that he did not explain the contents of the will to the testator simply because the testator was not present. Accordingly under***

Section 6(A) (2) of the Wills Act I concluded that the last will was invalid and was executed without the knowledge of its contents of the testator."

8. His Lordship, said at paragraph 74 of his judgment that after considering and evaluating all evidence he concluded that the last will dated 16th June 1999 was invalid, that the probate granted of that will was invalidly granted and that therefore he revoked the grant of probate to Sat Narayan.

9. His Lordship then went on, again of his own motion, to consider whether the laws of intestacy ought to apply to the estate of the deceased or whether a former will dated 4th May 1999 should regulate his estate. His Lordship made this comment in relation to the matter at paragraph 78. ***Therefore, I have found evidence that the last will dated 16th June 1999 was invalid, the rules of intestacy was applicable. However after considering the existence of a former will dated 4th May 1999, which was executed by the testator just over one month, I accept the testator's will dated 4th May 1999 as his last will and testament.***

10. His Lordship went on to discharge the second trustee, namely, Manoj Naidu in respect of the will of 16th June 1999 which he had just held invalid. Then His Lordship appointed Sat Narayan as the sole trustee to the deceased in the will of 4th May 1999 which he had just considered to be relevant and valid.

11. There was no evidence before his Lordship as to the circumstances of the execution of the will of 4th May 1999. Therefore, his Lordship Mr Justice Datt's assumption that the will had been validly executed was without factual foundation.

12. The undisputed facts in this case are that the testator, Latchmaiya, was an illiterate farmer who had procured the execution of his will by staff of the Sugar Cane Growers Association at Rakiraki, and it is clear from the evidence in the trial and confirmed at the appeal hearing that none of these staff were legally qualified personnel.

13. It is also equally clear from the evidence in this case and indeed, recognized by the trial judge that Ashok Naidu was living with his mother Darma Wati and working the farm on her behalf.

14. The critical fact which explains the trial judge's reasoning in the conclusion that the will of 16th June 1999 was invalid is the absence of the witnesses from the presence of each other and of the testator at the time of the execution of the will.

15. His Lordship then goes on to make his observations that the testator was not capable of reading or understanding English and that the will had failed to comply with Section 6(a) of the ***Wills Act.***

16 That section provides as follows:

Subject to the provisions of Part V, a will is not valid unless it is in writing and executed in the following manner:-

a) It is signed by the testator or by some person in his presence and by his direction in such place on the document as to be apparent on the face of the will that the testator intended by such signature to give effect to the writing as his will;

b) Such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and

c) The witnesses attest and subscribe the will in the presence of the testator;

17. It is clear that the formal validity of the will depended upon its execution by two witnesses who witnessed the signature of the testator in the presence of each other.

18. It appears clear to us from the detailed nature of the terms of the will of 16th June 1999 that the testator must have given these instructions to the drafters of the will about how he wanted his property to pass on to his various beneficiaries. It is also clear that the testator was not unfamiliar with the execution of wills as he had signed three prior wills before he executed the fourth and final one on 16th June 1999.

19. In our view the trial judge fell into error in three respects:

First, he embarked upon the evaluation of the validity of the execution of the will of 16th June 1999 without either of the parties raising the issue for determination. Nor, was it a question of any relevance in the trial with which his Lordship was concerned, namely, the interpretation of paragraph 3(d) (iii) in that will. Secondly, His Lordship fell into error in holding that the will of 16th June 1999 was invalidly executed pursuant to the requirements of Section 6(a) of the ***Wills Act*** and therefore of no effect. His Lordship went on to annul the probate which had been granted under this will. Thirdly, His Lordship went on to hold that the earlier will of 4th June 1999 was valid without any evidence of its execution and proceeded to order that the probate of that will be taken out by the Trustee Sat Narayan.

20. We accept that the trial judge as a member of the High Court of Fiji had the power to adjudicate upon a question which became relevant in the trial he was conducting notwithstanding that neither, party raised it as an issue. However, in this case, His Lordships holding that the will of 16th June 1999, of his own motion, was invalid was not only uncalled for in the circumstances of this case but also misdirected in the light of developments of law in this field.

21. It is instructive to consider a statement at Paragraph 7.61 on page 532 Volume 1 of ***English Private Law*** by Peter Birks which was published in the year 2000 where the following statement is made under the heading **Interpretation of Section 9 of the Wills Act 1837.**

22. ***Until recently there was a tendency for Judges to interpret Section 9 very strictly. This meant that some authentic wills which questionably represented the true intention of the Testator failed for non compliance with the prescribed formalities. English Law knows no doctrine of" Substantial compliance", so the Court has no power to admit to probate an authentic will which is invalid under Section 9. Having said this, the courts have recently shown a tendency to be slightly more relaxed about the formalities then were formally the case. In Weatherhill v. Peers [1995] 1 WLR 592 there was a doubt as to whether the testatrix had acknowledged her signature in the presence of both witnesses present at the same time and in Couser v. Couser [1996] 1 WLR 1301 there was a question as to whether one of the witnesses had acknowledged her signature in this case. In each case the validity of the will was upheld. This relaxation is to be welcomed.***

23. It can be seen from the foregoing quotation from ***English Private Law*** and the decision in ***Couser v. Couser***, that a court in proper circumstances will uphold a will which had not been executed in accordance with the relevant statutory requirements.

24. Section 6 of the ***Wills Act*** is in similar terms to Section 9 of the English Act.

25. In this case, the circumstances which, in our view, ought to have compelled His Lordship to hold that the will of 16th June 1999 was valid notwithstanding that it had not been executed in accordance with the provision of Section 6 of the ***Wills Act*** are that the will had been executed by the hand of the testator in respect of which there was no issue; that the will had been prepared and executed under the supervision of personnel who were not lawyers and that the terms of the will raised the clear inference that the testator had intended to make detailed provisions for various members of his family.

26. In these circumstances, we are of the view that His Lordship ought to have held that the will of 16th June, 1999 was valid.

27. Accordingly, we hold that His Lordship, the trial judge fell into error in both or raising the question of the validity of the will of 16th June 1999 of his own motion and concluding that it was invalid because it had not been validly executed under Section 6 of the ***Wills Act.***

We make the following orders:

a) The orders made on 20th February 2009 by his Lordship Datt are quashed.
b) In ***lieu*** thereof, order that the will of 16th June 1999 was valid and the probate thereunder was also valid.

c) Direct that the Trustee Sat Narayan make a further application to the court for the interpretation of clause 4 (d)(iii) of the will of 16th June 1999 in respect of the words *"grandson Dharma Wati"*

d) That the costs of these proceedings taxed or agreed be paid by the Estate.

DATED at Suva this 17th day of September, 2010.

.....

Hon. Justice Izaz Khan
Judge of Appeal

.....

Hon. Justice William Marshall
Judge of Appeal

.....

Hon. Justice Kankani Chitrasiri
Judge of Appeal