

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

HPP Action No. 66 of 2017

**BETWEEN:**        **SUJENDRA RAJ HALKA** of Auckland New Zealand,  
Contractor, Beneficiary

**PLAINTIFF**

**AND**            :        **RAJ PATI** of Laqere Tabia Labasa, Widow, Domestic  
Duties as the executrix in the Estate of CHANDRIKA  
PRASAD, Deceased

**DEFENDANT**

Counsel            :        **Mr. A . Singh for the Plaintiff**  
Counsel            :        **Mr. M. Yong for the Defendant**  
Date of Hearing    :        **31<sup>st</sup> October, 2018**  
Date of Decision   :        **8<sup>th</sup> November, 2018**

**DECISION**

**INTRODUCTION**

1. The Plaintiff filed this action against the Defendant seeking orders for a declaration regarding construction of a last will . He also sought an order of the court for the transfer of a property in terms of the last will. The above two orders are interrelated hence interpretation of last will is paramount consideration. At the conclusion of the hearing an issue was raised as to the correct mode of application. The Plaintiff filed this action by way of Originating Summons. Both parties requested to file submissions on this issue as a preliminary issue. This decision will relate only as to whether correct procedure is adopted .

**ANALYSIS**

2. The Plaintiff had sought interpretation of (construction of) last will of the deceased. The Defendant had obtained probate upon the proof the said last will.

3. Order 76 of the High Court Rules of 1988 deals with 'Probate Proceedings' and order 76 rule 1 deals with the application for interpretation of a last will.
4. From the order 1 sought in the Originating Summons , the Plaintiff is seeking construction of last will , and Order 76 of the High Court Rules of 1988 applies to probate causes and matters .
5. Order 76 rule 1 and Order 76 rule 2, of the High Court Rules of 1988 states

**“Application and interpretation (O 76, R 1)**

1. (1) This Order applies to probate causes and matters, and the other provisions of these Rules apply to those causes and matters *including applications for the rectification of a will subject to the provisions of this Order.*
- (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.
- (3) In this Order, “will” includes a codicil.

**Requirements in connection with issue of writ (O 76, R 2)**

2. (1) *A probate action must be begun by writ, and the writ must be issued out of the Registry.*
- (2) Before a writ beginning a probate action is issued it must be indorsed with –
  - (a) a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates; and
  - (b) a memorandum signed by the Registrar showing that the writ has been produced to him or her for examination.”
6. Order 76 rule 2(1) of the High Court Rules of 1988 makes it mandatory for all ‘Probate Actions’ to begin by way of writ of summons.
7. The word ‘probate actions’ is defined exclusively in Order 76 rule 1(2) and accordingly it confines to grants , revocation or validity of last will.

8. The Supreme Court Practice (White Book)1988 at p1167 (76/1/2/) states

**Action for probate or for a decree pronouncing for or against the validity of a will-** Any person whose interest in the estate of a deceased person is prejudiced by a testamentary document may compel the executor or other person seeking to propound it to do so in an action and establish it by the examination of one or more of the attesting witness (see *Belbin v. Skeates* (1858) 1 Sw. and Tr. 148) but a creditor cannot dispute the validity of a will unless letters of administration have been granted to him (*Menzies v. Pulbrook* )1841) 2 Curt. 845) and a legatee who has been paid his legacy must bring it into Court if he desires to dispute the will (*Bell v. Armstrong* (1822) 1 Add. 365, p.374; *Braham v. Burchell* (1826) 3 Add. 243, p. 256). The attesting witnesses are witnesses of the Court, and may be cross-examined by the party calling them (*Jones v. Jones* (1902) 24 T.L.R. 839). If a conflict arises in a probate action between the right of the Court to know everything that the witness to a testamentary documents knows, or has said, about the execution of that document, and the right of a party to claim privilege for communication passing between that witness and the party, or his solicitor for the purpose of collecting evidence for the hearing, that conflict must be resolved in favour of the Court (*Fuld (decd.)* (No.2) [1965] 2 All E.R.657).

Alternatively, the executor may propound the will in an action for his own protection.....’

9. The Plaintiff in this action not seeking orders as to the grant, revocation or validity of last will, of the deceased. He is seeking a declaration relating to interpretation of last will and also seeking orders relating to administration of the estate of the deceased in terms of Order 85 of the High Court Rules of 1988.
10. Order 85 rule 2 , Order 85 rule 3, Order 85 rule 4 and Order 85 rule 5 or the High Court Rules of 1988 states

***Determination of questions, etc., without administration (O.85, r.2)***

2. (1) *An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.*

- (2) *Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions:-*
- (a) *Any question arising in the administration of the estate of a deceased person or in the execution of a trust;*
  - (b) *Any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;*
  - (c) *Any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.*

- (3) *Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs:-*

- (a) *An order requiring an executor, administrator or trustee to furnish and, if necessary, verify accounts;*
- (b) *An order requiring the payment into court of money held by a person in his capacity as executor, administrator or trustee;*
- (c) *An order directing a person to do or abstain from doing a particular act in his capacity as executor, administrator or trustee;*
- (d) *An order approving any sale, purchase, compromise or other transaction by a person in his capacity as executor, administrator or trustee;*
- (e) *An order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.*

3. (1) *All the executors or administrators of the estate or trustees of the trust, as the case may be, to which an administration action or such an action as is referred to in rule relates must be parties to the action, and where the action is brought by executors, administrators or trustees, any of them who does not consent to being joined as a plaintiff must be made a defendant.*
- (2) *Notwithstanding anything in Order 15, rule 4 (2), and without prejudice to the powers of the Court under that Order, all the persons having a beneficial interest under the trust, as the case may be, to which such an action as is mentioned in paragraph (1) relates need not be parties to the action; but the plaintiff may make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of relief or remedy claimed in the action, he thinks fit.*
- (3) *Where, in proceedings under a judgment or order given or made in an action for the administration under the direction of the Court of the estate of a deceased person, a claim in respect of a debt or other liability is made against the estate by a person not a party to the action, no party other than the executors or administrators of the estate shall be entitled to*

*appear in any proceedings relating to that claim without the leave of the Court, and the Court may direct or allow any other party to appear either in addition to, or in substitution for, the executors or administrators on such terms as to costs or otherwise as it thinks fit.*

***Grant of relief in action begun by originating summons (O.85,r.4)***

4. *In an administration action or such an action as is referred to in rule 2, the Court may make any certificate or order and grant any relief to which the plaintiff may be entitled by reason of any breach of trust, wilful default or other misconduct of the defendant notwithstanding that the action was begun by originating summons, but the foregoing provision is without prejudice to the power of the Court to make an order under Order 28, rule 9, in relation to the action.*

***Judgments and orders in administration actions (O.85, r.5)***

5. (1) *A judgment or order for the administration or execution under the direction of the Court of an estate or trust need not be given or made unless in opinion of the Court the questions at issue between the parties cannot properly be determined otherwise than under such a judgment or order.*
- (2) *Where an administration action is brought by a creditor of the estate of a deceased person or by a person claiming to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust, and the plaintiff alleges that no or insufficient accounts have been furnished by the executors, administrators or trustees, as the case may be, then, without prejudice to its other powers, the Court may-*
- (a) *order that proceedings in the action be stayed for a specified period in the order and that the executors, administrators or trustees, as the case may be, shall within that period furnish the plaintiff with proper accounts;*
- (b) *if necessary to prevent proceedings by other creditors or by other persons claiming to be entitled as aforesaid, give judgment or make an order for the administration of the estate to which the action relates and include therein an order that no proceedings are to be taken under the judgment or order, or under any particular account or inquiry directed, without the leave of the judge in person.*

**11. CONCLUSION**

The Plaintiff is seeking declarations as to the interpretation and an order for administration of the estate of the deceased in terms of the last will. The Defendant had obtained probate in terms of the said last will. The preliminary issue found in

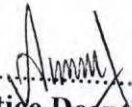
favour of the Plaintiff. Both parties are directed to file submissions as to the interpretation of the last will and also for the order for transfer of the property.

### **FINAL ORDERS**

- a. The preliminary issue is found in favour of the Plaintiff.
- b. Both parties are directed to make submissions relating to two orders sought in the originating summons within 21 days.
- c. Cost in the cause.

**Dated at Suva this 8<sup>th</sup> day of November, 2018.**



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