IN THE SUPREME COURT, FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. CBV0003 OF 1998S
(Court of Appeal Civil Appeal No. ABU0052 of 1996)

BETWEEN:

SASHI PRASAD SHARMA

Appellant

AND: DAVENDRA PRASAD SHARMA
RANJULA DEVI SHARMA

Respondents

Coram: Hon. Justice John von Doussa – Judge of Supreme Court
Hon. Justice Sir Kenneth Keith – Judge of Supreme Court
Hon. Justice Robert French – Judge of Supreme Court

Hearing: Wednesday 9th April, 2003, Suva

Counsel: Appellant in Person
Mr. G.P. Lala for the Respondents

Date of Judgment: Friday 11th April, 2003

JUDGMENT OF THE COURT

This is an appeal from a decision of the Court of Appeal given at Suva on 27 February 1998 which dismissed the Appellant's appeal from a decision of the High Court, Pathik J., given on 30 August 1996. The High Court had ordered the removal of a caveat lodged by the Appellant against the grant of probate of the last will of the Appellant's late father, Ambika Prasad Sharma (the deceased), to the Respondents who are the executors named in the last will. The Respondents are respectively the brother and sister of the Appellant.

The Appellant seeks to bring this appeal as of right pursuant to the provisions of the Supreme Court Decree 1991. Section 8(1)(b) of that Decree provides that an appeal shall lie from a decision of the Court of Appeal to the Supreme Court from final decisions in any civil proceedings where the matter in dispute is of the value of $20,000.00 or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of $20,000.00 or upwards. The Respondent has not challenged the competency of the appeal. The papers before the Court indicate that the value of the estate of the deceased exceeds $20,000.00. In these circumstances we treat the appeal as properly instituted before this Court.

By way of brief history to the proceedings, the deceased died on 8 February 1992 at the Colonial Memorial Hospital. Shortly before his admission to the

hospital he suffered serious injuries, apparently in a fall at his home. On 30 September 1992 the Respondents applied to the High Court for a grant of probate. On 28 October 1992 the Appellant lodged a caveat No. 33 of 1992 to prohibit the grant of probate being processed. There was hostility between the parties to these proceedings even before the deceased's death. After his death the Appellant asserted that the Respondents (and other family members) had been complicit in the happening of the deceased's death, and that his will was invalid on account of the Respondent's fraud, and undue influence and duress. The testamentary capacity of the deceased was also raised as an issue.

That caveat was warned by the Respondents on 3 November 1992 and the warning was duly served on the Appellant.

Considerable delay then occurred whilst an inquest inquiry into the circumstances surrounding the death of the deceased was held. A ruling on that inquest was given by the Resident Magistrate, Mr S.M. Shah in March 1995. The findings of the Magistrate stated that "there is no evidence whatsoever of any foul play" and concluded by stating that the deceased's "death was due to multiple injuries consistent with a fall". The Respondents then applied by summons to have the caveat removed. The matter came on for hearing before Fatiaki J. on 7 July 1995. There was no appearance of the Appellant, and Fatiaki J. ordered the removal of the caveat and that probate be granted in favour of the Respondents.

On 7 July 1995, after the order was made by Fatiaki J., the Appellant lodged another caveat against the grant of probate in identical terms to the first caveat. The Appellant later asserted that he was in the precincts of the court at the time that Fatiaki J. made his order, but he was not formally called. In these circumstances the Appellant could have, and should have, applied to set aside the order of 7 July 1995 pursuant to O14 r11 of the High Court Rules, 1988 (as amended). Instead of doing so, the Appellant sought to remedy his situation by lodging the second caveat. No point is taken that the second caveat is invalid. In the light of our conclusions as to the merits of the grounds of appeal now raised by the Appellant it is unnecessary for us to consider whether the second caveat had validity.

Without challenging the validity of the second caveat, the Respondents simply applied to have it removed. The application was heard by Pathik J., and on 30 August 1996 he ordered that the caveat be removed forthwith. The Appellant unsuccessfully appealed against that decision to the Court of Appeal, and now appeals to this Court.

The Appellant's grounds of appeal are not easy to follow. Errors are alleged on behalf of both the trial judge and the Court of Appeal. As we understand the grounds of appeal, the complaints made can be broadly summarised in the following way. First it is contended that the Court of Appeal erred in not finding that the Appellant had made out a case that the Respondents by entering into terms of settlement with Dr Arun Prasad Sharma (one of the Appellant's brothers who was a party represented at the inquest) caused the inquest to be prematurely closed.

This is an aspect of a wider complaint made before Pathik J. that the caveat should not be removed until the inquest into the deceased's death had been reopened. Secondly it is alleged that the Court of Appeal ought to have held that the trial judge erred in not finding against the validity of the will on the grounds of fraud, undue influence and testamentary incapacity. It is alleged that these errors are the result either of the wrongful rejection of evidence on those issues, or a failure to properly consider the evidence, by the trial judge. In the hearing before Pathik J. the only issue was whether the caveat should be removed. The validity of the will was not before Pathik J., although evidence showing that there was an arguable case of invalidity would have provided a reason for not removing the caveat.

In oral arguments before this Court, the Appellant did not elaborate on his written submissions or grounds of appeal, but urged this Court to order that the inquest be reopened. As the Court endeavoured to explain to the Appellant, the only issue raised by the appeal is whether the Courts below fell into error in ordering the removal of the caveat. In these proceedings this Court has no power to consider, or make any order about, the conduct of the inquest. In our consideration and disposal of the appeal we propose to deal with the issues raised in the grounds of appeal.

The grounds of appeal seek to canvass issues of fact that were not argued before the Court of Appeal.

The affidavit material which the Appellant by his grounds of appeal now seeks to rely on before this Court was before Pathik J. Pathik J. correctly treated the application before him as one made under s.47 of the Succession, Probate and Administration Act (Cap 60) which gives the Court a general discretion to remove a caveat after due notice to the caveator. See Rosy Reddy f/n Arjun Prasad v Manchama Webb and Lawrence Webb, Civil Appeal 14/94, Court of Appeal decision 11 November 1994. His Lordship, after reciting the history of the matter and referring to s.47 said:

> *" For the purposes of the issue before me, the only ground which the defendant gives for not ordering the caveat to be removed is that the Plaintiffs should wait "until the Inquest is re-opened, proper evidence collected and judgment made".*
>
> *On the evidence before me, I do not consider this to be a good enough reason for grant of Probate purposes to let the caveat remain. There is also no indication when, if ever, the inquest will be re-opened. The inquest matter was also before his Lordship and he must have considered it before he made the said Orders."*

Plainly, at the time of the hearing before Pathik J. the Appellant was expressing concern to have the caveat remain until the inquest was reopened. This reflected his assertion that the Respondents were responsible for the deceased's death. Pathik J.'s notes record that the Appellant said in argument that he was not satisfied with the outcome of the inquest, and that this was the ground for objecting to the removal of the caveat. This was the only ground considered in the reasons for judgment. It is not that his Lordship rejected or failed to consider material relied on by the Appellant. On the contrary, his Lordship was not asked to have regard to

the material which the notice of appeal now contends constitutes evidence establishing fraud, undue influence and duress, and testamentary incapacity.

If, as the Appellant contends in his notice of appeal, Pathik J. erred by misunderstanding the extent of the grounds he was relying on, the time to develop that contention was during the hearing before the Court of Appeal. However the judgment of the Court of Appeal indicates that this did not happen. The Court of Appeal referred to the passages from the judgment of Pathik J. set out above, and said that the Appellant advanced no argument before the Court of Appeal to demonstrate that the High Court erred in coming to the conclusion that it did. The Court of Appeal then noted that the proceedings before Pathik J. had been adjourned on several occasions over several months whilst the Appellant had sought to have the inquest reopened. The Court of Appeal concluded that the trial judge was correct not to allow the Appellant further time to pursue attempts to have the inquest reopened.

On the basis that the only ground of opposition to the removal of the caveat put forward by Appellant was that this should await the reopening of the inquest, and further investigation, we consider the decisions of the Courts below were clearly correct.

Since the decision of the Court of Appeal the Appellant has continued his campaign to have the inquest reopened. He has placed before this Court many letters that he has sent to the offices of the Prime Minister and the Attorney-General.

These letters point out alleged differences or inconsistencies in statements given by various witnesses who were interviewed by police officers who investigated the deceased's death. The correspondence which the Appellant has entered into is not relevant to the question whether error occurred in the Courts below, and cannot influence the outcome of this appeal.

In light of the way the proceedings were conducted by the Appellant before Pathik J., and before the Court of Appeal, it is now too late for the Appellant to raise in this Court factual issues about fraud, undue influence and duress, and testamentary capacity. These were factual issues that should have been developed by him in the lower Courts. Where a party in putting forward his case at trial relies on certain facts, but fails to persuade the Court, he is not permitted on appeal to mount a different case on other facts that were known at the time but were not relied on. A party is bound by the way he conducts his case. If this were not so litigation would never be brought to finality.

Notwithstanding our view that it is not open to the Appellant in this Court to raise and rely on factual matters not developed in the Courts below, we have considered the affidavit and exhibits of the Appellant filed in the High Court on 9 April 1996. This is the affidavit which he now contends provides the evidentiary basis for his contentions. In our opinion the affidavit falls far short of establishing an arguable case that the testator lacked testamentary capacity at the date of his last will, or that the will was executed in circumstances suggestive of fraud or undue

influence or duress. It is hardly surprising that these allegations were not maintained in the lower Courts.

In support of the allegation of fraud, the Appellant in his affidavit of 9 April 1996 exhibits a copy of the deceased's last will made on 16 November 1991, and also a copy of an earlier will made on 10 September 1985. The Appellant points out that signatures said to be those of the deceased on the two documents are not alike, and therefore, he argues, the signatures on the last will are not those of the deceased. The signatures on the two documents are certainly different, but the deceased was a man of advancing years who had been suffering from alcoholism. It is quite possible that his signature changed significantly in the period between the two wills. Importantly, no evidence of comparative signatures of the deceased on other documents around 16 November 1991 was put forward by the Appellant, and no evidence was brought forward from the witnesses to the deceased's last will. Those witnesses were a solicitor and a law clerk. In the absence of evidence from these sources the apparent differences in the signatures on the two wills prove nothing.

The affidavit of 9 April 1996 canvasses facts and allegations said to suggest the involvement of the Respondents and other family members in the deceased's death and to show their hostility towards the Appellant. These allegations were relevant to issues that fell within the investigative jurisdiction of the magistrate conducting the inquest. The affidavit also exhibits a letter dated 5 April 1994 written by solicitors representing Dr Arun Prasad Sharma to solicitors acting for the

Appellant. The letter is marked "without prejudice" and refers to an offer to settle issues over the distribution of moneys due to certain family members of the deceased under the will after the grant of Probate. The letter outlines one of the conditions of the proposed settlement, saying:

> *"Thus this is the settlement which we as Counsels together with our respective clients have agreed upon the condition that the inquest shall be closed without further progress or development in the Suva Magistrate's Court ...."*

The letter asks the recipient to endorse his agreement to the terms of settlement. The exhibited letter does not show such an endorsement. Without much more detail about the negotiations for the proposed settlement and correspondence which followed the letter of 5 April 1994, the letter itself establishes nothing that would have justified not removing the caveat. Further, the Appellant in the affidavit of 9 April 1996 deposed that on 5 December 1994 (eight months after the alleged settlement) he was called to give evidence at the inquest. The inference arising from this is either that the proposed settlement did not go ahead, or that the proposed condition that the inquest be closed was withdrawn. The inquest did go ahead.

The balance of the affidavit of 9 April 1996 exhibits correspondence entered into by the Appellant as he sought to have the inquest reopened after the findings were handed down in March 1995. The attempts made by the Appellant at that time to have the inquest reopened were taken into account by both the trial judge and the Court of Appeal.

On the issue of undue influence and duress the Appellant failed to place any evidence at all on the Court file, either in his affidavit of 9 April 1996 or otherwise. The issue is raised by paragraph 4 of a 'Statement of Defence' filed in the probate proceedings on 23 April 1993 which reads:

> *"THAT I further say that the said will was executed by my father under due (sic) pressure and duress."*

No particulars of this bald allegation are given, and it is not supported by any evidence. On the issue of testamentary capacity the Appellant in his affidavit of 9 April 1996 says

> *"2. That in the month of October 1991, three properties of the Testator was Transfered (sic) to the Testators wife as gift by Justice of Peace, Jerry Tikaram at the Testator's Residence."*

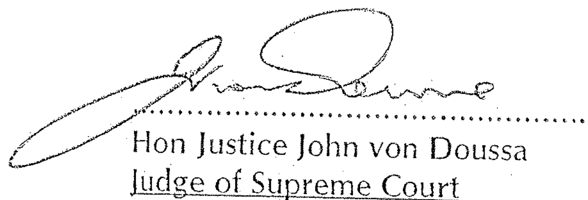
This statement, without more, does not even raise a question about the testamentary capacity of the deceased, let alone provide evidence of incapacity.

There was no medical evidence, or evidence about irrational behaviour of the deceased at or about the time he executed his will that could raise even a suspicion that he lacked testamentary capacity.

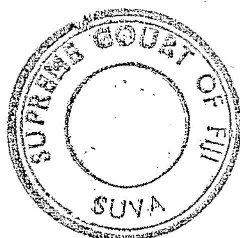
The Appellant in his written submissions to this Court also contends that the Courts below failed to take into account an affidavit by him sworn on 27 May 1996.

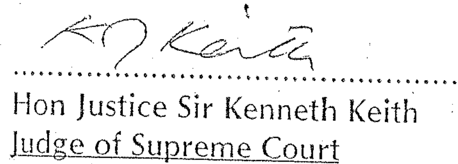
That affidavit deals only with why he was not present before Fatiaki J. at the hearing on 7 July 1995. It is clear that Pathik J. did take that affidavit into account.

In our opinion the present appeal is without substance and should be dismissed with costs.



Hon Justice John von Doussa
Judge of Supreme Court





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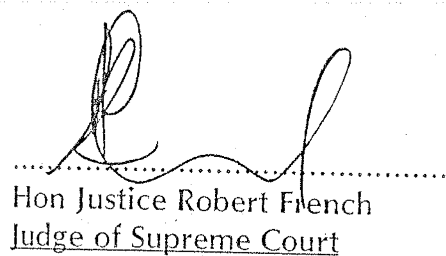

Hon Justice Robert French
Judge of Supreme Court

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