

THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION
Probate HPP No. 44 of 2013

BETWEEN:

Shakuntala Devi
Plaintiff
And
Sahadei
Defendant

COUNSEL: Mr M.Sadiq for the plaintiff
 Mr A.Sen for the defendant

Date of Hearing: 7th November, 2016

Dates of Judgment: 11th November, 2016

JUDGMENT

1. The plaintiff is the de facto wife of Bal Ram,(deceased). The defendant is his wife. The plaintiff, in her statement of claim states that the deceased appointed her as executrix and trustee of his estate in his will. She applied for probate. The defendant lodged a caveat .The plaintiff issued a Warning to Caveator and the defendant filed Appearance to Warning. The plaintiff prayed for removal of the caveat lodged by the defendant and for his will of 19th August, 2004, to be pronounced as valid.

2. The defendant, in her amended statement of defence, disputes the will. She states that the “*purported will*” was not executed in terms of the Wills Act. The deceased at the time of the execution neither knew nor approved the contents of the will. The will was neither signed by the deceased nor in the presence of the “*alleged two witnesses*”. The deceased never intended to make a will and did not give any instructions for the preparations of a will. The execution of the will was obtained by the undue influence of the plaintiff and/or others.

3. The defendant continues to state that she married the deceased on 9th May, 1965, and had 5 children. She lived with him for over 48 years. The properties of the deceased were acquired after their marriage. She was dependent upon the deceased for income. He paid her an allowance on a regular basis, but has not made any provision for her, in the "*purported will*".
4. The defendant moves for dismissal of the plaintiff's claim and counterclaims alternatively, for the court to (i) pronounce that all the properties owned by the deceased are matrimonial property, in terms of the Family Law Act, and (ii) make appropriate orders under the Inheritance (Family Provision) Act No 12 of 2004.
5. The plaintiff, in her reply to the defence and counterclaim states that she and the deceased lived together since 1996. She gave the deceased \$ 200 every week. She contributed a large sum of money towards the building of the house in which she is staying. She took him to hospital when he fell ill. The defendant never came to see him in hospital. His body was brought to the plaintiff's house and then to the defendant's house. The deceased built a house for the defendant on his land comprised in CT 26092.

The hearing

The plaintiff (PW1)

6. The plaintiff, in evidence in chief said that she was a market vendor. She had been living with the deceased, since 1996.
7. She produced a copy of the will of the deceased. At that stage, Mr Sen, counsel for the defendant submitted that no affidavit of testamentary script had been filed by the plaintiff, as required under O 76, r 5. In contrast, the defendant had filed an affidavit of testamentary script on 2nd February, 2016.
8. The riposte of Mr Sadiq, counsel for the plaintiff was that no objection was raised to the will at the PTC.

9. The plaintiff continued to state that she built a house on the land of the deceased. She did not have title to that land. The defendant lives on a house built by the deceased on his freehold land in Belogo. The deceased did not support her. She was living with her sons. The deceased gave his sons his insurance monies. The sons gave the defendant \$70 a week from those monies. The plaintiff said that the deceased did not live with the defendant, after he commenced living with her.
10. The plaintiff said that she took the deceased to hospital when he fell ill. The defendant did not visit him in hospital. His son did.
11. In cross-examination, the plaintiff said that the deceased had nothing to do with his family, after he left the defendant. She called the defendant after he died, as she was his wife. She did the funeral rites at her home, while the defendant did the same at her house.
12. It was put to the plaintiff that she had lived with the deceased for 14 years since 2001, not since 1996. She said that she commenced to live with him after her daughter's marriage in 1996.
13. It transpired that before she met the deceased, she was a squatter in a land belonging to the Town Council. She had money in the Bank. Presently, she has \$5000.
14. The deceased did not transfer any land to the defendant. He transferred Belogo estate to his three sons. She admitted that he had sold that land for \$ 10,000 to his sons.
15. She said that she was aware of the activities of the deceased during the day. After he dropped her at the market and her children in school, he did some jobs. If he did not have any jobs, he would help her in the market. He had promised her that he would visit the defendant.
16. She denied that the deceased gave the defendant \$100 a week.
17. In re-examination, PW1 said that if the deceased had no jobs, he would be in the market all day helping her.

The defendant, (DW1)

18. The defendant, in evidence in chief said that she married the deceased on 9th May, 1965. She has 5 children, 3 boys and two girls.
19. She could not recall the year the deceased left her to live with the plaintiff.
20. DW1 said that the deceased did not give her any land, after he left her. He sold all his lands. He supported and gave her money for expenses. She lives in a small house on her eldest sons' land.
21. In cross-examination, the defendant said that the deceased lived with her as well as the plaintiff, after he left her. She did not go to hospital, when the deceased fell ill. Her sons did. His body was taken to the plaintiff' house and then to her house.
22. She said that the deceased gave her \$ 100 a week. She denied that he never visited her.
23. In re-examination, she said that Belgo estate belonged to her sons. They built a small house for her on that land.
24. At the conclusion of the case for the defendant, Mr Sadiq and Mr Sen made oral submissions, as directed by Court.

The determination

25. The issues raised at the PTC are twofold:

***WHETHER** the said deceased make adequate provisions for the defendant?*

***WAS** the defendant dependent upon the deceased during his lifetime for income which was provided and paid on regular basis together with sundry expenses?*

26. Mr Sadiq submitted that since that no issue was raised on the validity of the will of the deceased, it follows that the defendant accepts the will. He said that the only issue was whether the defendant was maintained by the deceased.

27. Mr Sen, in reply submitted that the party propounding a will must establish that the will was duly executed by the deceased. The onus probandi was on the plaintiff to prove the will, which she has failed to do. He concluded that it follows the estate of the deceased must devolve on the defendant, the wife of the deceased and his children, according to the laws of intestacy.
28. In support, Mr Sen cited the decision of the FCA in *Muni Deo Bidesi and Others v Public Trustee of Fiji*, 21 FLR 65 which held that the burden of proof was on the party propounding a will to establish that the testator knew and approved its contents.
29. In my judgment, it is axiomatic the onus was on the plaintiff to raise the relevant issue and prove that the will was executed by the deceased, since the defendant has disputed the validity of the will on the grounds set out in her amended statement of defence and counterclaim.
30. I note that it is an agreed fact that the defendant has lodged caveat no 20 of 2013 against the estate of the deceased and applied for letters of administration.
31. I would also note that the plaintiff had not complied with the mandatory requirement in a probate action as provided in Or 76, r 5, to file an affidavit of testamentary script, as pointed out by Mr Sen.
32. In the light of my determination, I do not find it necessary to deal with the alternative claims in the defendant's counterclaim.
33. The plaintiff's case fails.

34. *Orders*

- (a) I decline the plaintiff's case.
- (b) I hold that Bal Ram died intestate.
- (c) The plaintiff shall pay the defendant costs summarily assessed in a sum of \$ 1000.

A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

JUDGE

11th November, 2016

