IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICITON

Action No. HPP 32 of 2017

IN THE ESTATE OF PUSHPAWATI also known as **PUSHPA WATI** late of Naikabula Road, Lautoka, Domestic Duties, Deceased, Testate.

BETWEEN

PRAVIN CHAND of Sunnybank, Queensland, Brisbane, Australia.

PLAINTIFF

AND

LALEEN PRABHA of Naikabula Road, Lautoka, Domestic Duties.

DEFENDANT

Counsel	:	Mr. Nand S. for the plaintiff. Mr. Gosaiy S.P. for the Defendant.
Date of Hearing	:	01st October 2019
Date of Judgment	:	01st November 2019

JUDGMENT

[1] The plaintiff filed this writ of summons seeking the following reliefs:

(a) An order that the Probate No. 59575 be forthwith revoked and cancelled.

(b) An order that Probate over the estate of the said deceased be granted in a solemn form pursuant to the true last will and testament of the said deceased dated 20th day of August 2011.

(c) And order that the plaintiff be named as the sole trustee of the estate of the deceased.

(d) An order that the defendant do forthwith deposit the original grant of Probate No. 59575 unto this Honourable Court.

(e) General and aggravated damages for fraud.

(f) Any other relief which in the opinion of this Honourable Court is just and expedient.

(g) Costs.

[2] The plaintiff alleges that the last will dated 07th January 2016 has been obtained fraudulently and by means of forgery. The particulars of forgery as pleaded in the statement of claim are as follows:

> Uttering the pretended Will as the last True Will and Testament of the said deceased.
>
> Obtaining by means of forgery the pretended Will of the deceased dated 7th January, 2016.
>
> The signature purporting to be that of Pushpawati also known as Pushpa Wati late of Naikabula, Lautoka, Deceased testate contained in the pretended Will dated 7th January, 2016 is not the genuine signature of the said deceased.

[3] In the statement of defence the defendant denies all the averments in the statement of claim and puts the plaintiff to strict proof same.

[4] The testator, Pushpawati, who is now deceased, is the mother of the plaintiff and the defendant. On 25th July 1996 she executed a last will and appointed the defendant as the sole executrix and trustee of her estate. On 20th August 2011 she executed another

last will and appointed he husband Vijendra Prasad as the sole executor and trustee of her estate and the plaintiff was named in the said will as the sole beneficiary of her estate. There is no dispute between the parties as to the execution of these two last wills.

[5] The plaintiff came to court by way of writ of summons alleging that the last will dated 07th January 2016 is a forgery. In that last will the defendant is the sole executrix, trustee and the beneficiary of the estate of the deceased. The defendant has already obtained probate to administer the estate.

[6] At the pre-trial conference the parties admitted that the plaintiff is the sole beneficiary in the Estate of Pushpa Wati also known as Pushpawati late of Naikabula Road, Lautoka, Domestic Duties, deceased, testate pursuant last will and testament of the deceased dated 20th August 2011 and the deceased died on 29th April 2016.

[7] To establish forgery there must be strong evidence. The plaintiff testified at the trial. He said the signature found in the last will dated 07th January 2016 is not his mother's signature. Witness Pusp Raj is one of the witnesses to the last will dated 20th August, 2011. The execution of this last will was not challenged by the defendant. In fact in her evidence she said before making the second last will her mother told her that she was going to change the first last will.

[8] The evidence of the plaintiff is that the last will dated 07th January 2016 is the evidence of the plaintiff that the signatures of the of the testatrix of the previous two last wills do not match with the her signature in the last will challenged in these proceedings.

[9] The question is whether this evidence is sufficient for the court to conclude that the last will in issue was not an act and deed of the testatrix.

[10] In this regard the plaintiff relied on the decision of the Supreme Court in **Sharma v Sharma** [2019] FJSC 20; CBV0010.2018 (30 August 2019) considering the decisions in H. Venkatachala Iyengar v. B.N. Thimmajamma and OthersAIR 1959 SC 443, Smt. Jaswant Kaur v. Smt. Amrit Kaur AIR 1977 SC 74, M.B. Ramesh v. K.M. Veeraje Urs (2013) 7 SCC 490 and Mahesh Kumar v. Vinod Kumar (2012) 4 SCC 387 made the following observation:

Undoubtedly, the decisions relied upon by learned counsel for the Petitioner hold that when the formalities for executing a Will are carried out, the presumption is that the Will is validly executed and cogent and strong evidence is needed to rebut that presumption. But, the presumption is nevertheless rebuttable and if there are surrounding suspicious circumstances, the judge must scrutinize the evidence carefully and satisfy his or her conscience that the Will was or was not validly executed.

Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an

instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter." [Emphasis supplied].

[11] One of the grounds relied on by the plaintiff in challenging the last will in issue, as I stated above, is that the signature of the testatrix is different from the two previous last wills. I have very carefully examined all the signatures in three last will and it appears that they are slight differences in all three signatures. The plaintiff's evidence that the signatures of the executrix in the two previous last wills are similar, is not correct.

[12] Upon examination of the signatures I could not find any difference that creates a doubt in the mind of the court. The contested last will has been executed almost 20 years after the 1st last will and nearly 4 ½ years after the second last will. It is natural that with the elapse of time there can be slight variations in the signature of a person. It appears from the plaintiff's own evidence that when the last will in question was executed she was over 70 years old. Therefore, unless there is very strong evidence that the testatrix's signature was forged these slight differences in the signatures alone is not sufficient for the court to safely arrive at the conclusion that the last will in question in not an act and deed of the testatrix.

[13] Witness Timoci Tamaidrove testified that is aware of the last will made on 07th January 2016 and it was signed by the mother of the defendant whom he referred to as old lady in his presence. In cross-examination he was asked to read the last paragraph (attestation) of the last will dated 07th January 2016 which is the declaration made by the witnesses to the last will explaining the manner in which it was executed. The said paragraph reads as follows:

SIGNED by the said PUSHPA WATI of Naikabula Road, Lautoka in the Republic of Fiji Islands, Domestic Duties the Testatrix as and for his last Will and Testament in the presence of both being present at the same time who at her request and in their sight and presence and in the sight and presence of each other have hereunto subscribed our names as witnesses **the same having been first read over and explained to her in the Hindustani Language when appeared fully to understand the meaning and effect thereof** and made her signature thereto in our presence as aforesaid. (Emphasis is mine).

[14] In cross-examination the witness said he speaks Hindustani language but when was asked to translate paragraph of the last will dated 07th January 2016 he cannot translate English to Hindi. The witness finally admitted that he did not explain the last will to the testatrix.

[15] Section 6 of the Wills Act 1972 as amended by Act No. 10 of 2004 provides:

> Subject to the provisions of Part V, a will is not valid unless it is in writing and executed in the following manner:-
>
> (a) it is signed by the testator or by some person in his presence and by his direction in such place on the document as to be apparent on the face of the will that the testator intended by such signature to give effect to the writing as his will;
> (b) such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and
> (c) the witnesses attest and subscribe the will in the presence of the testator,
>
> but no form of attestation is necessary.

[16] It is not the responsibility of the witnesses to explain the contents of the last will to the testator. They only witness the signing of the will by the testator. Therefore, failure of the witnesses to explain the contents of the last will to the testator does not make it invalidate.

[17] By the first last will the testatrix made both the plaintiff and the defendant beneficiaries of her estate. In the 2nd last will the only beneficiary was the plaintiff and in the 3rd last

will the only beneficiary is the defendant. The plaintiff lives abroad and it was the defendant who looked after the mother.

[18] From the above it appears that the plaintiff has failed to adduce sufficient evidence to rebut the presumption that the last will in question was properly executed and the court accordingly, makes the following orders.

ORDERS

1. The action of the plaintiff is dismissed.
2. The plaintiff is ordered to pay $3000.00 as costs (summarily assessed) of the action to the defendant.

Lyone Seneviratne

JUDGE

01st November 2019