

IN THE SUPREME COURT OF FIJI

PROBATE JURISDICTION

Action No. 9 of 1981

In the Estate of Manbodh son of  
Bechu late of Naqoro, Raki Raki,  
Cultivator, Deceased.

Between : DHARAM KUMAR, LAL BAHADUR and  
SHIU DUTT all sons of Manbodh Plaintiffs

And : RAJ KUMAR son of Manbodh Defendant

J U D G M E N T

On the morning of 8th April, 1978, Manbodh s/o Bechu (hereinafter called "the testator") executed a typewritten document purporting to be his last will and testament (hereinafter called "the will").

On the afternoon of that same day, some hours after he had executed the will, the testator died.

The defendant having entered a caveat, the plaintiffs, as executors, now propound the will.

The three plaintiffs and the defendant are all sons of the testator. The three plaintiffs are all beneficiaries under the will - the defendant is not.

The defendant, in his statement of defence, asserts that

- "(a) The said pretended will was not executed by the deceased in accordance with the provisions of the Wills Act or otherwise",
- "(b) That at the time of the execution of the said pretended will the deceased did not approve the contents thereof",

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- "(c) The deceased at the time of said pretended Will purported to have been executed was not of sound mind and understanding",
- "(d) The execution of the said pretended will was obtained by under pressure and influence of the plaintiffs on the deceased" and
- "(e) That the pretended will is a forgery within the meaning of the word contained in section 335 of the Penal Code."

It is common ground that the testator was about 70 years of age when he died and that for some time before his death he had been suffering from some sort of kidney ailment. For a period of about 8 days ending about a week before his death he had been an in-patient in hospital. Thereafter he had been confined to bed in his home except for a few visits to the hospital for out-patient treatment. During his life-time he had engaged with substantial success in farming and business and had fathered 8 sons and 5 daughters all of whom survived him. He died a widower.

Three relatives and a neighbour of the test ator gave evidence. The rest of the evidence was provided by a solicitor's clerk and a driver in the solicitor's employ.

Called by the plaintiffs, 1PW Shiu Prasad, aged 51, a nephew of the testator, not a beneficiary, said that he had visited the testator "at times" during the week immediately proceeding his death and found him to be "quite in possession of his mental faculties". He was present when a solicitor, Mr. M. T. Khan (now deceased) visited the testator two or three days before he, the testator, died and he heard them conversing, obviously about the testator's will. He heard the testator say he wanted his property to go to his children and he also heard the testator expressly exclude three of them, Vidya Prasad, Genda Prasad and Raj Kumar (the defendant). At that time the testator was apparently not on good terms with the defendant because he had eloped with "Hari the cobbler's

daughter".

On the morning of the day on which the testator died - he thought it was between 10 a.m. and 11 a.m. - the witness was at the testator's home when a female clerk and a driver from the solicitor's office arrived. (It appears that the "driver" was so called because he was the solicitor's chauffeur). Shortly afterwards, in a room in the testator's house he was present when the testator executed a will. That was after the clerk had read the will in English and explained it in Hindustani. He particularly remembered the clerk telling the testator in Hindustani that it was his will and naming the persons to whom his property would pass. At that time the testator "looked all right and appeared to understand what the clerk said and he said that what the clerk had said was O.K."

The testator executed the will by affixing his thumb print. That was after the clerk had asked him to "write his name" on the will and the testator had replied that he could not write as his hand was shaky and that he would affix his thumb print instead. The clerk helped the testator to affix his thumb print by holding his hand.

According to Shiu Prasad, he, the clerk, the driver and two of the plaintiffs, Lal Bahadur and Shiu Dutt, were present in the room when the testator executed the will.

Also called by the plaintiffs, 4PW Ram Raju, a neighbour who had known the testator for about 20 years, and who was not a beneficiary or a relation of the testator, said that he visited the testator "about 12.30 or 1 p.m." on the day of his death and conversed with him about the state of his health. He massaged his leg because he said it was paining. Regarding the testator's condition at that time, he said "He acted as if he recognised me ..... I left his house after being with him for about 10 minutes. We conversed during that 10 minutes. He conversed quite sensibly. His speech was clear and he appeared quite alert mentally". He admitted that he had borrowed money from the testator but he was quite definite that he owed him nothing at the time of his death.

The defendant Raj Kumar, aged 32, the testator's second to youngest son, told the court that he had lived with the testator all his life, right up to the time of his death when they were on good terms, "living happily together", although, as he admitted, he had "had an affair with Hari the cobbler's daughter" a year before.

He swore that from the time of the testator's discharge from hospital until his death he appeared to be unable to recognise people, even members of his family, or to speak, and that he could hardly move his hands. He said he was present when the will was executed and that "At that time Manbodh did not know what was going on. He could not talk or see and he could hardly drink".

He said that he did not believe that Mr. M. T. Khan, the solicitor, had received instructions from the testator to prepare a will as they were not on talking terms.

He denied that Shiu Prasad was at the testator's house at all on the day the will was executed.

He also denied that Ram Raju had visited the testator on the day of his death. In further contradiction of Ram Raju's evidence, he said that there was never cause for anyone to massage the testator's leg. That was when he was giving evidence on 5th December, 1983 - apparently he had forgotten that he had earlier told the court, on 24th November, that he himself "used to massage his hands and leg" in the period between the testator's discharge from hospital and his death.

Raj Kumar's version of the execution of the will was very different from that of the plaintiffs' witnesses. He said that the solicitor's female clerk and driver arrived in a taxi with two of the plaintiffs, Lal Bahadur and Shiu Dutt at about 1.30 p.m. Referring to the driver as "the bailiff" (no doubt because the driver was a part-time bailiff) he said:

"Those people wanted Manbodh to sign a will. I objected because

he was unable to do anything properly. The bailiff was drunk. I requested him to give me the will to read. We had an argument and trouble was about to erupt. By force the bailiff lifted my father's thumb and put it on the will without the contents of the will having been read out to him. Manbodh did not appear to understand what was going on."

Mind you, none of that version had been put to any of the plaintiffs' witnesses.

Raj Kumar also told the court that the testator was in the habit of signing his name in Nagri script, that shortly after the testator's death he noticed that a suitcase in which the testator kept business papers was missing from under his bed (which fact he reported to the police) and that when the testator was in hospital the plaintiff Lal Bahadur and others had tried to get the testator to execute a will but had been thwarted by him, Raj Kumar.

Maya Wati, one of the plaintiffs' and defendant's sisters, was the only other defence witness. She was not asked her age but she seemed to me to be about 30. She is one of the beneficiaries.

She told the court that she was present on an occasion when the testator was an in-patient at the hospital and Lal Bahadur and others called. One of them, her uncle Ram Shankar, asked the testator to sign a will. He swore at him, refused to sign and said to Ram Shankar "Why have you brought my son here? You have never come to see me and even when you come you come with documents." Ram Shankar then said "Give all your property to your son, whatever you've got", to which the testator replied "Whatever is left over is for my two younger children Raj Kumar and Dharam Kumar".

Maya Wati also said that by the time the testator was discharged from hospital "he was sometimes intelligible, sometimes barely intelligible" and that the day before his death she had seen him at the hospital (where he had come for out-patient treatment) when he was apparently unable to recognise her.

I clearly gathered from Raj Kumar and Maya Wati's evidence the inference that the plaintiff Lal Bahadur was trying, with the assistance of others, to get the whole of the testator's estate for himself. It is therefore remarkable that in the will to which, according to Raj Kumar, the testator's thumb print was foreceably affixed on the day of his death (to which outrage Lal Bahadur was a party) there were 9 beneficiaries besides Lal Bahadur.

It is also remarkable that, whereas Raj Kumar said that the suitcase was missing from under the bed shortly after the testator's death (which fact he said he reported to the police), Maya Wati said that he told her "that papers had been taken from a suitcase under Manbodh's bed" and that "he showed me a suitcase under Manbodh's bed which had been broken open..... on the evening of the day on which Manbodh died".

I turn now to the remaining evidence, that of 2PW Shireen Hussein, the solicitor's female clerk, and 3PW Ahmed Ali, the solicitor's driver, both called by the plaintiffs.

The clerk, aged 28, said that she typed the will, as dictated to her by the solicitor, on the morning of the day on which it was executed. She and the driver arrived with the will at the testator's house between 10 a.m. and 11 a.m. having been taken there from the solicitor's office in a car by two "people" whom she could not name and doubted she could recognise. She had no idea who they were. She and the driver went into a bedroom where the testator was sitting in bed. The testator called for lemon drink to be brought for them. She told him they had brought his will from the solicitor's office for him to sign. She read the will to him in Hindustani. He appeared to understand and approve of what she read out. She was impressively definite about that. She was also definite, mind you, that she did not first read the will to the testator in English and that she did not say anything at all to him in that language. She remembered that, before she translated the revocation clause, she asked him if he had made a previous will and that he replied that he was revoking whatever wills he had previously made. After she had read out the will in Hindustani, the testator asked her where he should sign it and she then asked him if he could sign his name,

to which he replied that he could not and that he would affix his thumb print. He then inked one of his thumbs on an ink pad they had brought to meet that eventuality and affixed his thumb print on the will in the presence of herself and the driver. He appeared to do that willingly, without any effort being made to persuade him. She did not notice that his hand was shaking and she did not assist him by holding his hand. She was, mind you, quite definite about that.

As to the testator's testamentary capacity, the clerk appeared to be in no doubt that he understood and approved of what she read out. After she had read it out to him she asked him if it was correct and he replied that it was. After he had executed it, she asked him if he was happy with the will and he replied that he was. In the course of her examination in-chief she said "At the time he executed the will, Manbodh was speaking clearly and rationally and appeared to be quite in possession of his senses. He was sitting in bed". She was impressively unshaken by cross-examination. When it was put to her that the testator was "in his dying moments" when he executed the will she answered, simply, "I don't know" and when it was put to her that he "did not understand what he was executing" she answered "He definitely appeared to understand - he was saying 'yes' in Hindustani as I translated the will to him."

When the testator executed the will she and the driver signed it as attesting witnesses in the presence of the testator and of each other.

About 10 minutes after that, they left the house.

She was unable to say whether the defendant, Raj Kumar, or the first witness, Shiu Prasad, were at the testator's house that day. For that matter, she was unable to identify anyone, apart from herself and the driver, as having been at the house that day. However, she remembered that there were 4 or 5 people in the house, some in the sitting room, some in the bedroom, and she thought that there were 2 others present in the bedroom when the will was executed.

As I have already remarked, none of Raj Kumar's story of his

raising objection and asking that the will be given to him to read, of the driver being drunk, of an argument and of the testator's thumb print being forceably affixed, was put to this witness when she was cross-examined.

Nor was any of that story put to the driver, Ahmed Ali, when he gave evidence.

The driver appeared to me to be a mature, stolid and sensible man. He was 46 years of age. He said that the testator was a regular client of the solicitor and that he knew him well.

The driver told the court that he and clerk were driven in a taxi by the plaintiff Shiu Dutt from the solicitor's office to the testator's house, arriving there at "something like 10.30 a.m. or 11 a.m." They entered a room in which the testator was lying on a bed. The testator sat up in bed when they entered. He asked the testator how he was and he replied that he was well - the witness was sure that he did not just nod. He said that the testator's face was "bright" and that he smiled. He appeared to recognise the witness. He called for chairs "for the solicitor's clerks". He also called for fruit juice to be brought into the room for them. That, the witness thought, was after the execution of the will. (The clerk had said it was before she read out the will).

After chairs had been brought into the bedroom as requested by the testator, the clerk explained the contents of the will to the testator in Hindustani. She said nothing in English. The testator appeared to understand and approve of what the clerk read out. The witness said "I'm sure Manbodh understood what last witness" (the clerk) "read out to him. He was, in my opinion, in a quite normal state of mind".

After that explanation by the clerk, the witness heard the testator say that it was his last will. (The clerk had said that this was before she read the revocation clause).

Then the testator affixed his left thumb print to the will in the presence of the clerk and the witness. Then the clerk and the witness signed the will as attesting witnesses in the testator's presence and the presence of each other.

The witness identified the one-page will, his and the clerk's signatures following the attestation clause and the testator's thumb print, at the foot of the page, around which he had written "Manbodh H.L.T.M."

He was unable to remember whether the clerk had helped the testator to affix his thumb print by holding his hand. However, he was definite that he himself had done no such thing. He said that the clerk had asked the testator to sign the will whereupon the testator had said he would affix his thumb print - the testator did not say anything about his hand being shaky or being unable to sign. (The clerk had said that the testator had said that he could not sign his name).

Like the clerk, this witness told the court that they remained in the bedroom for a short while after the execution of the will. He said that they conversed with the testator during that period.

He remembered the plaintiffs Shiu Dutt and Lal Bahadur entering the bedroom before the execution of the will and that they and the first witness Shiu Prasad were present when the will was executed. He was certain that the defendant, Raj Kumar was not then in the room. That tallies with Shiu Prasad's evidence. However, Shiu Prasad's evidence clashes twice with the testimony of the clerk and the driver. Shiu Prasad said that the clerk read the will in English before explaining it in Hindustani. He also said that the clerk assisted the testator to affix his thumb print, by holding his hand, after he had said that he could not sign his name because his hand was shaky. Of course it would not have affected the validity of the will one way or the other if the clerk had in fact first read it out in English or if she had in fact helped the testator by holding his hand. However, I consider it most improbable that she

did read the will in English - there was no cause for her to do so. I suspect that Shiu Prasad was under the impression that wills written in English should first be read out in English and that a convincing explanation was needed as to why the testator affixed his thumb print instead of signing his name and that he tailored his evidence accordingly. I have therefore decided to place no reliance at all upon his evidence.

I found no such fault in the evidence of 4PW Ram Raju. He appeared to be independant and objective. His evidence about visiting the testator "at about 12.30 p.m. or 1 p.m." on the day of his death (which must have been after the execution of the will) and finding the testator quite alert mentally, capable of conversing sensibly and speaking clearly, was given in a convincing manner and he was unshaken by cross examination.

In my view, the driver's evidence tallied well enough with that of the clerk, considering the fact that they were speaking of events which had occurred over 5 years previously. Such discrepancies as there were seemed to me to be understandable and also to show that there had not been the putting together of heads by these two witnesses which one would have expected had they been parties to the outrage recounted by Raj Kumar. They appeared to be quite independant. I was favourably impressed by their demeanour.

Their evidence about the testator's mental condition was convincingly supported by that of the fourth witness, Ram Raju, who, as I have said, appeared to be independant and objective.

For reasons I have already indicated, I was quite unconvinced by the evidence of Raj Kumar and Maya Wati. In my estimation, Raj Kumar's evidence, weighed against that of the clerk, the driver and Ram Raju, was false. It appears to me that Maya Wati's evidence, to some extent at least, was the product of amateurish directing by Raj Kumar and that she badly fumbled her lines in relation to the suitcase. Weighing their evidence of the testator's mental condition against that of the clerk, the driver and Ram Raju, I have

no hesitation in rejecting it.

I find that the testator was of full testamentary capacity when he executed the will. He executed it freely and voluntarily, with full understanding of its nature, meaning and effect, in the joint presence of the clerk and the driver, both adults, who immediately thereafter attested and subscribed the will in his presence.

Bearing in mind the onus of proof which rests upon the plaintiffs, I am well satisfied, in relation to the defendant's several assertions in his statement of defence, that:

- (a) The will was executed in accordance with Section 6 of the Wills Act (Cap. 59)
- (b) The testator understood and approved of the contents of the will at the time he executed it
- (c) At the time he executed the will, the testator was of sound mind and understanding.

Smee v. Smee (1879) 5 P.D. 84 was a case in which the testator was subject to insane delusions. Summing up to the jury, the President said:

" The capacity required of a testator is that he should be able rationally to consider the claims of all those related to him and who, according to the ordinary feelings of mankind, are supposed to have some claim to his consideration when dealing with his property as it is to be disposed of after his death. It is not enough that the will upon the face of it should be what might be considered a rational will. "

I am thoroughly well convinced by the evidence of the clerk, the driver and Ram Raju, all of whom impressed me as witnesses of integrity and mature common sense, that the testator, a sensible and responsible man, having deliberately decided that his property should be disposed of in the manner

expressed in the will, executed the will when he was able rationally to consider the claims which, according to the ordinary feelings of mankind, his relatives might be supposed to have to his consideration.

- (d) The testator executed the will freely and voluntarily
- (e) The will was in no sense a forgery

I pronounce for the validity of the will. I order that the caveat be removed and that the defendant pay the plaintiffs' costs.

L A U T O K A

1<sup>st</sup> February, 1985

*R. A. Kearsley*  
(R. A. Kearsley)  
JUDGE