

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL ACTION HBC 339 of 2001**

**BETWEEN** : **ANIRUDH SHANKAR** of Natokowaqa, Lautoka, Fiji Sugar corporation  
Limited Locomotion Driver.

**PLAINTIFF**

**AND** : **HARI SHANKAR** of Notokowaqa, Lautoka, Driver in his own capacity and as  
the Trustee of the Estate of Ram Shankar.

**DEFENDANT**

## **JUDGEMENT**

### **INTRODUCTION**

- [1]. This matter was marked for hearing before me on 11 June 2015 but neither the defendant nor his counsel on record, Mr. D.S. Naidu appeared. The matter then proceeded on formal proof. The plaintiff ("**Anirudh**" Shankar) and the defendant ("**Hari**" Shankar) are brothers. They are both surviving sons of the late Ram Shankar. Hari is the executor/trustee of the Ram Shankar estate.
- [2]. Anirudh and Hari are fighting over a half interest in a piece of land described as Housing Authority Lease No. 313984 (Lot 38 on DP 6244) ("**property**"). This half interest is in the name of Hari. It was devised to Hari under the last will and testament of Ram Shankar and formally transferred thereafter upon the death of Ram Shankar. It is important to note that the land is under Hari's name personally and not under the estate.

### **EVIDENCE**

- [3]. Apart from himself, three other witnesses gave evidence for Anirudh, namely Radha Krishna (**PW1**), Roshni Devi (PW3) and Ilaijia Qalova (**PW4**).
- [4]. Krishna has been a neighbour of the Shankar for many years. He said that in 1996, he built a house on Anirudh's compound. For that work, he was paid by Anirudh himself, and not by Ram Shankar, Anirudh's father or Hari Shankar (Anirudh's brother) – both of whom he (**PW1**) knew very well.

- [5]. Anirudh gave evidence after Krishna. He said that the property was acquired in his father's name but it was actually he (Anirudh) who paid the purchase price of \$3,450-00<sup>1</sup>. He said he paid by weekly (and sometimes monthly) deductions of \$5 to \$10 towards the full lease purchase price.
- [6]. Anirudh said the lease was not acquired in his name personally because he was, then, still single and the Housing Authority, at the time, had a policy that favoured and prioritised the allocation of housing units to families over applicants who were single.
- [7]. Anirudh said that, in June 1994, upon Ram Shankar's retirement, he (Ram Shankar) transferred one undivided half share to Anirudh. The other undivided half share would remain with his father, Ram Shankar, until after his death, when it was then transferred to Hari.
- [8]. Anirudh said the house was dilapidated and in such disrepair at the time, so much so that the Lautoka City Council ordered that it be pulled down. After the old house was pulled down, Ram Shankar requested Anirudh to obtain monies from his (Anirudh's) FNPF Account or loan from Housing Authority to build a new house which is compliant with Lautoka City Council requirements.
- [9]. Anirudh said he did withdraw funds totalling \$5,599 from his FNPF Account as well as took a loan in the sum of \$21,689.03 from the Housing Authority to build a new house on the land. In court, he produced a Bundle of Documents, amongst which is a statement of account showing remittances at \$70-00 (seventy dollars) per week from his employer to the Housing Authority.
- [10]. According to Anirudh, his father, Ram Shankar, did go for a short visit abroad upon retirement. Ram Shankar and Anirudh had an arrangement in which Ram Shankar had promised Anirudh that if he (Anirudh) were to build the house, "Ram Shankar would transfer the whole property to him (Anirudh)" i.e. to transfer his (Ram Shankar's) half share to Anirudh on the condition that Anirudh was to allow Ram Shankar to live in the house for remainder of his (Ram Shankar's) lifetime – while Anirudh pays for all outgoings and rent. Anirudh agreed. He did look after and take care of his father until he (father) died.

- [11]. The loan from Housing Authority was secured by a mortgage, the account of which was settled only by Anirudh. Anirudh said that Hari did not contribute to the construction of the house nor in the purchase of the land.
- [12]. However, when Ram Shankar died, it became apparent that he did leave a Will in which he bequeathed his half interest in the land to the defendant, Hari Shankar.
- [13]. Shankar says that from 1994, he had permitted Hari Shankar and his wife to occupy premises temporarily and to move out as soon after he build own house but they have stayed on.

### ISSUE

- [14]. Anirudh is pursuing a claim based on equitable principles and in particular, on estoppel. The estoppel claim is really against Ram Shankar who is now deceased. Since Ram Shankar is now deceased, the first question I ask is whether or not his estate can be liable on a cause of action on estoppel.
- [15]. If assuming that the estate can be liable on a cause of action on estoppel, can the estate still be ordered to make good the promise of the deceased Ram Shankar by transferring the half interest to Anirudh, considering that the half interest in question is already under the name of Hari Shankar and not under the estate.

### LAW

- [16]. Generally, a court of equity may intervene to declare the existence of a beneficial interest in property.
- [17]. Where a plaintiff has acted to his or her detriment on an assumption or expectation induced either by a promise of the defendant, or was merely encouraged by the defendant, the law of equitable estoppel will come to the relief of the plaintiff, if the defendant reneged.
- [18]. It must be shown that the defendant knew or intended that the plaintiff would act (or not act) in reliance on the assumption or expectation (see **Waltons Stores (Interstate) Limited v Maher** [1988] HCA 7; (1988) 164 CLR 387, 404 (Mason CJ and Wilson J)).

- [19]. The underlying rationale is that it would be unconscionable (and unfair or unjust) if the defendant were left free to ignore his promise/inducement.
- [20]. But can a Court of Equity direct an estate to make good a promise allegedly made by a testator and, in particular, considering that the making good of that alleged promise will contravene the terms of the Last Will and Testament of the testator?
- [21]. The short answer to the above question is “yes”.
- [22]. However, having said that, the burden is extremely high on a party claiming estoppel/constructive trust against estate to establish his claim. Because the alleged promisor is not alive to give his or her version of events, there is a need to carefully scrutinise any claim based on an alleged promise or representation by a deceased person – and the courts, accordingly, have always exercised great caution when dealing with contested claims against an estate.
- [23]. In Parveen Varma v Gautam Varma & Ors [2010] NSWSC 786, the New South Wales Supreme Court explains this position thus:

418 The difficulties facing the court where a claim is based on an assurance made by a deceased have been noted in many cases. **It was conceded, in effect, by Mr Rayment that Parveen bears a comparatively difficult task in evidentiary terms in seeking to persuade the court on the balance of probabilities of the making of the alleged promises given that Sid is not alive to give his version of events.** (Of course, even had he been given the opportunity to do so when this issue first arose during his lifetime, there is a question as to how reliable Sid’s evidence would have been in view of his state of mind at that time.)

419 Careful scrutiny is required (Plunkett v Bull (1915) 19 CLR 544; Clune v Collins Angus & Robertson Publishers Pty Limited (1992) 25 IPR 246, at 253). As explained in Weeks v Hrubala [2008] NSWSC 162, at [20], the court generally looks for corroboration of those claims (see also Re Hodgson (1886) 31 Ch D 177; Vukic v Luca Grbin and Ors; Estate of Zvonko Grbin [2006] NSWSC 41).

420 In Weeks v Hrubala (at [20]), Young CJ in Eq said:

In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see Re Hodgson (1886) 31 Ch D 177 even though, as a matter of law, corroboration is not absolutely necessary. Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration.

421 In Plunkett v Bull, Isaacs J said:

Then we come to the question how far the onus of proof which lay upon the plaintiff was satisfied. She had the burden of establishing the original creation of the indebtedness of the deceased to her, and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against the

estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as *primâ facie* fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.

422 In Vukic and in Joseph Saliba & Anor v Thomas Tarmo [2009] NSWSC 581, respectively, each of Brereton and Nicholas JJ emphasised that the court must closely scrutinise claims against an estate in circumstances where the only person who can contest the issue is deceased.

423 Similarly, in Lewis v Lewis & Anor [2001] NSWSC 321, Hodgson J (as his Honour then was) referred to the need for caution before finding an intention to create legal relations in a family situation

[24]. On the second question of whether or not the half interest in question can still be transferred to Anirudh considering that it has been already been transferred to Hari as beneficiary, I am of the view that there is nothing wrong in principle in that. It is a different position though if Hari has since sold and transferred it to a bona fide purchaser for value without notice, which Hari is not.

[25]. In the New South Wales Supreme Court case of Joseph Saliba & Anor v Thomas Tarmo [2009] NSWSC 581 (23 June 2009) - a widow who did not have any children and who lived alone in her suburban house in Bankstown in Sydney, Australia, had verbally promised her neighbours (husband and wife, her close friends) on numerous occasions, that she would leave them half of her house when she dies. The woman later made a Will to that effect at her solicitors' office on her own initiative - with the neighbours in question in attendance - on the woman's request. The woman made the promises (and the Will) in acknowledgement and in gratitude for the neighbours' friendship and their past and on-going care and support of her. After the Will, the neighbours remained unwavering (if not, even more) in their support, and also felt obligated on account of the prospect of their inheritance upon the woman's death. However, some years later, the woman made another will leaving the entire house to her nieces who resided in the US. The neighbours succeeded in their claim on constructive trust and/or equitable estoppel and were awarded half of the estate.

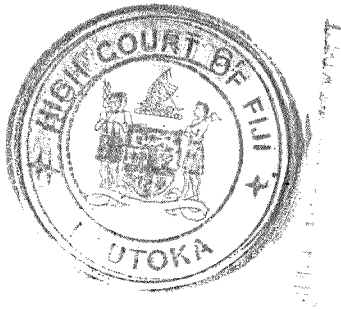
## **CONCLUSION**

[26]. After hearing the evidence of the plaintiff as well as all the witnesses he called to give evidence for his case, and considering that neither the defendant nor his

counsel has bothered to appear to defend the claim, I accept all the evidence given by and for the plaintiff and do find that the plaintiff, Anirudh Shankar has made out his case of promissory estoppel against the estate.

**ORDERS**

[27]. I grant Order in Terms of prayer Number 3 and Order that the defendant, Hari Shankar do, within 28 days of the date of this Ruling, vacate the property. In addition, I grant \$2,000 (two thousand dollars) costs in favour of Anirudh Shankar. I also order that the half interest in the land in question be transferred to Anirudh.



Anare Tuilevuka  
**JUDGE**  
24 June 2015.