
IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HPP 95 of 2022

IN THE ESTATE of RAM KALI
SHARMA aka RAM KALI of 3
Aiwa Street, Samabula, Suva,
Retired, Testate.

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Parshotam S. for the Plaintiff

DATE OF DECISION: 20th July, 2023

DECISION

*[Rules against perpetuities pursuant to section 41 of the succession,
Probate and Administration Act]*

Introduction

- (1) This application by Summons is made by the sole Executor and Trustee, Ramesh Chandra Dutt in the Estate of Ram Kali Sharma aka Ram Kali and sought for the following orders:-
 - a) Clause (4) of the Will of the Deceased is invalid due to it infringing the rule against perpetuities;
 - b) The Applicant is at liberty to sell the property comprised in State Lease No. 23043.
- (2) The application is supported by an Affidavit deposed by the Executor /Trustee Ramesh Chandra Dutt.
- (3) This Court on 17th May 2023, gave further directives to the Applicant/ Executor to furnish Court with the following:
 - (a) two recent valuation reports on the property; and
 - (b) updated consents from the other beneficiaries of the estate that they agree that the property not to remain in the family in perpetuity, that they agree that the property be sold, that they agree that the net sale proceeds be distributed amongst the beneficiaries and that none of them wishes to purchase the property.

Rules against Perpetuities

- (4) The rule against perpetuities is a common law rule that states that no interest in land is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.
- (5) The rule against perpetuities stipulates that a will, estate plan or other legal document intending to transfer property ownership more than twenty-one years after the death of the primary recipient is void.

- (6) In other words, the rule prevents a grantor from legally guaranteeing that their grandchildren, great grandchildren or other heirs far in the future will retain ownership of the grantor's property.
- (7) The rule against perpetuities influence on property transfer law in operation that it can impose restrictions on how a grantor's descendants inherit property. With only twenty-one years to vest after the death of the first beneficiary or life in being, property rights can become void through the rule against perpetuities.
- (8) In the current matter the provision in the deceased's will states that;

"...4. it is my wish and I so direct that my property at 3 Aiwa Street is never to be sold and should remain for use, as necessary with the approval of the Trustee, by my sons, daughters and their families..."

- (9) This provision in the will quite clearly breaches the rule against perpetuities as it is open-ended without an end date. It could remain in operation indefinitely or in perpetuity. This provision of the will is *void ab initio* based on the following discussion.

In *Joshua Williams Memorial Essay Prize Winner 2005 - The Rule Against Perpetuities*, the author said as follows:

"...An interest that infringes the rule against perpetuities is void ab initio. Moreover, all ensuing interests that are dependent on the voided interest also fail. Any other interest comes into being as if the voided interest(s) had never been, and, as such, may be accelerated..."

- (10) The leading case is *Cadel v. Palmer* (1833) 1 Cl. & F. 372; 6 ER 956. In that case, a trust was created for a term of 120 years, if 28 named persons or any of them should so long live and from the determination of that term for a further period of 21 years, and after the end of both terms, for the benefit of persons to be then ascertained. The House of Lords held that the transfer was valid in respect of the persons in being and 21 years thereafter.

- (11) In other words, the settlor must not define any beneficial interests in such a way that they may be capable of vesting in a beneficiary later than the expiration of 21 years from the inception of the trust.
- (12) While there does not appear to be any case in Fiji applying the rule against perpetuities in Fiji, a reference to the rule in *Shafiq v Sattar* [1979] FJSC 81 shows that it is generally accepted that the rule against perpetuities is applicable in Fiji.

Determination

- (13) In the current application the Applicant's Contentions is that Clause 4 of the Deceased's Will of the deceased is invalid due it infringing the rule against perpetuities. Clause 4 of Deceased Ram Kali Sharma's Will states:

"...4. it is my wish and I so direct that my property at 3 Aiwa Street is never to be sold and should remain for use, as necessary with the approval of the Trustee, by my sons, daughters and their families."

- (14) His further contention is that the Applicant is at liberty to sell the property comprised in State Lease No. 23043. Clause 5 of the Deceased Will states:

"...5. I also direct that all rent monies received from the house are to be used for the maintenance, upkeep and repair of the house and for the payment of all necessary bills including payment of rate and taxes.

- (15) Section 41 of the Succession, Probate and Administration Act refers and provides as follows-

- "(1) The Court may make such order with reference to any question arising in respect of any will or administration, or with reference to the distribution or application of any real or personal estate which an executor or administrator may have in hand, or as to the residue of the estate, as the circumstances of the case may require.
- (2) Such order shall bind all persons whether *sui juris* or not.
- (3) No final order for distribution shall be made except upon notice to all the parties interested, or as the court may direct."

- (16) At Common Law, the Rule can be traced to Lord Nottingham LC's decision in the *Duke of Norfolk's Case* (1681) 2 swans 454, which settled the Two (2) basic aspects of the Rules:
- First, that the Validity of a future interest in property depends on whether it is possible that it will vest outside the perpetuity period;
 - Second that this perpetuity period is defined by a life in being.

Vesting at Common Law

- (17) The Rule against perpetuities focused on when an interest vests. In this context, vesting requires three things to have occurred:
- (i) The beneficiary of interest is ascertained;
 - (ii) The satisfaction of any condition precedent has been achieved; and
 - (iii) If the interest is a class gift, the exact amount or percentage of each member's entitlement must be known.

The perpetuity period at Common Law

- (18) The initial perpetuity period of a life in being was later extended to a life in being plus 21 years and any period of gestation in fact. The 21 years is based on the age of majority.

Effect of breach of the rule against perpetuities.

- (19) An interest that infringes the rule against perpetuities is *void ab initio*. Moreover, all ensuing interests that are dependent on the voided interest also fail. Any other interest comes into being as if the voided interest(s) had never been, and, as such, may be accelerated.

Harshness of the rule and expense

- (20) The effect of a breach of the rule against perpetuities is to void the violating interest (and possibly others). This results in the testator's intentions being disregarded, and the specified beneficiaries losing out – and often the testator is entirely innocent of any perpetuitous design. Moreover, when the common law still applies, the interest(s) will be *void ab initio* on the basis of a mere possibility. Thus, the application and consequences of the rule can be quite harsh.

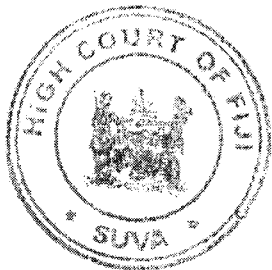
In Conclusion


- (21) The late Ram Kali Sharma took demise on 20th December 2001. Ramesh Chandra Dutt was appointed the executor /trustee of the Estate pursuant to grant of Probate No. 40821.
- (22) The beneficiaries of the Estate who are entitled to the property comprised in State Lease No. 23043 have now all agreed that it should not remain in the family in perpetuity but that the property should be sold and the proceeds thereof shared amongst the beneficiaries accordingly.
- (23) It is noted that most of the beneficiaries of the said property reside overseas and have no interest in keeping the said property in the family forever. Thus, sought for declaratory orders.
- (24) Bearing above in mind, that there being no objection by any of the beneficiaries of the Deceased's Estate, whether residing overseas, out of the jurisdiction of this court and or elsewhere, it is only appropriate that I accede to the declaratory orders sought by the Applicant/Executor/ Trustee herein accordingly.

ORDERS

- A. Clause (4) of the deceased's will is invalid due to it infringing the rule against perpetuities;
- B. The Applicant is at liberty to sell the property comprised in State Lease No. 23043.

Dated at Suva this 20th day of July, 2023.




Vishwa Datt Sharma
JUDGE

CC: PARSHOTAM LAWYERS, SUVA