

IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

Action No: HBC 104/2011

BETWEEN : **SHYAM KUAR** also known as **SHAM KUAR** of 10 Anderson Road, Martintar, Nadi, Domestic Duties.

PLAINTIFF

A N D : **VISHWA NAND** of 10 Anderson Road, Martintar, Nadi, Driver.

DEFENDANT

Appearances

Ms. Arthi Bandanna Swamy on the instructions of Messrs PATEL & SHARMA for Plaintiff

Mr. Siwan on the instructions of JANEND SHARMA LAWYERS for Defendant

Date of Hearing : 4th May 2017

Date & Time of Ruling : 16th May 2017 at 2.30 pm

R U L I N G

INTRODUCTION

1. The following ruling is delivered consequent to the hearing held before me on **4th May 2017** in relation to an application of the plaintiff, made by way of **Notice of Motion**, dated 6th October 2016 and filed on 12th October 2016, together with the supporting affidavit of her son **RAM CHAND** and the exhibit marked as "A" claimed to be a Medical Certificate.
2. The said hearing culminated in filing of written submissions on behalf of both the parties and though the delivery of ruling was fixed for **26th of May 2017**, on perusal of the record subsequently, and being mindful of the alleged delay in the adjudication of the substantial matter, which in fact is pending from the year 2011, and considering the admitted age and the sickness of the plaintiff, I decided to abridge the date of ruling in order to expedite the disposal and the ruling is

hereby pronounced by giving the notice of abridgment to the respective Solicitors.

BACKGROUND OF THE PRESENT APPLICATION

3. By the aforesaid application plaintiff is seeking reliefs, among others:
 - (a) An order that there be an inquiry into the mental state of the plaintiff to determine whether she is of unsound mind and if found to be such, she be declared of unsound mind and a “patient” incapable of managing and administering her property and affairs.
 - (b) An order appointing her Son (RAM CHAND) as her Next friend and Guardian Ad Litem for the purpose conducting the cause herein.
4. The defendant VISHWA NAND, who is said to be a Grandson of the plaintiff, by his counter affidavit, dated 7th November 2016 and filed on 10th November 2016, while admitting the averments in paragraphs 1, 3, 4, 5, 6, 7 and 8 of the affidavit of RAM CHAND, denied the rest of the averments therein except for the facts that the Pre-trial formalities were dispensed with by consent, in order to have a speedy trial and the plaintiff is elderly and sick.
5. He further alleged that the applicant RAM CHAND is the instigator of the substantial action against him, he does not have the best interest of the plaintiff at heart, he has abused the plaintiff and he is after the land in certificate of title number 14469, which is the subject matter of the main action and the applicant is having an eye on it. The defendant moved for the dismissal of the plaintiff's motion for which RAM CHAND replied by his affidavit dated 9th December 2016 filed on 14th December 2016.
6. The case record reveals , among other things, that there had been two earlier applications for appointment of Guardian Ad Litem & Next Friend and when the matter came up for hearing before Sharma J on 26th August 2016 on the application dated 27th February 2015, the learned counsel for the plaintiff, seemingly, becoming mindful of the proper procedure to be followed, in appointing a Guardian Ad Litem and Next Friend, on behalf of a person under disability withdrew the above application and filed the application in hand on 12th October 2016 by Notice of Motion dated 6th October 2016 supported by the Affidavit of said RAM CHAND.

7. It is on the said application the hearing was held before me and I am required to make orders, primarily, whether an inquiry should be held to ascertain the mental state of the plaintiff as prayed for in paragraph (a) of the prayer to the said Notice of Motion and thereafter to decide on the subsequent reliefs prayed for therein, however, subject to outcome of this hearing.

HISTORY OF SUBSTANTIAL ACTION.

8. The plaintiff on 8th July 2011 filed her writ of summons, dated 8th July 2011 together with the statement of claim dated 6th July 2011 against the defendant claiming reliefs, inter- alia,
 - a. An order requiring the defendant to sign, execute and perfect all papers required to transfer the land comprised in Certificate of title Number 14469 to the plaintiff free of charge and all encumbrances and **in the alternative** the Deputy Registrar of the High Court to execute all papers in place of the defendant.
 - b. Alternatively, a declaration that the defendant holds and has held the land in question as a Trustee for and on behalf of the plaintiff.
9. The defendant by his statement of defence dated 3rd August 2011 filed on 9th August 2011, while admitting the contents in paragraphs 1, 3 & 5 of the plaintiff's statement of claim, denied the rest thereof and particularly stated the property in question was transferred to him by the plaintiff on her own volition and free will and moved, among other things, for the dismissal of the plaintiff's claim.
10. It is transpired from the record that considering the age of the plaintiff and her admitted debilitating physical condition and sickness (not mental) the pre-trial formalities were dispensed with by way of consent.
11. The question that begs ruling, for the time being, is whether there should be an inquiry into the mental state of the plaintiff to decide as to whether she is or is not a mentally retarded person and with disability to manage her affairs, for the consideration of a declaration to that effect and for the subsequent decision whether plaintiff's

application for her son to be appointed as Guardian Ad Litem & Next Friend should be allowed or not.

THE LAW

High Court Rules of 1988

12. It is observed that Rules 1, 2 (1) (2) & 3(4) under Order 80 of High Court Rules of 1988 and Sections 39 to 43 of part VI of the **Mental Treatment Act** come in to play in deciding who is the person with disability and whether there should be an inquiry before declaring a person is or is not of unsound mind and incapable of managing himself, his affairs and in appointing someone to manage his affairs.
13. High Court Rules- Order 80 Rule 1 defines a “person under disability” means a person who is an infant or a patient. A “patient” means a person who by reason of mental disorder is incapable of managing and administering his property and affairs.

Part VI of Mental Treatment Act Cap 113 provides as follows.

14. Sec.39. (1) The Court may, on such application as is hereby mentioned, make an order directing an inquiry whether any person subject to the jurisdiction of the court who is alleged to be unsound , is or is not of unsound mind and incapable of managing , himself and his affairs.

THE ANALYSIS

15. The aforesaid Rule 1 of Order 80 of the **High Court Rules** categorically states, who is the “Person with Disability” and the section 39 of the Mental Treatment Act states about the authority of the Court to make order directing and inquiry to decide whether any person subject to the jurisdiction of the court who is alleged to be of unsound mind, is or is not of unsound mind and incapable of managing himself and his affairs.
16. Admittedly, this is an on-going action where the Plaintiff, half way through the substantial action, filed by her in the year 2011, has moved this court to appoint her son as the Guardian Ad Litem and Next Friend of her on the purported grounds averred in her son’s

affidavit dated 6th October 2016 filed along with the Notice of Motion of the Plaintiff.

17. Since a comprehensive inquiry, in to her application for the appointment of her son as Guardian Ad Litem & Next Friend, has **not** yet been held before me and what I had before me was an inquiry only for the limited purpose of deciding the necessity of an inquiry to look into the mental status of the plaintiff, I shall not, for the time being, engage in the assessment of the evidential value of her son's affidavit or medical document annexed to the present application.
18. It transpired through the case record that an attempt made by **Justice L. Abeygunaratne** (as he then was) to take plaintiff's evidence on 12th Feb 2015, as per her original request, has failed and the court has arrived at a finding to the effect "*I observe that the plaintiff is unable to give evidence as she seems to be very feeble and sick*". This finding is not disputed by the defence.
19. What is primarily needed, to consider the application for the appointment of Guardian Ad Litem and Next Friend as prayed for by the plaintiff, is an adjudication by this Court declaring whether the plaintiff is a "patient" who by reason of mental disorder is incapable of managing and administering her property and affairs in terms of Order 80 Rule 1 of the High Court Rules.
20. Admittedly, Plaintiff has not so far been subjected to any procedures under provisions in sections 39 to 43 of the Mental Treatment Act and declared that she is a person of unsound mind for her to fall in to the category of "patient" and thereby to be treated as a "person under disability" within the meaning of Rule 1 of Order 80.
21. She is, presently, said to be living under her son, the person sought to be appointed as Guardian Ad Litem & Next Friend. No any formal inquiry has been held so far in order to adduce relevant evidence to decide the prime question of plaintiff's present mental condition, except for filing a document claiming to be a Medical certificate without being supported by an affidavit.

PRELIMINARY OBJECTION BY THE DEFENCE

22. In page 3 of the written submissions for the Defence the learned Counsel has taken up the position that if the affidavit of RAM CHAND

in support of application to appoint Guardian Ad Litem is to be accepted at face value, then RAM CHAND cannot have any authority from the plaintiff to swear affidavits on her behalf.

23. It is to be observed that nowhere in his affidavit RAM CHAND has ever said that his mother is of unsound mind or that he has any reason to believe so. What he has stated in paragraph 11 of his affidavit is as follows:

Para. 11. "THAT due to my mother's mental status and deteriorating health conditions I am of the belief that she cannot give further instructions to her Solicitors therefore the said matter cannot proceed before this Honourable Court"

24. The Plaintiff is moving the court to have her son appointed as her Guardia Ad Litem & Next Friend and for that purpose has subjected herself to this court for an inquiry in to her mental status under the relevant provisions of Mental Treatment Act. She is not brought from mental Hospital being admitted by a committal of a Magistrate after adjudication as a "patient" or being admitted by the relatives with the finding of a Medical Doctor that she is a "patient". Still she is to be adjudged of her mental condition by a due inquiry and until such time she should be presumed to be a person of sound mind.
25. I proceed on the understanding that the sprit behind the Rule 41 (1) (2) and 42 in part vi of the Mental Treatment Act, requiring Notice, of inquiry on the person alleged to be of unsound mind, to be served personally or by substituted service and if deemed fit to call the person of alleged unsound mind before the court, is that a person must be assumed to have mental capacity unless it is established that she lacks capacity. Therefore, she cannot be treated as unable to make decisions and/or give authority to her Son Ram CHAND to swear an affidavit on her behalf or to give instructions to her Solicitors.
26. Further, on the question of giving instructions to Solicitors, it has to be borne in mind that that the application in hand is not the first one of its kind. On careful perusal of the case record it transpires that the plaintiff has had already made two applications for the appointment of Guardian Ad Litem & Next Friend ,first one by notice of motion dated 5th April 2013 filed on 8th April 2013 and the 2nd one by notice of motion dated 27th February 2015 filed on 24th April 2015. The application in hand is the 3rd one made by her for this purpose.

27. Apart from the above she had made two separate applications in the year 2011 and 2012, respectively, for her to be examined "viva- voce" by an examiner as directed by court or to lead her evidence before the Judge in chambers for same to be read and led at the subsequent trial considering her deteriorating health condition. None of those applications were followed up and/or bore fruits to her for no fault on her part.
28. However, when she appeared before Justice Lal Abeygunaratne on 12th February 2015 as aforesaid to give evidence, which in any event, did not materialize due to the reason, correctly observed by the learned Judge, it is observed that on that occasion no objection had been taken by the Defence to the effect that she had no capacity to instruct her Solicitors or give authority to her son to swear an affidavit on her behalf.
29. Also it has to be assumed that the instructions given by her to her Solicitors to file aforesaid several Notices of Motions, particularly, for the appointment of Guardian Ad Litem on two previous occasions still remain un-revoked and valid until her Solicitors do or have done the correct thing on behalf of her and therefore it can be safely assumed that her Solicitors have filed this Notice of Motion in hand on due and valid instruction from her.
30. Therefore, now the defendant's Counsel cannot be heard to say that her son RAM CHAND could not have had authority from her to swear an affidavit or she did not have capacity to give instructions to the Solicitors to file the present application.
31. Another objection taken by the Defence at the hearing before me was that the application should have been made by way of petition, seemingly, relying on the section 50 of the Mental Treatment Act. This section, obviously, speaks about the application made to the Magistrate Court under the circumstances stated therein. Admittedly, this is an on-going action before the High Court, which is governed by Order 80 Rule 3(4) which says.

O.80.R 3 (4) " Where , after any proceedings have been begun , a party to the proceedings becomes a patient ,an application must be made to the Court for the appointment of a person to be next friend or Guardian Ad Litem, as the case may be of that party."

32. However, it is my considered view that the plaintiff has, sufficiently, complied with the section by making the application together with an affidavit from her son RAM CHAND.
33. It has to be stressed that the purpose of the inquiry asked for by the learned Counsel for the Plaintiff is only to ascertain the present mental status of the plaintiff and not for any past time period. Therefore, the defendant need not be panic on this intended inquisition or on the positive outcome of it as there will be another inquiry, in case the plaintiff is adjudged of unsound mind, with regard to the propriety of her son being appointed as the Guardian Ad Litem & Next Friend and even if he is appointed again there will be a full scale trial to decide whether the substantial relief prayed for by the plaintiff in her statement of claim dated 6th July 2011 should be granted or not.
34. This action has been filed way back in the year 2011. Admittedly, the plaintiff is very old, feeble and sick as correctly observed by the former judge in his order dated 12th February 2015. Since the plaintiff is said to be mentally ill and become a patient within the meaning of Order 80 Rule 1 of the High Court Rules. It is the duty of the Court to inquire in to the present application to see whether she is in fact mentally ill in order to consider the appointment of Guardian Ad Litem and Next Friend and thereafter to see whether the final redress could be given or not and find an end to the protracted litigation.
35. The need to conduct an inquiry in to the mental state of an alleged patient before making orders is explained in the Indian case ***Moohammad Yaqui vs Naazir Ahamed and others , 1920 58 Ind Case 617*** as follows.

“When a person is alleged to be insanethere ought to be a careful and through preliminary inquiry and the judge out to satisfy himself that there is a real ground for an inquisition. It is impossible to lay down any hard and fast rule, but in the first place it is essential that the person making the application should support it ordinarily by affidavit or by tendering himself for examination to the judge on oath in support of the allegation in his application.An application of this kind ought to be supported by some medical evidence in the nature of a certificate of some Doctor Lady or otherwise, who has had a reasonable opportunity of seeing the condition of the alleged invalid. If no medical evidence is forthcoming of more recent date than eight years before the application, so much the worse for the applicant.It should be very desirable that the judge should seek some personal interview with the alleged Insane, not with a view of forming a final opinion as to her

real condition but to satisfy himself in the ordinary way, in which a layman can do, that there is a real ground for supposing that there is something abnormal in her mental condition which might bring her within the Lunacy Act.

36. The Plaintiff in this case has already appeared before the judge where taking of her evidence was attempted but failed due to reason given by the judge on 12th February 2015. But I am of the view, provided her health condition permits, her presence at a forthcoming inquiry, would be of some use in arriving at the most justifiable decision with regard to the matter in hand.
37. The same view was expressed, in underlining the importance of such an inquiry, in another Indian case of **Ranji Kumar Ghose vs Secretary Indian psychoanalytical Society AIR 1963 Calcutta 261**, where the Court decided, among others, as follows.

".....the inquiry with which is contemplatedinto the alleged mental infirmity is a judicial inquiry with notice to the allegedly insane person and any order passed against an allegedly insane person without such an inquiry will vitiate the order to the extent of making same a nullity. The Court should on its own motion conduct an inquiry in accordance with the provisions of that section before accepting the application .it was obligatory.....that the Court conduct an inquiry as to whether the petitioner had become incapable due to any mental infirm of protecting his interest.

38. It was in another Indian case of **Balakrishnan vs Balachandran (1956) 1 Mad LJ459** where the rationale for this inquiry was explained in as follows.

"This is intended to ensure that no man is adjudged a lunatic without proper enquiry, and that the Court should hold a judicial inquiry and it may seek the assistance of Medical experts.If the precaution of a judicial inquiry is not observed, a man cannot be declared to be a lunatic. The affected individual's mental status must be determined by a Medical doctor or by Court upon inquiry.

39. I am convinced that there should be an inquiry in to the mental condition of the plaintiff. While the above authorities have been persuasive for me to arrive at a decision to have a formal inquiry, the decision of then Master of this Court Hon. **Mr. Tuilevuka** in the case of **Shanker V Kumari (2009) FJHC 255;HBC 23 . 2008 (13 November 2009**, relied on by both the parties before me, has guided

me correctly towards my decision of having an inquiry in this matter by calling evidence including cogent Medical evidence.

In the above judgement he, among other things, says "**some evidence of unsoundness of mind must be required by thus the Court before it can sanction anyone to act as Guardian Ad Litem or next friend for a person who is alleged to be unsound mind.**"

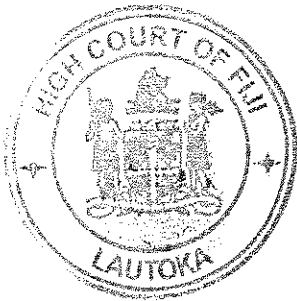
CONCLUSIONS

40. Section 39 of the Mental Treatment Act makes provision and authorizes the court to hold inquiry in to the mental status of a person, who is alleged or suspected to be a person of unsound mind.
41. The substantial matter filed by the plaintiff on 8th of July 2011 is pending before this court for nearly 6 years, without the preliminary adjudication, need for which, allegedly cropped up later whether the plaintiff is a person with "**disability** " within the meaning of Order 80 Rule 1 of the High Court Rules and, if so, should she be represented by a Guardian Ad Litem & Next Friend.
42. In view of the foregoing observations, I am convinced that there should be an inquiry forthwith into plaintiff's mental status with the participation of the plaintiff and the assistance of cogent Medical evidence supported by affidavit and other evidence oral and/or documentary, however, subject to calling the doctor/s concerned to give oral evidence if necessity arises.

ORDERS

- A. There shall be an inquiry into the mental state of the plaintiff and same will be held on 26th May 2017 or on an earliest convenient date to both counsels.
- B. Since this is an application by the plaintiff and not by a third party, the plaintiff's Solicitors shall take notice of this inquiry on her behalf and cause the presence of the plaintiff at the inquiry through her Son RAM CHAND.

- C. Plaintiff's Son RAM CHAND shall take step to subject the plaintiff for a proper and comprehensive medical examination with regard to her alleged mental status and furnish the court with such Medical Certificates supported by affidavits, 3 days prior to inquiry, with copy to the Solicitors for the defendant.
- D. Apart from plaintiff's son RAM CHAND there shall be witness/es from the plaintiff's family (by blood or marriage) who can swear about plaintiff's mental status.
- E. Considering the circumstances no cost ordered and parties shall bear their own cost.



A.M. Mohamed Mackie

JUDGE

16th May 2017

At Lautoka