

**IN THE HIGH COURT OF FIJI**  
**CIVIL JURISDICTION**  
**AT SUVA**

Action No.: HBC 384 of 2015

**IN THE MATTER** of Trustee Act Cap 65

**AND**

**IN THE MATTER** of the Estate of  
**RAGHUBAR SINGH** deceased who died  
on 1<sup>st</sup> October, 2010, Testate

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**BETWEEN** : **BIJAE WATI SINGH** also known as **VIJAY WATI** also known as  
**VIJAY WATI SINGH** of Vunivivi Hill, Nausori, Fiji, Domestic Duties

**PLAINTIFF**

**AND** : **SURESH KUMAR SINGH** of 73 High Street, Toorak, Suva,  
Businessman and **SUBHAS CHANDRA PARSHOTAM** of Suva, Legal  
Practitioner as the Executors and Trustees of the Estate of **RAGHUBAR**  
**SINGH** late of Vunivivi Hill, Nausori, Businessman, Deceased.

**DEFENDANTS**

**Counsel** : **Mr. A. Singh for the Plaintiff**  
**Mr. G. O'Driscoll for the Defendants**  
**Date of Hearing** : **23<sup>rd</sup> May, 2016, and 18<sup>th</sup> June, 2016**  
**Date of Judgment** : **15<sup>th</sup> July, 2016**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff is one of the trustees of the estate of her late husband who in his last will had granted an allowance for her maintenance. Apart from the said allowance she was also given the matrimonial house and tenancy in common of a commercial building. After the demise of her husband she lived in the matrimonial house with the family of the 1<sup>st</sup> named Defendant and her needs were looked after by the 1<sup>st</sup> named Defendant for

nearly 5 years. The said house was transferred to the Plaintiff in terms of the last will and she had transferred the same to another child who had evicted the 1<sup>st</sup> named Defendant and his family from the said house. Since then, the Plaintiff was requesting some money for the maintenance from the executors in terms of the last will. It should be borne in mind that apart from the Defendants there is an unnamed party and the Plaintiff, are named as an executor under the last will. Since the trustees could not come to a 'unanimous' decision as to the exercise of their 'discretion' regarding the amount, to be paid to the Plaintiff. The Plaintiff had sought intervention of the court through Originating Summons for said determination. Though the said summons dealt some other issues they were not dealt and the Parties only addressed the issue of narrow issue of the reasonable amount that the Plaintiff is entitled under the last will.

## ANALYSIS

2. The last will of late R. Singh who was the husband of the Plaintiff and father of the 1<sup>st</sup> named Defendant inter alia stated as follows

*'3(b). To maintain support and suitably provide for my wife Vijay Wati during her life and to pay my trustees shall in their absolute discretion think fit and proper having regard to the condition in life to which she has become accustomed up to the time of my death.'*

3. The trustees of the estate of late R. Sing are the Plaintiff the Defendants and one Vishnu Deo. This person is living abroad and there were email communications and he had also raised concern as to the plight of the Plaintiff, where she had to seek redress from court. The impasse is due to 4 trustees not making a unanimous decision.

4. In *Boardman and another v Phipps* [1966] 3 All ER 721 House of Lords <sup>1</sup>held,

*'In the present case the appellants did not make a profit out of buying shares which it was intended that the trust should acquire or which, unless Mr. Fox changed his mind and the sanction of the court was obtained, there was any possibility of the trust acquiring. There are, however, passages in the opinions delivered in that case which are very relevant to*

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<sup>1</sup> Defendant had submitted CA decision (Lord Denning) of the same matter, and it was affirmed in HL.

*the issues your lordships have to determine. Viscount Sankey said ([1942] 1 All ER at p 381, letter e):*

*"The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect."*

*Lord Russell of Killowen said ([1942] 1 All ER at p 386, letter a):*

*"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides: or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intentioned, cannot escape the risk of being called to account."*

*Further at p 733-734*

*'They had been authorised by the trustees to represent the trust holding at two annual general meetings of Lester & Harris Ltd, Mr. Boardman as trust solicitor had dealt with the inquire whether the trust would sell their holding and Mr. Boardman as solicitor and Mr. Phipps had discussed with Mr. Fox in December, 1956, Lester & Harris, Ltd's accounts and what should be done to improve the value of the trust holding. Apart from these occasions, I agree with Lord Denning MR ([1965] 1 All ER at p 855, letter d; [1965] Ch at p 1017) that there was not any contract of employment of the appellants made by the trustees or any of them.*

*Wilberforce J held ([1964] 2 All ER at p 200, letter e) that in 1956 the appellants assumed the character of self-appointed agents of the trustees; that the agency continued throughout the negotiations; and, as I have said in my view wrongly, that the acquisition of shares by them was no departure from the agency. In the Court of Appeal Lord Denning MR ([1965] 1 All ER at pp 855, 856; [1965] Ch at pp 1017, 1018) agreed with Wilberforce J ([1964] 2 All ER at p 200) that they had assumed this character and said that they had taken on themselves an authority which they did not possess. Pearson LJ ([1965] 1 All ER at p 859; [1965] Ch at p 1022) held that they were acting with the authority of the trustees and Russell LJ ([1965] 1 All ER at p 864, letter h; [1965] Ch at p 1031) expressed the view that two out of three trustees could come to an*

*arrangement with a third party which would have the effect of placing the latter in a fiduciary position.*

*In my opinion, despite the able arguments advanced by counsel for the appellants the unanimous opinion of the Court of Appeal and of Wilberforce J, that their relationship to the trust was fiduciary is correct. In my opinion that relationship arose from their being employed as agents of the trust on the occasions that I have mentioned and continued throughout. It does not, however, necessarily follow that they are liable to account for the profit that they made. If they had entered into engagements in which they had or could have had a personal interest conflicting with the interests of those they were bound to protect, clearly they would be liable to do so. On the facts of this case there was not, in my opinion, any conflict or possibility of a conflict between the personal interests of the appellants and those of the trust. There was no possibility so long as Mr. Fox was opposed to the trust buying any of the shares of any conflict of interest arising through the purchase of the shares by the appellants.*

5. So, the Plaintiff being the trustee of the estate of her husband could not have exercised her 'discretion of the trustees' as to the amount that she needed when there was no unanimous decision as to the amount she been given monthly. The 1<sup>st</sup> named Defendant is the person who is in control of the trust property and is also the person who will be the beneficiary to the residue after due execution of the last will. He was the person who had looked after the Plaintiff prior to 6<sup>th</sup> November, 2015.
6. The issue involved the amount the Plaintiff needed to maintain 'having regard to the condition of life' she was accustomed. At the moment she is confined to a wheel chair as she had a fall early this year and since then she required a caregiver to be with her all the time.
7. The amended summons sought the order for maintenance take effect from 6<sup>th</sup> November, 2015. It also sought ongoing expenses including the medical bills since the injuries to the Plaintiff in January, 2016. It also sought an 'Order for reimbursement of medical and or care costs'. The summons dated 2<sup>nd</sup> June, 2016 which was filed after the evidence of the first witness was concluded and there was no affidavit in support of the said summons. Considering the circumstances of the case the request for the cross examination of the Defendant was not allowed. The issue before the court is determination of the sum for the

Plaintiff and since November, 2015 she is living in the matrimonial house with the youngest son of her, whom she had transferred the house, and her wife and care givers.

8. The issue before the court is limited and it is to determine the amount that the Plaintiff would need for her maintenance in the same condition as she was used before the demise of her husband.
9. The Plaintiff was cross-examined by the Defendants in terms of Order 38 rule 2(3) of High Court Rules of 1988 and her daughter in law (who had not sworn an affidavit) gave evidence and she was subject to cross examination.
10. The evidence that was presented are contained in the two affidavits of the Plaintiff and her oral cross-examination and also the evidence of her daughter in law and the affidavits in opposition filed by the Defendants.
11. Both sides have submitted irrelevant facts to this matter, through affidavit evidence and I do not wish to deal with them, but suffice to say that it demonstrate the estrangement between the two siblings. In the affidavit in opposition filed by the 1<sup>st</sup> named Defendant stated that he had maintained the Plaintiff when she was living with his family prior to 6<sup>th</sup> November, 2015. He had also stated that he used to give \$100 per week for the Plaintiff when she was with him, for her expenses other than the things that he provided.
12. The issue before the court is determination of the amount that is needed for the Plaintiff for her maintenance. So, there is an admission that the Plaintiff was given a sum of \$100 per week for her expenses prior to 6<sup>th</sup> November, 2015 when she was taken care by the 1<sup>st</sup> Defendant.
13. The Plaintiff had written a letter dated 3<sup>rd</sup> March, 2014. This is annexed to the affidavit in support as 'BWS 4'. In this letter she had requested a payment of \$150 and in that letter she stated

*'I need \$150 per week for my personal expenses that will include my medication. My personal body care, shoe, clothing, taxi fare, brandy and*

*give gifts to my families who visit me from overseas, that bring presents for me. I want money in hand to spend, as I wish and to save some for my future need, and do not have to give an account for every dollar I spend to anyone.'*

14. It is understood that she did not want 'to give an account for every dollar' she spend to 'anyone' and she wanted to save some money for her future and for that she wanted \$150. This included her personal body care, shoe, clothing, taxi fare, brandy, gifts but not her other expenses like food and care taking. At that time she was living with the 1<sup>st</sup> Defendant as the first latter for his eviction is dated 8<sup>th</sup> August, 2015 and he had left the premises on 6<sup>th</sup> November, 2015. That is the basis for seeking this order for maintenance retrospectively from that date.
15. According to the affidavit in opposition filed by the 1<sup>st</sup> named Defendant, when the Plaintiff was living with him, he had given \$100 a week for to the Plaintiff. This was in addition to taking care of her and for providing food etc. He had stated that the said amount was given to Vimlesh, the youngest son of the Plaintiff. But the fact remained that the 1<sup>st</sup> Defendant thought that it was reasonable to give her \$100 per week .Her giving that money to whoever she wants is not relevant. What should be determined here is the reasonable amount that she needed to live in the life she used to live prior to the death of her husband.
16. The Plaintiff came to court in a wheel chair and she was cross-examined by the counsel for the 1<sup>st</sup> named Defendant. She needs to be taken care by a caregiver. This may be due to her fall early this year. For how long this is needed cannot be ascertained with certainty.
17. She had transferred a valuable matrimonial house to her younger son, for her love and affection in 2015. So, there is a duty cast on him to look after her as well. This does not absolve the duty cast on the trustees to provide an appropriate sum for her maintenance considering the life style she was accustomed when her husband was living. When said sum is determined and it is given to her, she can do as she pleases with the said sum. The

Plaintiff, though elderly was of sound mind and can take decisions on her own, as regards to the expenses.

18. In her cross examination she did not specify the life style she was used before the death of her husband, and this fact is not fully addressed in the affidavits filed in support of this application, but that may be not what she needs now as she is on a wheel chair at the moment. She said that she needs to entertain people who come to visit her. This is a reasonable request, considering her social status. This can be considered as an expense, apart from her medical needs and also services of a caregiver.
19. The Plaintiff is a widow of a businessman who had a considerable income. This can be deduced from the assets of the estate of her late husband. The family could not have been successful without her contribution as a housewife of late R. Singh, and it is the duty of all and specially the trustees to look after her and take care of her. The last will had made ample provisions for that.
20. The last will adequately protected her as her late husband bequeathed the matrimonial home as well as she was granted tenancy in common in a commercial building 'R. Singh Building' along with the 1<sup>st</sup> named Defendant.
21. Considering the affidavits of the Plaintiff and oral evidence of the cross-examination it is evident that 1<sup>st</sup> named Defendant who is also a trustee is virtually in control of the estate property and the income of that. That is the basis of the Plaintiff seeking her maintenance from the executors including him. Any order should be directed to him though there are three executors excluding the Plaintiff.
22. The sum of money needed for the Plaintiff has to be determined at the discretion of the executors which also included the Plaintiff. The exercise of the discretion was not done as there was no consensus among them. The Plaintiff who had requested only \$150 per week in 2014 is now seeking more than \$700 per week. The main difference was in 2014

she was with the 1<sup>st</sup> named Defendant who looked after her and now she is with another son, in the same residence.

23. The Plaintiff needs special food as she is suffering from hypertension and also considering her old age. She is accustomed to a lifestyle of a businessman who was successful and that life style should be maintained. Admittedly the 1<sup>st</sup> named Defendant had paid about \$100 per week when she was with him. But at that time she was not on a wheel chair. So, some of her extra expenses like visiting friends (taxi fare) would have decreased but at the same time the expenses for 24 hour caregiver would have added.
24. Though there is no evidence of any urgent need of medical treatment, but she needs some medicine and perusing the documents submitted and oral evidence indicate that it may be a future requirement depending her condition and also improvements to her health condition. This raises an issue if there is a future requirement for special medical treatment. I do not think that this is an issue that I can determine with the evidence before me, but would suffice to say that her medical expenses at the moment are not substantial and can be included in the amount that is determined in this application. This is what the Plaintiff had sought in her letter BWS4. She had requested any medical expense more than \$200 to be excluded from her weekly amount for maintenance, and this is reasonable. So I would order any medical bill in excess of \$200 to be directly submitted to the 1<sup>st</sup> Defendant and or to the trustees of the estate. At the moment there is only one receipt of \$350 (P1) which exceeded \$200.
25. The 1<sup>st</sup> Defendant at the outset of this application stated that any medical expense to the Plaintiff could be borne out by himself as an urgent measure. This indicates his affection towards mother. So, any medical expense in excess of \$200 should be submitted to the trustees for reimbursement or payment by the estate. Such expense should be informed to the 1<sup>st</sup> Defendant beforehand unless it is a part of expense from hospitalization of the Plaintiff.
26. The evidence of the daughter in law of the Plaintiff does not reveal substantial expense for food for the Plaintiff. There is a need for around the clock supervision by a caregiver,



and she had also volunteered to take care of her mother in law. According to her evidence the main component of the expense is the caregiver. At the moment the house is not owned by the Plaintiff, so cleaning that and keeping it clean is a duty of the owner, youngest son and his wife. Apart from care giving, the Plaintiff said that she needed money to entertain visitors.


27. Considering all the evidence before me I award a sum of \$200 per week as maintenance from 6<sup>th</sup> November, 2015. The said amount should be paid by the 1<sup>st</sup> named Defendant on or on behalf of the trustees of the estate, every fortnight on 1<sup>st</sup> and 15<sup>th</sup> of every month in installments of \$400. There is an outstanding amount of \$7,200 for 36 weeks (as at 15<sup>th</sup> July, 2016).
28. Parties are at liberty to make an application for variation of the orders if the circumstances change.

#### **FINAL ORDERS**

- a. The Defendants as trustees should pay a sum of \$200 per week every fortnight as her maintenance in terms of the last will. (Payment dates are on or before 1<sup>st</sup> and 15<sup>th</sup> of each month in the sum of \$400).
- b. Any medical expense including hospitalization in excess of \$200 be borne by the estate and such hospitalization should be informed to the 1<sup>st</sup> Defendant on or prior to admission.
- c. No costs.

**Dated at Suva this 15<sup>th</sup> day of July, 2016**



  
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**Justice Deepthi Amaratunga**  
**High Court, Suva**