

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

HPP Action No. 32 of 2021

IN THE MATTER of the Succession,
Probate and Administration Act (Cap
60), and The Trustee Act Cap 65.

AND

IN THE MATTER of **BANSRAJ** late
of Laulau, Naitasiri in the Republic of
Fiji, Farmer, Deceased, Testate.

BETWEEN: **UTTRA WATI** of Lot 1 Rosi Street, Nasinu in the Republic of Fiji,
Domestic Duties as the Administratrix in the Estate of **BIJENDRA**
KUMAR late of Lot 1 Rosi Street, Nasinu in the Republic of Fiji,
Carpenter, Deceased, Intestate & **ILBEN RITESH KUMAR** of
Tovata, Nasinu in the Republic of Fiji, Joinery Worker as the
Administrator in the estate of **MAHESH KUMAR** late of Lot 35
Joyce Place, Piling Road, Nasinu in the Republic of Fiji, Tailor,
Deceased, Intestate.

PLAINTIFFS

AND: **RAJENDRA KUMAR** of 15 Libnai Avenue, Manukau Heights,
Auckland, New Zealand, Surviving Executor and Trustee of the Estate
of **BANSRAJ** late of Laulau, Naitasiri in the Republic of Fiji, Farmer,
Deceased, Testate.

DEFENDANT

Counsel : **Plaintiff:** Mr. Singh K

: **Defendant:** Mr Nand S

Intervener (Proposed Defendant): Mr. Reddy J

Hearing Date : 30.11.2021

Date of Judgment : 01.12.2021

JUDGMENT

INTRODUCTION

1. Plaintiffs who are beneficiaries of an estate had instituted this action by way of originating summons against the Defendant as executor or and trustee of the estate.

Plaintiff is seeking certain orders regarding sale of a property belonging to the said estate, and distribution of proceeds among the beneficiaries. Defendant had opposed this application and stated that beneficiaries prefer not to sell but only transfer of their respective shares in the said property. Intervener, is one of the beneficiaries and the party who is residing on the said property. He had also indicated that he was willing to purchase it at the sale. He stated, that property had a sentimental value to him as well as all his siblings who are beneficiaries. Sale of it, outside family was opposed. He had also stated that he had incurred cost in maintaining the property for long time. Defendant who is the trustee is seeking to add the Intervener, mainly due to disagreement between parties as to sale to Intervener at a particular price. According to trustee there may be an issue of conflict, as the Intervener wishes to buy property and also indicated that he had expended on the property for a considerable time. He is s the only beneficiary who had lived on the property in issue for a long time and allegedly expended money over it or maintenance and the only person who had shown interest to buy it. Some of the beneficiaries had already agreed to him purchasing it. So it is prudent for trustee to seek joinder of intervener as party to originating summons, so that he could make independent legal representation as to the sale of the property and directions of the sale, if such orders are granted as final relief. It is possible to consider all matters relating said property among the beneficiaries, hence the Intervener is added to this action.

FACT

2. On the 27.5.2020, the Plaintiffs filed an Originating Summons and an Affidavit in Support seeking certain orders for sale of a property belonging to an estate.
3. On the 13.8.2020, the Defendant filed an Affidavit in Opposition to said originating summons as the trustee and administrator of the estate to which said property belongs.
4. On the 28th day of August 2020, the Plaintiff's filed a Reply to Affidavit in Opposition.
5. On the 7.4.2021, a summons and an Affidavit in Support was filed by Mr. Narendra Kumar, (The intervener), through solicitors for Defendant, who is one of the beneficiary, seeking a joinder of that party.
6. The intervener is the only party who is residing on the property for long time.
7. On the 5.11.2021, the Plaintiff's filed an Affidavit in Opposition to the Affidavit of intervener.

ANALYSIS

8. In the summons filed by the Intervener he is seeking following orders,

- i. Whether or not Narendra Kumar of 35 Joyce Place, Pilling Road, Nasinu, Fiji, Retired can be an interested party this action?
 - ii. Can the Valuation of the Defendants share in the estate property comprised in CT 13440, Lot 35 on DP3291 located at 35 Joyce Place, Pilling Road, Nasinu be determined based on the sum of \$320,000.00?
 - iii. Whether or not Narendra Kumar can purchase the Defendants share in the estate property based on the sum of \$320,000.00 being the current market value of the Property.
9. At the outset it is observed that (ii) and (iii) above which were orders (2) and (3) of the summons filed on 7.4.2021 are final reliefs and cannot be considered through summons at this stage, when an application for joinder is considered. So I stuck off said orders and deal only the issue of joinder of the Intervener to this action.
 10. If the joinder is successful all the parties should fully ventilate issues relating to sale of the property where the Intervener is residing including and not limited to any direction that court make.
 11. Supreme Court in *Land Transport Authority v Begg* [2019] FJSC 7; CBV0004.2018 (decided on 26. 2019)(unreported) discussed the relevant law regarding addition of a party and power of the court to add a party *ex moro motu*, held,

Order 15 rule 6 (2)(b), upon which this argument depends states as follows:

“Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

(a)...

(b) Order any of the following persons to be added as a party, namely –
 (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
 (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him or her and that party as well as between the parties to the cause or matter.”

The correct approach to rule 6(2)(b)(i) was succinctly articulated – albeit in relation to a slightly differently worded rule where the difference is

not material for present purposes^[2] - by Devlin J (as he then was) in *Amon v Raphael Tuck & Sons Ltd* [1956] 1 QB 357 at 368-369:

“The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and *has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose.*

It is not I think disputed that “the cause or matter” is the action *as it stands between the existing parties.* ...

The intervener [who seeks to be joined] must be a party whose presence is *necessary* to enable all questions involved to be adjudicated upon and settled, but *the question must be one which has to be addressed upon in the issue between the existing parties and not in any new issue raised by an intervener.*” (Emphasis added).”

12. If one breaks down Order 15 rule 6(b)(ii) a discretion is granted for the court to add a party in its ‘opinion’ in following circumstances
 - a. There ‘**may exist**’ a ‘question or issue’ and,
 - b. That is ‘arising out of or relating or connected’ with any relief /remedy sought, and
Are ‘just and convenient to determine’ between intervener and Plaintiff and or other parties.
13. Plaintiffs’ are seeking sale of an estate property, where Defendant had lived for a long time and allegedly maintained it. So the question or issue is sale of the property where the Intervener had lived for a long period of time.
14. The Intervener also claims that he had done some improvements and or maintained the said property, if so there may be value added as well as equitable interest.
15. In this originating summons Plaintiffs are seeking directions of the court to sell the property, and considering the directions sought there is no directions as to consider any improvement and or maintenance to said permanent structure.
16. Intervener is also claiming that he has a sentimental value for the ancestral property. This may be so for some other beneficiaries and it will not be so to parties who see property as any other commodity in the market.
17. In Supreme Court Practice (white book) (1988) p 18415/6/6 states

“Where defendants applied for an order that one D be joined in an action with D’s consent but against the will of the plaintiff D was joined. The test was held

to be :” Would the order for which the plaintiff was asking in the action **directly affect the intervener**, not in his commercial interests, but in the enjoyment of his legal rights?”(*Amon v Raphael Tuck & Sons* [1956] 1 Q.B 357.”(emphasis is mine)

18. There is no qualms, that sale of ancestral property where the Intervener lived with his parents after all beneficiaries left is dear to him and there is sentimental value in it.
19. This may be the reason for him to offer to buy the property which is worth to the Intervener more than a mere commodity value.
20. His occupation may not only preserved the property, but may have also added value, but it is premature to come to any conclusion on such issue summarily at this juncture.
21. The Intervener is required to establish that he is ‘directly affected’ from the orders sought by Plaintiff. As the only person residing on the said property and the alleged improvements to it he is affected if he is prevented from making independent legal advice, and or representation in this action.
22. It is clear that Plaintiffs and the Intervener as well as other beneficiaries have issue in the manner in which the distribution of shares in the said property where the Intervener desires to purchase. Some of the beneficiaries had allegedly consented to the Intervener purchasing it but also had consented to a sale price. These are all contentious issues between the Plaintiffs and Interveners as beneficiaries of the estate.
23. It is convenient to add the Intervener to this action in order to decide all the issues relating to sale of the property in consideration of giving directions for the said sale.
24. It is desirable and convenient to allow the Intervener to be added as a second Defendant to this originating summons, as he ought to have been added from the beginning considering the circumstances of this case.
25. Trustee of the estate had also indicated that there ‘may exist’ a conflict between the Intervener and other beneficiaries as to the sale of the property to the Intervener and requirement for the trustee to be independent in the exercise of fiduciary duties as trustee. This is a valid reason for seeking joinder of the Intervener.
26. Lastly, there are case management reasons for allowing the Intervener to join as multiplicity of actions on the same issue should be prevented as much as possible and this addition will also reduce the costs to the parties.

CONCLUSION

27. Plaintiff in the originating summons seeking sale of an estate property. Plaintiffs are beneficiaries and Defendant is the trustee of the estate. The Intervener, is the only beneficiary who had been residing on the said property and allegedly maintained it after demise of parents. He also wishes to purchase it and does not want to sell it outside family. Due to the nature of his long occupation and alleged improvements it is prudent for trustee to seek the Intervener as a Defendant to this action. In terms of Order 15 rule 6 (2)(b)(ii) of High Court Rules 1988, 'any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed..' can be added 'in the opinion of the court it would be just and convenient' to do so. In my opinion it would be just and convenient to add the only residing beneficiary. Some of the beneficiaries had also indicated their desire to sell the property to him. Trustee should act independently for the benefit of entire estate hence it is my opinion that addition of the Intervener would not only be convenient but also allow him to act independently. Considering circumstances of this case no costs awarded.

FINAL ORDERS

- a. Leave is granted for Defendant to add Narendra Kumar as second Defendant (Intervener), to the originating summons.
- b. Orders 2 and 3 in the summons of the Defendant are premature at this moment, and struck off.
- c. The caption of originating summons to be amended accordingly. (Include 2nd Defendant – Intervener)
- d. No cost ordered for this summons.

Dated at Suva this 1st day of December, 2021.



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Justice Deepthi Amaratunga
High Court, Suva