

IN THE HIGH COURT OF FIJI  
AT SUVA  
PROBATE JURISDICTION

Probate Action No. HPP 59 of 2017

In the Estate of JAI SINGH late  
of Lal Singh Road, Waila, Nausori,  
Fiji, Retired Driver, Deceased.

AND

In the matter of an application by  
DHIR SINGH aka DHIREND SINGH  
Under the Trustees Act Cap 65.

BETWEEN : DHIR SINGH aka DHIREND SINGH of Lot 12 Lal Singh Road Waila, Nausori, Fiji,  
Unemployed.

PLAINTIFF

AND : PRATAP SINGH of Mangu Maharaj Road, Kinoya, Fiji, Taxi Driver.

DEFENDANT

BEFORE: Hon. Justice V D Sharma

COUNSELS: Mr Jiten Reddy - for the Plaintiff  
Mr O'Driscoll - for the Defendant

Date of Hearing: 01<sup>st</sup> October, 2018.

Date of Ruling: 29<sup>th</sup> October, 2018 @ 9.30 am

DECISION

*[Preliminary Objection whether the application seeking an order for Removal  
and Discharge of an Executor and Trustee be filed in terms of a  
Writ Action and/or an Originating Summons]*

### INTRODUCTION

1. The Plaintiff's substantive **Originating Summons** seeking an order for the **Removal and Discharge** of Pratap Singh as the **Executor and Trustee** from the **Deceased Estate of Jai Singh** was scheduled for hearing on 01<sup>st</sup> October, 2018.
2. The application is filed in support of an Affidavit deposed by Dhir Singh aka Dhirend Singh and made pursuant to **Section 4 (1) (d) of the Trustees Act Cap 65**.
3. Prior to the commencement of the substantive hearing, the Defence Counsel raised **two Preliminary Issues** and sought for its **deliberation and Decision** ahead of the **substantive matter** seeking for the **Removal and Discharge of the Executor and Trustee**.

### FACTS OF THIS CASE

4. The Plaintiff instituted this application by way of an Originating Summons seeking an order for the Removal and Discharge of the current Executor and Trustee namely Pratap Singh from the Deceased Estate of Jai Singh.
5. The parties to this proceeding are brothers.
6. The Deceased took demise on 29<sup>th</sup> October, 2010 leaving behind a Will wherein he appointed the Defendant Pratap Singh to be the sole Executor and Trustee of his Will.
7. The Plaintiff is a beneficiary whereas the Defendant is not a beneficiary in the Deceased's Will.
8. The Defendant was given a Probate Grant by the Principal Probate Registry on 02<sup>nd</sup> August, 2017, some 7 years after the demise of the Deceased and according to the Plaintiff, the Defendant as the Executor and Trustee of the Deceased Estate has delayed and failed to carry out his responsibilities and duties to fully administer the Deceased's Estate.
9. The Plaintiff is now seeking an order that the Defendant as the Executor and Trustee be removed and discharged and that the Plaintiff be now appointed in his place accordingly.

### ANALYSIS and DETERMINATION

10. The **Defence Counsel** raised the following **Preliminary Issues** and sought for the Decision ahead of the substantive proceedings. This court acceded to the Defence Counsels application and heard the submission from both Counsels on these Preliminary Issues-
  - (i) **That this was a contested Probate Action and the Application must be begun by a Writ Action.** Reference was made to *Order 76 Rule 2 of the High Court Rules, 1988*.

(ii) That the application is made by the usage of Form 4 of the Originating Summons instead of Form 3 as required by the Trustees Act. Reference was made to *Order 7 Rule 2 of the High Court Rules, 1988*.

11. In reply, the Plaintiff's Counsel submitted as follows-

- (i) Order 76 Rule 1 of the High Court Rules deals with Probate actions.
- (ii) Application before court is not for Probate application and made under Trustees Act not the High Court Rules.
- (iii) The application is seeking for the removal of Trustee and not revocation of Will.
- (iv) The Trustee has refused to carry out his duties in terms of the Deceased's Will and therefore this application is proper.

First Preliminary Objection:

12. The Defendant's contention is that this application is a contentious Probate Action and therefore the application must be begun by a Writ Action in terms of *Order 76 Rule of the High Court Rules, 1988*.

13. *Order 76 rule 2 (1)* provides as follows-

'A probate action must be begun by writ, and the writ must be issued out of the Registry.'

14. *Order 76 Rule 1 (2)* precisely defines the term " Probate Action" within the Rules and states as follows-

*"(2) In these Rules "probate action" means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business".*

15. This particular provision of the law deals with various types of applications defined within the "Probate Action" but, does not have or allow for the provision for an action for the "Removal and Discharge" of the current Executor and Trustee as sought for in the current application before this Court by the Plaintiff.

16. Therefore, the Defendant's Preliminary Objection that the present application was a contentious Probate Action which must be begun by a Writ Action fails and accordingly dismissed.



Second Preliminary Objection

17. Secondly, the Defendant's contention that the application is made by **Form 4 Originating Summons** instead of a Form 3 Originating Summons.
18. I refer to **Order 85 Rule 4 of the High Court Rules 1988** which deals with **Grant of relief in an action begun by Originating Summons** as is applicable in this case.
19. **Order 85 Rule 2** deals with the **Determination of Questions in Administration Actions**.
20. Particular reference is now made to **Order 85 Rule 2 (1) and (2) (a)** and states as follows:-

"An action may be brought for the determination of.....**Any questions arising in the Administration of the Estate of a Deceased Person or in the Execution of a Trust.**"
21. Bearing in mind the abovementioned Provisions of the Law, **Order 85 Rule 4** clearly sets out the Provisions that "**In an Administration Action or such an Action as referred to in Rule 2 [An Action for Determination of Any Questions Arising in the Administration of the Estate of the Deceased Person or in the Execution of a Trust] O, 85, r2 (1) (2) (a)** refers."
22. The Application Seeking Grant of the **Order for the Removal and Discharge of the Executor and Trustee** should be begun by **Originating Summons (O.85, r4)**.
23. Obviously, the Plaintiff's **Originating Summons** Seeking for the Relief for the Removal and Discharge of the Defendant and/or the Executor and Trustee has been correctly made by the usage of the Originating Summons.
24. In terms of **Order 7 Rule 2 of the High Court Rules, 1988**, the present **Originating Summons** is not made **ex-parte** but **inter-parte** and therefore the correct Form to use would be **Form No. 3** or, if so authorized or required, in Form No. 4. This provision of the law allows the Plaintiff to either use Form 3 and or Form 4 depending on the type and requirement of the application that would be made.


"Form of Summons, etc. (O.7, r.2)  
2.-(1) Every originating summons (other than an ex parte summons) shall be in Form No. 3 or, if so authorized or required, in Form No. 4 in Appendix A, and every ex parte originating summons shall be in Form No. 5 in Appendix A."

25. In light of the above, the **Defendant's contention** that the proceedings have not been properly instituted in terms of the **Originating Summons by usage of Form 3** herein does not have any merits in his objection.
26. I find that the Plaintiff has properly instituted the current application by the **Originating Summons** for the determination of the "*question arising in the administration of estate of 'Jai Singh for the removal and discharge of the present Executor and Trustee.* (See O 85r.2).
27. Accordingly, the **Defendant's Second Preliminary Objection** also **fails** and is accordingly **dismissed**.
28. Further, in all fairness to the parties to the proceedings, there will not be any **Order for Costs** made against the Defendant since the Plaintiff failed in his bid to seek any costs whilst making his submissions on the two Preliminary Objections. The Plaintiff should have left the Costs issue to be decided by the court in the circumstances.
29. "Following are the Final Orders of this court:

#### FINAL ORDERS

- (i) Preliminary Objections raised by the Defendant hereby Fails and accordingly Dismissed.
- (ii) No order for costs made at the discretion of this Court.
- (iii) Substantive Matter to be assigned a hearing date.
- (iv) Orders accordingly.



  
VISHWA DATT SHARMA  
JUDGE  
SUVA  
29<sup>th</sup> Day of October, 2018

Cc. Jiten Reddy Lawyers, Nakasi.  
O'Driscoll & Co., Suva.