

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Probate Action No.: HPP 009 of 2012

BETWEEN : **JAGAN NATH** of Lot 33, Nasilivata Road, Nadera, Nasinu

1ST PLAINTIFF

JAGAN NATH of Nadera and **NOKAIYA** of Rakiraki, Ra as the Administrators of the Estate of Ramaiya late of Nasilivat Road, Nadera

2ND PLAINTIFF

AND : **DENNIS NARAYAN** and **NATHAN RAMA NAIDU** both of 419 Moreland, Pascoevale South, Melbourne Victoria, Queensland, Australia, 3044

1ST DEFENDANT

AND : **SARGENT SAMI NAIDU** of Nadera, Nasinu, Student

2ND DEFENDANT

Counsel : **Mr. Maopa E. for the Plaintiff**
Mr. O'Driscoll E. the Defendants
Date of Hearing : **6th July, 2018**
Date of Decision : **9th July, 2018**

DECISION

INTRODUCTION

1. The Plaintiff had filed this action seeking stay of the execution of judgment delivered on 27.4.2018. There is an alternate application seeking interim stay of pending determination of this application and that was abandoned at the outset since I have granted an early hearing of for the summons. The Judgment was delivered on 27.4.2018 and it granted letters of administration to the 2nd Defendant and the previous grant of letters of administration to the Plaintiffs were revoked. The same was sealed as orders of the court on 16th May, 2018 and the summons seeking stay of execution is filed on 18.6.2018. The

summons was filed in terms of 'Rule 26(3) and Rule 34 of the Court of Appeal Rules and Order 45 rule 10 and Order 47(1)(sic) of the High Court Rules of 1988'.

FACTS

2. The Plaintiffs obtained letters of administration through misrepresentation of a material fact. They did not disclose the 1st named defendants as the children of the deceased. The Plaintiffs were only living siblings of the deceased, whose parents had preceded.
3. 1st Defendant, who was living abroad, had come to know the misrepresentation of the Plaintiffs and tried to settle the issue of the grant obtained by the Plaintiffs and they refused to allow them to administer the estate of the deceased.
4. So 1st named Defendants had instituted another action seeking a declaration as to the lawful sons of the deceased and it was held in their favour, in the action HPP 11 of 2011. The Plaintiffs had denied obvious facts to delay the process of revocation of the grant obtained through misrepresentation.
5. After that present action was filed by the Plaintiffs stating that a purported last will discovered in the house where they were living. At the hearing last will was not proved.
6. Following orders were made in the judgment delivered on 27.4.2018 and sealed on 27th April, 2018.
 - a. The grant of Letters of Administration No. 48213 is revoked.
 - b. If grant No. 48213 is not deposited in the court the Plaintiff is ordered to deposit it forthwith.
 - c. The Defendant's counterclaim as to the grant of Letters of Administration to the 2nd Defendant is granted.
 - d. The counterclaim of the Defendants, for money is refused.
 - e. The cost of this action is summarily assessed at \$4,000 to be paid by the Plaintiff to the Defendant within 21 days.

LAW

7. *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005)(Unreported) Fiji Court of Appeal laid down the criteria for granting stay and held,

'Principles on a stay application

[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):

"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.

The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNZ 48, at p 50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:

(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).

(b) Whether the successful party will be injuriously affected by the stay.

(c) The bona fides of the applicants as to the prosecution of the appeal.

(d) The effect on third parties.

(e) The novelty and importance of questions involved.

(f) The public interest in the proceeding.

(g) The overall balance of convenience and the status quo." (emphasis added)

8. The above list is not a comprehensive list and the competing consideration of rights of the successful party to enjoy the fruits of the judgment and effect of that on the appellant if the appeal is successful needs careful evaluation. The above list though not comprehensive is a guide in that evaluation process.

9. In this case the Plaintiff another person who is now dead had obtained Letters of Administration without disclosing the 1st named and 2nd named 1st Defendants who were the legal sons of the deceased. Not only they were not disclosed, but also denied their paternity even when they came to know the grant of letters of administration to the Plaintiffs.
10. The grant of letters of administration was a misrepresentation and by virtue of that alone the Letters of Administration granted to the Plaintiff needs to be revoked.
11. The Plaintiff in this action sought to prove a purported last will of the Defendant which was allegedly found under suspicious circumstances in a cabinet of the deceased, after conclusion of the action that recognized the 2nd Defendants as sons of the deceased.
12. So, the Plaintiff had obtained Letters of Administration through misrepresentation and there is no way that it can obtain any legal authority. The recognition of the 1st Defendant as sons of the deceased was through another decision in a separate action and it had concluded and an admitted fact and they also gave evidence in this hearing and not disputed in the cross examination.
13. So the revocation of the grant of letters of administration cannot be stayed in law as the grant to the Plaintiff was though deceit and or misrepresentation.
14. The Plaintiff had obtained letters of administration through misrepresentation and it was proved in the court that 1st Defendants are the biological children of the deceased, and a last will had emerged from the house where deceased lived. This is the same house where the Plaintiff lived with the 2nd Defendant for a long time. So the circumstances create a suspicion.
15. As I have stated earlier it is imperative to revoke letters of administration issued to the Plaintiff and there is no basis for the Plaintiff to be the executor of the last will till it is proved in a court of law.

16. If the stay is granted 1st and 2nd Defendants are gravely affected as they are the biological sons of the deceased and 2nd Defendant is the preferred choice among themselves as the administrator of the estate of the deceased.
17. The Plaintiff had already administered the estate for number of years and there were no evidence of any estate accounts being prepared. So there is an issue of mismanagement of the estate of the deceased which comprised substantial amount of money and also properties.
18. If the stay is granted it will invariably validate a grant through misrepresentation to continue.
19. The Plaintiffs are not entitled to administer the estate when there are children of the deceased. So if a stay is not granted there is no risk of appeal being made nugatory. If the stay is granted there is an issue of estate mismanaged.
20. I can't see bona fide of the Plaintiff who had obtained Letters of Administration though misrepresentation and in law such a grant cannot be recognised and stay of the judgment is indirectly giving effect to the said illegal grant.
21. There are no effects on third parties as the interested parties are all the parties to this action.
22. There is no novelty or public interest involved in the issues before the court.
23. The overall balance of convenience also favours the refusal of the stay as the Plaintiff is administering the estate illegally and had done so with disregard to the law. The contention of the Plaintiff is he is old and should be continued with the administration of the estate cannot hold water. Any illegal act should be immediately restrained irrespective of the age of the person who is doing the illegal act.

FINAL ORDERS

- a. The summons for stay is struck off.
- b. The cost of this application is summarily assessed at \$1,500 to be paid within 21 days.

Dated at Suva this 9th day of July, 2018



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Justice Deepthi Amaratunga
High Court, Suva