

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 75 OF 2017

IN THE MATTER of Section 11(4) of
the Trustees Act Cap, 65

AND

IN THE MATTER of the ESTATE OF
LATCHMAN GOUNDAN aka
LATCHMAN GOUNDER late of
Waiyavi, Lautoka, Deceased, Intestate.

BETWEEN : GYANESHWAR GOUNDAR aka GYNESHWAR GOUNDER
of Waiyavi, Lautoka, Cashier & VINESHWAR GOUNDER of
Waiyavi, Lautoka, Sales Person and VIKASHNI VARSHA
GOUNDER of Vancouver, Canada, Nurse.

PLAINTIFFS

AND : DINESHWAR GOUNDAR aka DINESHWAR GOUNDER of
Waiyavi, Lautoka, as Administrator in the ESTATE OF
LATCHMAN GOUNDAN aka LATCHMAN GOUNDER late
of Waiyavi, Lautoka, Deceased, Intestate.

DEFENDANT

Appearances : Ms S. Khan for the plaintiff
Mr K. Tunidau for the defendant

Date of Hearing : 31 May 2018

Date of Judgment : 31 May 2018

J U D G M E N T

Introduction

[01] The plaintiffs originated this action by way of originating summons supported by an affidavit of Gyaneshwar Gounder, the first named plaintiff, seeking orders among other things that:

'the defendant as the administrator of the Estate of Latchman Goundan aka Latchman Gounder late of Waiyavi, Lautoka, Deceased, Intestate sell the Estate Property being Native Lease No. 15422 Lot 4 Waiyavi Subdivision in the Tikina of Vuda Province of Ba containing an area of 9.3 perches at the market value and the proceeds to be distributed equally amongst the four (4) beneficiaries namely Gyaneshwar Goundar aka Gyneshwar Gounder, Vineshwar Gounder, Vikashni Varsha Gounder and Dineshwar Gounder.'

[02] The order is sought on the basis that the defendant is refusing to distribute the estate property so that the beneficiaries had decided to sell the property at market value and proceeds to be distributed equally.

[03] The defendant filed an affidavit in response and states that his late father, on his death bed, had solely given the lease and his house to him (*'the defendant'*) and that the father verbally authorised him to utilise his savings with the Bank of Baroda for renovation and payment of utilities.

[04] At the hearing, the plaintiffs tendered their written submission. In their submission, they seek remedies which they do not ask for in their originating summons. The primary remedy sought in the originating summons is the sale of the estate property and the distribution of the proceeds of the sale among the beneficiaries equally, whereas in the submission, they seek an order revoking the administration granted to the defendant as he is refusing to administer the estate property pursuant to section 6 (1) (d) of the Succession, Probate and

Administration Act 1970 ('SPA Act'). Section 6 (1) (d) states that: '*if the intestate leaves issue, but no wife or husband, the issue of the intestate shall take per stirpes and not per capita the whole estate of the intestate absolutely.*'

- [05] It will be noted that the plaintiffs seek a remedy that is materially different from their claim in the originating summons.
- [06] The defendant in his affidavit states that the father's dying declaration was that he ('*the defendant*') can enjoy the property absolutely. The plaintiffs deny this.
- [07] There have been disputed issues of facts in this case. The sale of the estate property and distribution of the sale proceeds cannot be decided on the affidavit. The plaintiffs need to lead oral evidence establishing their entitlement to the property.
- [08] The action has been instituted by way of originating summons. However, hearing discloses that there are a number of disputed issues of facts which need to be tried.
- [09] Mr Tunidau, counsel for the defendant agrees to convert this action into a writ action.
- [10] Therefore, I act under order O.28 r.9 of the High Court Rules 1988 and convert the action into a writ action. The plaintiffs may continue the proceedings as if it was begun by a writ. The affidavits filed by the parties will be considered as pleadings. If they so wish, they have the liberty to file fresh pleadings. The

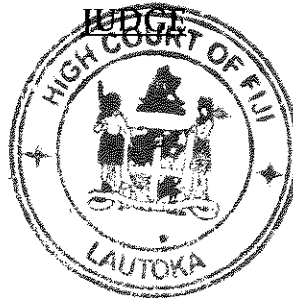
matter will be returned to the Registry. The proceedings will continue as a writ action. There will be no order as to costs.

The Results

1. The matter will continue as a writ action.
2. The parties are at liberty to file fresh pleadings, if they so wish.
3. No order as to costs.

M.H. Mohamed Ajmeer
31/5/18

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M.H. Mohamed Ajmeer



At Lautoka
31 May 2018

Solicitors:

For the plaintiffs; M/s Iqbal Khan & Associates, Barristers & Solicitors

For the defendant; M/s Kevueli Tunidau Lawyers, Barristers & Solicitors