IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV0020 OF 2019

Court of Appeal No. ABU 0029 of 2018

BETWEEN : **KEOLA PATI**

Petitioner

AND : **OM WATI**

Respondent

Coram : **The Honourable Mr. Justice Salesi Temo**
Acting President of the Supreme Court

: **The Honourable Madam Justice Lowell Goddard**
Judge of the Supreme Court

: **The Honourable Mr. Justice Filimone Jitoko**
Judge of the Supreme Court

Counsel : **Mr. N. Sharma for the Petitioner**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **11 August 2023**

Date of Judgment : **31 August 2023**

JUDGMENT

Temo, AP

[1]

Goddard, J

[2] I am in full agreement with the reasoning, conclusion and Orders made.

Jitoko, J

[3] This is an application for leave to appeal the judgment of the Court of Appeal 4 October, 2019 dismissing the Petitioner's appeal against the judgment of the High Court on 18 April, 2018 ordering the Petitioner (as the defendant in the High Court proceedings) to transfer, as administratrix of an estate, a piece of land, to the Respondent (the plaintiff in the High Court proceedings) as bequeathed under a Will, as well as the Order as to payment of costs on personal basis.

Background

[4] The testator, Ram Lagan, was a dairy farmer of Korovou, Tailevu, born on 31 July 1947. On 10 March 1962, he married 18 years old Keola Pati of Nausori (the Petitioner). They separated after more than 20 years together and the Petitioner is now resident of Sydney, Australia. Om Wati, the Respondent, soon or thereafter the separation, moved in and shared her life with the testator, for the next 20 years or so, in a de-facto relationship, until Ram Lagan's death on 19 August, 2014.

[5] During his lifetime, Ram Lagan had acquired the following properties:

(i) Certificate of Title No. 36280,

(ii) two-third undivided half share in Certificate of Title No. 3580, and

(iii) one undivided half share in Native Lease No. 29608.

[6] On 8 July 2014 the late Ram Lagan made a Will bequeathing under Clause 3 thereof, CT 36280 to the Respondent for her own use and benefit absolutely. Clause 3 states:

> *"3. I GIVE DEVISE AND BEQUEATH, after payments of all my just debts funeral testamentary and administrative expenses and all the Probate Estate and other duties payable on my Estate my property located at Waila, Nausori, comprised in Certificate of Title No. 36280 to OM WATI (father's name Ram Hit) for her own use and benefit, absolutely"*

[7] The estate was to be jointly administered, under Clause 2 of the Will, by Pranita Devi Jattan of Sydney, and Gardiner Whiteside of Suva. However, both refused to take out the Probate.

[8] The Petitioner, as the legal wife, applied for Letters of Administration De Bonis Non to the Probate Division of the High Court and on 23 July, 2015 she was appointed the Administratrix of the estate.

[9] On 11 July 2016, almost a year later, the Respondent through her solicitor requested the Petitioner's solicitors for CT 36280 to be transferred to the Respondent, in accordance with Clause 3 of the Will. The Petitioner failed to do so, but instead demanded that all the monies ($11,252.77) held in the joint account at the Bank of Baroda, belonging to the late Ram Lagan and the Respondent, be first paid to the Petitioner.

Proceedings

High Court

[10] On 12 June 2017, the Respondent, (as plaintiff) in the High Court by Originating Summons sought the following Orders:

> *"1._____ THAT the Defendant does forthwith transfer all that piece and parcel of land comprised in Certificate of Title Number 36280 to the Plaintiff.*
> *2._____ THAT the Defendant pay costs on an indemnity basis…"*

[11] The application relied on section 41 of the Succession, Probate and Administration Act (as amended), section 85 of the Trustee Act, Order 85 rule 2 (2) (a) and 2 (3) (c), (d) & (e) of the High Court Rules and the inherent jurisdiction of the High Court.

[12] The Affidavit in Support by the Respondent, and filed on 11 July 2017, Sets Out in greater details, the grounds in support of the application.

[13] The Petitioner filed her Affidavit in Reply dated 24 August, 2017, and the Respondent's Affidavit in Response filed on 16 November, 2017.

[14] On 13 March 2018, the matter was heard before Honourable Seneviratne J and on 18 May, the Court made the following Orders:

> *"1. That the Defendant is ordered to transfer all that piece and parcel of land comprised in Certificate of Title Number 32680 to the Plaintiff.*
>
> *2. The Defendant is also ordered to pay personally $3,000.00 to the plaintiff as cost of this action."*

Stay Application

[15] On 28 May 2018, the defendant applied for Stay pending appeal, with Supporting Affidavit. The plaintiff filed her Affidavit opposing the Stay on 7 June, 2018 and the defendant, on 15 June, 2018 filed her Affidavit in Response.

[16] The application for Stay was heard by Seneviratne J on 25 September, 2018 and on 4th October, 2018 His Lordship dismissed it and ordered a further $1,000.00 costs against the defendant.

Appeal to and Judgment of the Court of Appeal

[17] Meanwhile the defendant in her Notice of Appeal dated 8 May, 2018 sought from the Court of Appeal the following:

"FOR AN ORDER that the decision delivered by the Honourable Justice Lyone Seneviratne delivered at Suva on 18 April 2018 in the High Court Civil Action No. HPP 39 of 2017 be wholly set aside.

AND FOR A FURTHER ORDER that the costs of the Appeal and hearing in the High Court be paid by the Respondent and FOR SUCH FURTHER ORDERS as the Court of Appeal deem just."

[18] The eleven (11) grounds of appeal are to say the least, convoluted as it is repetitive. In the main, they challenge:

"1. The order based on law and facts, by the High Court, that the Petitioner Transfer CT 36280 to the Respondent (grounds 1, 9, 10 & 11)

2. The determination on the ownership of the money in the joint bank account belonging to the deceased and the Respondent (grounds 3, 4 & 5);

3. The determination that the properties the subject matters in the High Court proceedings (HBC 352 of 2015), do not form part of the testator's estate (grounds 6, 7 & 8);

4. The Order that the Petitioner personally pay $3,000.00 to the Respondent as costs (ground 2)."

[19] The Court of Appeal after hearing the submissions of Counsel on 12 September 2019 ordered on 4 October, 2019 that the appeal be dismissed and on costs ordered:

"2. The Appellant shall pay as costs of this Appeal a sum of $5,000.00 to the Respondent within 21 days of the judgment which shall be in addition to the costs ordered by the High Court.

Petition for Leave to Appeal and Appeal to the Supreme Court

[20] On 12 November, 2019 the Petitioner filed her application for leave to appeal the judgment of the Court of Appeal and also setting out the 12 grounds of appeal as follows:

"a) Whether the Court of Appeal and the High Court erred in not determining that the properties in respect of which the Sale and Purchase Agreements being sought to be specifically performed in Suva High Court Civil Action No. HBC 352 of 2015 formed part of the estate of Ram Lagan which the Petitioner as the Defendant was attempting to preserve in those proceedings and subject to costs as per Clause 3 of the Will of Ram Lagan given that the Respondent admitted the same by not disputing nor challenging the same and in contrast submitted that the transfers of the said properties had not been registered [hence still owned by the Estate] as stated by the Learned Judge in Paragraph 11 of his judgment in the High Court;

b) Whether the Court of Appeal erred in determining that the Petitioner had failed to adduce evidence of the "date of the execution of the said agreements" in the High Court and as a result could not determine whether the qualifying provision of Clause 3 applied when clearly Order 28 Rule 5 allowed the High Court to give directions on the filing of such evidence if the Court so determined fit given that the Respondent did not challenge nor dispute the Petitioner's contention in her Affidavit in Opposition of ongoing costs of preserving the Estate properties in HBC 352 of 2015 thereby admitting the same. The High Court did not deem fit to ask for any such evidence being produced;

c) Whether the Court of Appeal and the High Court erred in not taking judicial notice of the documents filed in Suva High Court Civil Action No. HBC 352 of 2015 given the Respondent's position; in determining if the properties in respect of which the Sale and Purchase Agreements being sought to be specifically performed in Suva High Court Civil Action No. HBC 352 of 2015 formed part of the estate of Ram Lagan as stated by the Petitioner given that all the documents filed in Suva High Court Civil Action No. HBC 352 of 2015 were readily available to his Lordships to determine the dispute in the proceedings;

d) Whether the Court of Appeal erred in making a finding that the date of the execution of the sale and purchase agreements would have proven that the costs of the proceedings in Suva High Court Action No. HBC 352 of 2015, fell within the qualifying provision of Clause 3 where the Petitioner as the Defendant was defending the Estate which fact was not disputed by the Respondent;

e) Whether the Court of Appeal erred in dismissing the appeal and allowing the Respondent beneficiary to take the conditional bequest in Clause 3 without making any contributions towards the "just debts, funeral, testamentary and administration expenses and

all probate estate and other duties" in direct contradiction of the wishes of the Testator, Ram Lagan in his last will when the proceedings to preserve the Estate properties in which the Petitioner was defending the Estate in Suva High Court Action No. HBC 352 of 2015 was still ongoing.

f) Whether the Court of Appeal erred in upholding the decision of the High Court where the High Court reached a decision on the basis of a gross misunderstanding and in error of the facts that the Petitioner was challenging the transfers in HBC 352 of 2015 and not defending the Estate hence the necessity of the dates of execution of the transfers despite the Respondent's counsel's submission that the transfers of the said properties had not been registered [hence legally owned by the Estate] to determine that the two properties subject of the proceedings in HBC 352 of 2015 did not form part of the Estate of Ram Lagan hence costs in that action should be discovered as costs in those proceedings.

g) Whether the Court of Appeal erred in giving an effect to Clause 3 of the Last Will of the Late Ram Lagan contrary to the wishes of the Testator by allowing the Respondent to obtain the transfer of CT 36280 without allowing for the payment by the Respondent of "just debts, funeral, testamentary and administration expenses" which were ongoing in Suva High Court Action No. HBC 352 of 2015.

h) Whether the Court of Appeal erred in making a finding that there was no quantification of accounts for the Estate when the Petitioner as the Administratrix of the Defendant Estate was defending the interests of the Estate in Suva High Court Civil Action no. HBC 352 of 2015 which costs were ongoing and could not be quantified until the final determination of HBC 352 of 2015 or any such appeal.

i) Whether the Court of Appeal erred in upholding the decision of the Learned Judge in the High Court in awarding costs to be awarded personally in the sum of $3,000.00 and costs in the Appeal in the sum of $5,000.00 against the Petitioner on the basis that the Petitioner as the Administratrix of the Estate had withheld the transfer of the CT 36280 to the Respondent without any valid reason when neither the High Court nor the Court of Appeal found any valid reasons for the same and evidence showed that the Petitioner had never refused to complete the transfers subject to the fulfilment of Clause 3 of the last Will.

j) Whether the Court of Appeal and the High Court erred in penalizing the Petitioner personally with substantial costs when

the Petitioner was simply giving effect to the Last will of the Testator, Late Ram Lagan and there was a valid dispute as to the "just debts, funeral, testamentary and administration expenses" of the Estate to be paid by the Respondent.

k) Whether the Court of Appeal erred in only considering the Respondent's old age in deciding against a rehearing by way of writ given that the Court did find that there were some contentious issues involved as the Petitioner was of similar advanced age and only wanted to give full effect to the intentions of the Testator in his last Will.

l) Whether the Court of Appeal erred in determining that the funds in the joint account belonged solely to the surviving joint account holder, the Respondent irrespective of the source of the funds or when the funds had come into the joint account hence did not form part of the Testator's Estate."

[21] The reliefs sought by the Petitioner are:

"i) That special leave be granted to the Petitioners to appeal from the Judgment of the Court of Appeal dated 4th of October 2019.

ii) That the Supreme Court set aside the Judgment of the High Court and order that the Transfer of Certificate of Title No. 36280 to Respondent is subject to the Respondent equally contributing to the legal costs of the 1st Defendant as the Administrator of the Estate of Ram Lagan in the proceedings in Suva High Court Civil Action No. HBC 352 of 2015 upon the determination of that action [including any appeals thereafter] and subsequent quantification and contribution towards such costs.

iii) That the Supreme Court set aside the Judgment of the High Court and order that the Transfer of Certificate of Title No. 36280is to be made after the determination of the proceedings in Suva High Court Civil Action No. HBC 352 of 2015 including any appeals thereto and thereafter upon the Respondent equally contributing to the legal and administrative costs of the 1st Defendant as the Administrator of the Estate of Ram Lagan in the proceedings as quantified.

iv) That the Judgment of the Court of Appeal dated 4th of October 2019 be wholly set aside with costs against the Respondent.

v) That the Judgment of the High Court dated 18th April 2018 be wholly set aside with costs against the Respondent.

vi) *That the Respondent do pay the costs of Appeal to the Supreme Court to the Petitioner.*

vii) *Such further or other relief in the premises as the Supreme Court may seem fit.*

Leave to Appeal

[22] The written submission by Counsel for the Petitioner in support of the application of leave to appeal are set out at paragraphs 5 to 10 of his *"Statements of Written Submissions."*

[23] They are by and large a reharsh of all the Petitioner's arguments that constitute her grounds of appeal. They do not, at any time, attempt to persuade the Court, as to how these matters raise any of the requirements of section 7 (3) of the Act, and why leave should be granted. It is, it seems, left to the Court to sift through the instances of facts and issues carefully chronicled, and resulting in conclusions arrived at by the courts below, to satisfy itself that the threshold requirement of section 7 (3) had been reached. It is a rather unsatisfactory standard of legal work that does not in the end, help either of the parties nor the Court, in addressing the dispute between the parties.

[24] As far as the court can determine upon its perusal of grounds 7, 8, 9 and 10 of the submission, that the Petitioner is aggrieved in either or both the High Court's and Court of Appeal's findings and conclusions in both matters of facts and of law, on:

(i) the interpretation of the Will,

(ii) the ownership of the money in the joint account, and

(iii) the award of costs against the Petitioner.

[25] With respect, I do not think that any of these grounds raise serious matters that came anywhere near satisfying the section 7 (3) of the Supreme Court Act threshold.

[26] On the other hand, the Respondent argues that the grounds set out by the Petitioner in support of her leave appeal, are without merit and do not, in any case, satisfy the

requirement of section 7 (3). The law and the Courts' interpretation of the provisions of the Will are plainly correct and should not be disturbed.

[27] In the Respondents view, there was no doubt as to the reason the deceased did not include the two properties the subject of the High Court proceedings in HBC 352/2015 in his Will. The simple fact was that on the day of his executing his Will, 8 July 2014, he had already entered into an Agreement for Sale and Purchase (ASP) with a 3rd party in respect of both properties, which he followed up by executing the transfer documents on both, on 28 July, 2014.

[28] In summary, for the Petitioner to obtain leave of this court to appeal, it has to satisfy the Court that the case raises (as per section 7 (3) of the Supreme Court Act 1998):

> *"(a) a far-reaching question of law;*
>
> *(b) a matter of great general or public importance;*
>
> *(c) a matter that is otherwise of substantial general interest to the administration of civil justice."*

[29] These requirements are not cumulative, but should be read as if *"or"* appears between them: **Lt Colonel Filipo Tarakinikini v Commander Republic of Fiji Military Forces & Ors** [2004] SC Rep 04/599 CBV7/06 (apf 70/06) 17 July 2008 per Fatiaki P, Gault and Mason JJ.

[30] The Supreme Court in **Penioni Bulu v Housing Authority** [2005] FJSC1 CBV0011 of 2004S (6 April 2005) (per Handley, Mason, Weinberg JJ) emphasized the requirements at paragraph 10 of the judgment, as follows:

> *"The requirements for a grant of special leave were worked out by the Privy Council over many years. The case had to be one "of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount and where the case is otherwise of some public importance or of a very substantial character": **Daily Telegraph Newspaper Company v McLaughlin*** [1904] AC 776,779. *Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the*

grant of special leave ibid 778 – 779. A decision on the facts of a particular case: Ibid 779, or on the construction of a particular agreement did not warrant the grant of special leave: ***Albright v Hydro-Electric Power Commission*** *[1926] AC 167, 169."*

[31] As I had earlier expressed at paragraph 25 above, there do not appear to be any grounds advanced by the Petitioner, to satisfy this Court that leave should be granted, except may be in the interpretation of the provisions of the Will relating to testamentary and funeral expenses as permitted under the provisions of the Succession Probate and Administration Amendment Act 2004. Perhaps, one may argue that it raises a far-reaching question of law. Only in this very narrow context is this Court minded to grant leave to appeal.

[32] Leave is therefore granted.

The Appeal

The Interpretation of Clause 3 of the Will

[33] This ground incorporates grounds a), c), d), e), f). g) and h) of the Petitioner's appeal. The relevant clause of Ram Lagan's Will reads:

"3. I GIVE DEVISE AND BEQUEATH after payments of all my just debts, funeral, testamentary and administration expenses and all the Probate Estate and other duties payable on my Estate, my property located at Waila, Nausori, comprised in Certificate of Title No. 36280 to OM WATI (father's name Ram Hit) for her own use and benefit absolutely)"

[34] There is no dispute between the parties that the gift is valid and that Om Wati is entitled to the property. The Letters of Administration to the estate was taken out by the Petitioner on 23 July 2015. The Petitioner, as the Administratrix, is not bound to distribute the estate before the expiry of one year, as specified under section 37 of the Succession, Probate and Administration Act 1970, to whit:

"37. An executor or administrator shall not be bound to distribute the estate of the deceased between the expiry of one (1) year from the date of grant of probate or administration as the case maybe."

[35] On 11 July 2016, the solicitors for the Respondent wrote and requested the Petitioner as the administratrix of the estate, that the CT 36280 be transferred to the Respondent pursuant to the provision of the Will. Whilst the Petitioner said she was willing to transfer the property, this was made subject to the condition that the Respondent transfer all the monies held in the joint account belonging to the deceased and the Respondent, to the Petitioner. An offer by the Respondent for half of the monies in the joint account to be given to the Petitioner, was refused.

[36] The deadlock brought about this proceedings, in which the Respondent successfully obtained the Order of the Court for the Petitioner to transfer CT 36280 to the Respondent. Only this time, the reason the Petitioner could not, she argued, transfer the property was another court proceedings HBC 352/2016 which she, purporting to act as the Administratrix of the estate, was trying to rescind the Agreements for Sale and Purchase of the sale of shares in CT 3580 and NL 29605 dated 28 July 2014 and the resultant transfers of the same signed by the deceased.

[37] The thrust of the Petitioner's argument is based on the belief that as the Administratrix of the estate, she is bound to protect and preserve the assets of the estate of the deceased and at all times ensure that she is able to discharge all funeral, testamentary and administrative expenses, including debts and liabilities from the estate. In her view, the properties the subject matter of the HBC 352/2016, are properly part of the estate of the deceased and so long as the court proceedings continue, the fees and expenses that accrue as a consequence, are proper charges on the estate. Clause 3 of the Will, the Petitioner argues, makes the disposition of the devise subject to the *"payments of all my just debts, funeral, testamentary and administrative expenses…"* and therefore, unless and until HBC 352/2016 are finally disposed of the Petitioner, as the Administratrix, is not able to transfer CT 36280 to the Respondent.

[38] The High Court did not share the Petitioner's (defendant in the High Court) arguments, holding the view, on the issue of whether the properties in the HBC 352/2015 formed part of the estate, as follows, paragraph [11]:

"The next ground urged by the defendant for not transferring the land that was given to the plaintiff by the last will is that there is a court case pending in respect of undivided shares of a land belonging to the estate of the deceased. These undivided shares do not form part of the estate. It is the position of the defendant that since this is a part of the estate until the matter is concluded the distribution of the state property cannot be done. The costs of the action pending before the court in respect of the properties which alleged to have been the estate of the testator have to be recovered as costs. It was submitted by the learned counsel for the plaintiff that the deceased before his death has executed transfers in respect of these properties but has not yet been registered. The testator died on 19th August, 2014 and the last will of the testator has been executed on 08th July, 2014. The defendant for reasons unknown to the court has not given date of the execution of the transfers which are being challenged in court. If the testator wished to make the properties which are the subject matter of the action No. HBC 352 of 2015 there had been no reason for him not to include it in his last will. This is not an attempt to decide the matter pending before another court but to decide whether the reasons given by the defendant are reasonable to deprive the plaintiff from enjoying the benefits conferred upon her by the last will. The defendant should have taken into consideration the fact that the plaintiff is now seventy years old and further that she would like to enjoy the benefits of it during her lifetime."

[39] The Court of Appeal: per Dr Guneratne JA (as he then was), agreed with the High Court reasoning above and added at paragraphs [15] and [16] of the judgment:

"[15] I respectfully agree with that reasoning. If the Appellant wished to put in issue the said two sale-purchase agreements as forming part of the estate of the testator then, the dates of execution of the said agreements and their registration became crucial. The burden was clearly on the Appellant to produce the evidence, which Devlin J. might have characterized as "the lighter burden of producing evidence" as distinguished from the overall burden of proof in a case. ***Hill v Baxter*** *[1958] 1 QB 277 at 284.*

[16] Consequently, could it be said that, those proceedings fell within the qualifying provision to Clause 3 of the testator's last will? I think not."

[40] The funeral, testamentary and administrative expenses are generally termed as *"executorship expenses"* as usefully explained in the headnote of **Sharp v Lush** (1878 – 79) 10 CH D 468:

"The term "executorship expenses" in a will means expenses incident to the proper performance of the duty of an executor, and include costs incurred by executors in obtaining the advise of solicitors or counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action; whether instituted by the executors themselves or by a beneficiary, for the administration of the testator's personal estate; also the testator's funeral expenses; also expenses incurred by the executors for the protection of specific legacies – as for instance, for warehousing furniture specifically bequeathed – pending the distribution of the assets; and payment by the executors in discharge of debts falling due from the testator's estate after death – as for instance, rent due after the testator's death for a house of which he was a tenant from year to year."

[41] Further guidance in how the executor or administrator of an estate should apply the resources at his or her disposal to discharge the funeral, testamentary and administrative expenses are clearly set out in section 19B of the Succession Probate and Administration Amendment Act 2004.

"Funeral testamentary and administrative expenses, etc

19B-(1) <u>Where the estate of a deceased person is solvent</u>, the deceased persons real and personal estate shall, subject to the rules of court and section 19A and to any provision of the will, be applied towards the discharge of the funeral testamentary and administration expenses, debts and liabilities payable out of the estate in the following order –

(a) firstly, property of the deceased <u>not disposed of by will</u> subject to retention out of it of a fund sufficient to pay pecuniary legacies;

(b) secondly, property of the deceased not specifically devised or bequeathed by will but included (either by specific or general description) in a residuary gift, subject to the retention out of it of a fund sufficient to meet any pecuniary legacies, so far as not provided for;

(c) thirdly, property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts;

(d) fourthly, property of the deceased charged with or devised or bequeathed (either by specific or general description) subject to a charge for the payment of debts.

(e) fifthly, any fund, retained to meet pecuniary legacies;

(f) sixthly, property specifically devised or bequeathed, rateably according to value;

(g) finally, property appointed by will under a general power rateably according to value;

(h) any other right or interest of the testator in or in relation to property.

(2) The order of application under subsection (1) may be varied by the will of the deceased."
[emphasis added]

[42] There is not a doubt that the costs of the Petitioner's action in HBC 352/2016, if the two properties implicated in the proceedings were part of the estate, would constitute a proper charge on the estate. The costs amount to legitimate expenses incurred by the Petitioner as the Administratrix in the protection of the assets of the estate. The costs fall under the *"executorship expenses"* as defined in **Sharp v Lush** (supra) chargeable to the estate.

[43] The legal difficulties for the Petitioner firstly however is posed by the provisions of section 19 B (1) of the Succession Probate and Administration Amendment Act 2004, as cited above. The sub-section sets out in great details, how the funeral, testamentary and administration expenses are to be paid from the real and personal estate of the deceased, and the order the property of the estate should be charged.

[44] Section 19 B (1) is applicable to this case as the estate of Ram Lagan is solvent. This being so, the provision then sets out the orders of how, or more precise, from where, from the estate, the funeral testamentary and administrative expenses are to be paid out. Sub-section (a) stipulates that in the first instance, the payment of these expenses are a charge on the property of the deceased *"not disposed of by will."* All the ensuing sub-sections [(b) to

(h)], involve charges to categories of property not specifically devised or bequeathed or those that are devised or bequeathed specifically for payment of debts.

[45] In the courts view, section 19 B (1) (a) of the Act, makes it very clear that a property that has been disposed under a Will, is not subject to charges that form the *executorship expenses"* or the funeral testamentary and administrative expenses of the estate. In this instance, CT 36280, has already been disposed of under clause 3 of Ram Lagan's Will, and therefore the Petitioner as the Administratrix cannot hold it as part of the estate for the purpose of payment of the testamentary and administrative expenses of the estate. She may only impose such costs and charges on the residual estate of the deceased, excluding those property that had been disposed of in the Will.

[46] Section 19A of the Act which acts to qualify the application of section 19 B, does not apply, neither are there any rules of the Court applicable. Section 19 B (2) only varies the order of the charge if stipulated under the Will, but not the effect.

The Intention of the Testator

[47] Counsel for the Petitioner strenuously argued that both the High Court and the Court of Appeal had *"substituted"* the intention of the testator with their own, by interpreting Clause 3 of the Will as excluding the properties the subject of HBC 352/2016. Drawing support from Re Sebba [1959] Ch 166, that decided that the *"cost of collecting and preserving the estate with the exception of specific bequests and devices formed part of testamentary and administrative expenses"*

Counsel argued that:

> *"The Court of Appeal as well as the High Court have continued to overlook this issue and misunderstood the facts to believe that the transfers have already been registered and the said two properties in Suva High Court Civil Action No. HBC 352/2015 are no longer part of the Estate of the Deceased."*

[48] I cannot find anywhere in the transcripts of the High Court nor in the record of both courts or either of the courts asserting that the transfers of CT 3580 or NL 29608 the subject matters of HBC 352/2015, had been registered in the Titles Office.

[49] The courts merely noted that undisputed facts that the deceased had entered into two Agreements for Sale and Purchase with a third party with respect to both properties and thereafter executed the transfers of the same to the third party on 28 July, 2014. The High Court had alluded specifically to this when it noted at paragraph 11 of the judgment:

> *"…It was submitted by the learned Counsel for the plaintiff that the deceased before his death had executed transfers in respect of those properties but had not been registered…The defendant for reason unknown to the Court had not given the date of the transfers which ae being challenged in court…"*

[50] The Court of Appeal likewise shared similar position and noted the fact that the High Court *"accepted the stand taken by the Respondent that, the deceased testator before his death had executed transfers in respect of those properties."* It added [at paragraph 15 of the judgment]:

> *"…If the Appellant wished to put in issue the said two sale-purchase agreements as forming part of the estate of the testator then, the dates of the execution of the said agreements and their registration became crucial…"*

[51] As can be seen, nowhere in either the High Court or the Court of Appeal judgments are there any finding that the transfers signed by the deceased have been registered. To suggest otherwise is not only mischievous, but also contumelious of Counsel.

[52] In the end, it is the intention of the testator that this Court has been asked to give effect to.

The Construction of Wills

[53] The judgment in the Court of Appeal has usefully referred to the tenents of construction of a will as stated by Viscount Simon LC in **Perrin v Morgan** [1943] AC 399 at page 406:

"…the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not , of course, what the testator meant to do when he made his will, but what the written words he uses mean, in the particular case – what are the "expressed intentions" of the testator."

[54] Closer to home, our Wills Act 1972, sets out under section 26 the general rules of construction of wills as follows:

"26. Unless the contrary intention appears by the will-

(a) a will is to be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator;

(b) property which is subject of a disposition which is void or fails to take effect is to be included in any residuary disposition contained in the will;

(c) whether or not the testator owns freehold land a general devise of land or of land at a particular place includes leasehold land;

(d) a general disposition of all the testator's property of a particular kind includes property over which he or she had a power of appointment exercisable by will and operates as an execution of the power;

(e) a disposition of property without words of limitation whether to a person beneficially or as executor or trustee is to be construed as passing the whole estate or interest of the testator therein."

[55] In the quest to ascertain the actual intention of the testator, the Court can allow extrinsic evidence as per section 26B of the Act:

"26B The court may admit extrinsic evidence (including the evidence of the actual intention of the testator) in order to show the intention of the testator and to aid in the construction, ambiguity or equivocal reference in a will."

[56] Both the High Court and Court of Appeal, having considered and weighed the language of Clause 3 of the Will and importantly, the meaning and intention of the testator, and furthermore taking into account extrinsic evidence, concluded that the shares of the testator

in CT 3580 and NL 29608 the subject matters of HBC 352 of 2015, did not form part of the testators estate. The legal interests in them had been transferred by the testator prior to his death.

[57] It is pertinent to note that the principal argument by Counsel for the Petitioner in this issue is that the ownership of the shares in the two properties, although had legally been transferred through agreements for sale and purchase and execution of transfer documents by both parties including the testator, these transfers have not been registered. Furthermore, Counsel seemed to be emphasizing that, while not disputing the existence of these agreements, the actual dates of their execution was important in considering the intention of the testator and the meaning of Clause 3 of the Will. If the transfers have not been registered then the properties remain in the estate, according to the Petitioner. However as the Court had concluded above, the transfers had already conveyed the legal interests to the third party notwithstanding that they had not been registered. It is the intention of the testator that is relevant, not the action of the Administratrix.

[58] In his submission, and also a ground of his appeal, Counsel for the Petitioner argued that it was for the courts to compel the production of these documents before them to satisfy themselves on the issue. But as Guneratne JA in the Court of Appeal pointed out above, the burden was on the Petitioner to produce the evidence before the Court. It was for the Petitioner to produce these documents as well as other *"relevant materials"* she claimed, in HBC 352 of 2015 to substantiate her arguments.

[59] The extrinsic evidence to assist the Court in arriving at the most possible intention of the testator is the fact that he had on 8 July 2014 at the date of making the will, he on the same day decided and entered into agreements for sale and the transfer of his shares in CT 3580 and NL 29608. It seems logical that the only possible reason why the testator had not specifically included his shares in the properties the subject of HBC 352 of 2015, in his Will, is because he was selling them and had begun the formalities by signing the Agreements for Sale and Purchase, on the same day he made his will.

[60] This in my view, is the only likely construction to be made to Clause 3 of the Will. It is the approach favoured by Lord Atkins in **Perrin v Morgan** (supra) at p.414,

> *"To decide on proven probabilities, is not to guess but to adjudicate. If this is to decide according to "context,"I am content, but I cannot agree that the Court is precluded from looking outside the terms of the will. No will can be analysed in vacuo. There are materials surrounding such as I have suggested in every case, that they have to be taken into account. The sole object is to ascertain from the will the testator's intention."*(emphasis added)

Statement of Account and Order 85 Rule 5

[61] This constitutes grounds b) and h) of the appeal. The Petitioner's claim that the court had acted contrary to the Rules (085.R5) by determining of its own, the intention of the testator without resort to the O 85 R.5 (2), procedure. This submission is totally misconceived.

[62] In summary, the applicable provision is Order 85 Rule 5 (1) where the Court had proceeded on the basis that *"the questions at issue between the parties cannot properly be determined otherwise than under such judgment or order."* Rule 5 (2) is only triggered when details of the accounts is requested to be furnished by the administrator or trustee of the estate. No such request had been made in this case.

[63] If and when necessary, the Court may assess whether the expenses and costs charged on the estate properly comes under the *"executorship expenses"* as per **Sharp v Lush** (supra). In any event, the court has the powers under section 39 of the Succession, Probate and Administration Act, to order an inventory or account of the estate to be produced upon request.

[64] This ground of appeal is unsuccessful.

Joint Account Share

[65] This constitutes grounds l) of the Petitioner's appeal. There is no dispute that the Respondent's name was added to the Baroda bank account previously held by the testator,

and became a joint owner on and after 27 March 2013. There is furthermore no dispute that the rent monies as well as milk monies from the testator's dairy farms were deposited into the joint account.

[66] The Petitioner's argued that the funds in the joint account, especially given the sources of the deposits must be regarded as trust fund to be held for the estate of the deceased.

[67] However, the Court of Appeal agreed with the High Court finding that the principle of survivorship applied in this instance and that the funds in the joint account upon the death of the other devolved to the survivor. The Court referred to the England and Wales High Court in Chancery case: **Drakeford v Cotton & Anor** [2012] EWHC 1414 as authority. The Court of Appeal added at paragraph 28:

> *"No matter from what sources or when funds had come to the said Account (whether before or after the Joint Account holder's death) the funds lying in such joint account will accrue to the surviving joint account holders and will not form part of the testator's estate and consequently, the survivor of the joint account could not be said to have held the funds in Trust on behalf of the Testator's Estate."*

[68] This Court agrees with the conclusion of the Court of Appeal. There must be very clear undisputed evidence of the intention by the deceased joint account holder than the account would devolve into a trust upon his or her demise. The fact, in this case that the sources of deposit were from the testator's farms and rentals from his property, are not of themselves sufficient to prove any intention of the creation of a trust by the testator. The presumption is that the joint account passed by survivorship to the surviving joint owner.

[69] The High Court of Australia in **Russell v Scott** [1936] 55 CLR 440 at page 451 (per Dixon and Evatt JJ) stated:

> *"…there is much authority to the effect that where a joint bank account is opened by husband and wife with the intention that the survivor shall take beneficially the balance at credit on the death of one of them, that intention prevails, and, on death of husband, the wife takes the balance beneficially, although the deceased husband supplied all the money*

paid in and during his life the account was used exclusively for his own purposes."

[70] It matters not that in this case the Respondent was a common law wife but she had been living with the testator for more than 20 years. In **Russell v Scott** (supra) the relationship between the joint account holders was one of aunt and nephew;

[71] This ground of appeal is unsuccessful.

Award of costs

[72] This constitutes grounds i) and j) of the Petitioner's appeal

[73] The powers and the discretion to award costs are exercised by the Court under Order 62 of the High Court Rules

[74] The Petitioner claims that the High Court, and the Court of Appeal, in awarding $3,000.00 and $5,000.00 costs respectively against her, had premised the award on the basis of her refusal to transfer CT 36280 to the Respondent, notwithstanding the fact that *"she had never refused to complete the transfer subject to the fulfilment of Clause 3 of the last will."*

[75] There is no evidence from the Courts' record to substantiate the claim by the Petitioner that the award of costs personally against her in the High Court or the costs against her as the Appellant in the Court of Appeal, were predicated on the Petitioner's refusal to transfer CT 36280 to the Respondent.

[76] In any event, the award of costs is under the rules, are normally awarded to the successful party and the consideration and circumstances the award of costs made are carefully set out under Order 62 Rule 3 (General Principles). The powers are exercised at the Courts discretion and the appellate courts are reluctant to disturb the award of costs unless the amount of the award is legally wrong or is disproportionately or unduly excessive. This Court is satisfied that the costs awarded in the High Court and the Court of Appeal are correct and reasonable given the circumstances.

[77] This ground of appeal is unsuccessful.

Conclusion

[78] The duties of the Petitioner as the Administratrix of the estate of Ram Lagan are to collect the assets of the deceased, pay the funeral, testamentary, administrative and other debts owed and incurred by the estate, and distribute the estate to the beneficiaries in accordance with the terms of the will.

[79] This Court, together with the courts below, have determined firstly that the shares in the two properties, the subject matter of the High Court proceedings in HBC 352/2015, do not form part of the testator's estate, for reasons explained above. Secondly, the property CT 32680 bequeathed to the Respondent under Clause 3 of the Will, cannot be charged for *"executorship expenses"* as claimed by the Petitioner, for the reason that it is precluded under section 19B (1) of the Succession Probate and Administration Amendment Act 2004, and that the shares in the two properties (CT 3580, and NL 29605), in the courts' interpretation of the will as above, no longer formed part of the estate.

[80] The Petitioner as the Administratrix of the estate of Ram Lagan has, since 23 July 2015, been managing the affairs of the estate and has a legal duty to distribute the bequests to beneficiaries and heirs within a reasonable time. While Section 37 of the Succession Probate and Administration Act does allow one year's reprieve before the Administratrix may distribute the estate, it is now eight (8) years since the Letters of Administration De Bonis Non was granted and the bequest to the Respondent is still to be fulfilled. The Respondent is now 76 years old and she is legally entitled to the bequest to be acquired at a reasonable time.

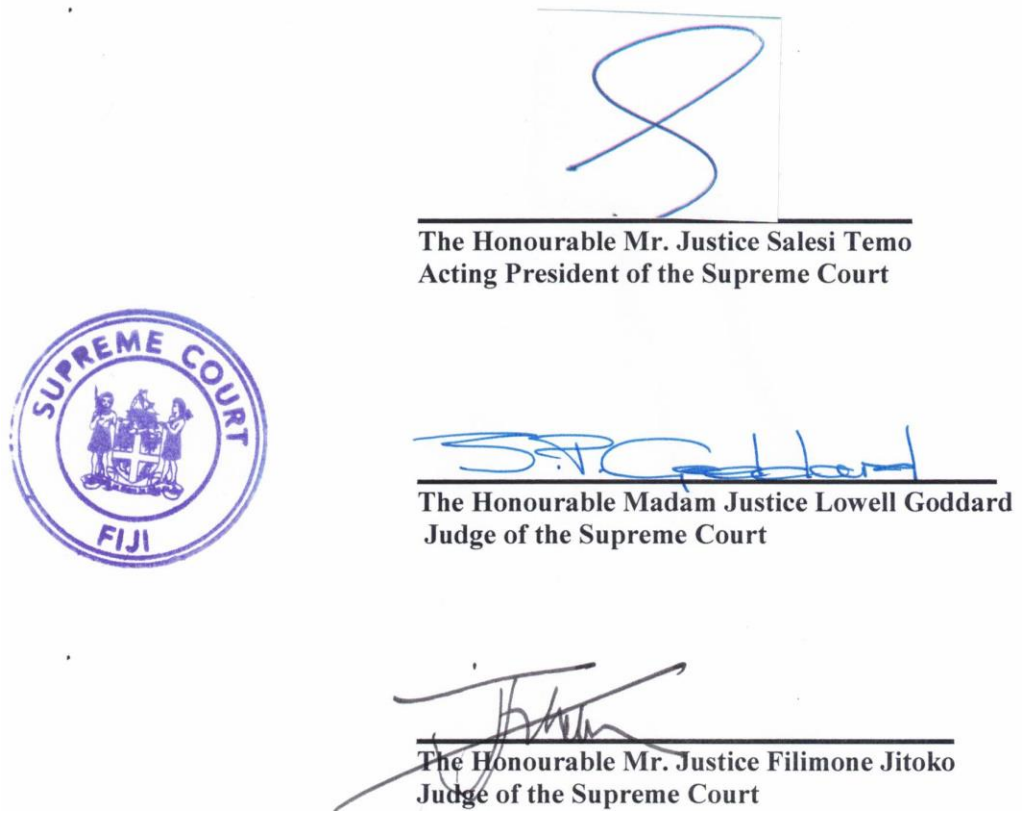
[81] It is important to note that in exercise of her duties as the Administratrix, the Petitioner is not only required to act with due diligence, but she also has a duty to act ethically. It is clear that under Clause 4 of the Will, the Administratrix stands to inherit all the residual estate of the testator during her lifetime and then the remainder to the grandson, Prayag Lagan. Although the Court of Appeal found that there was no conflict of interest in this

regard, it does beg the question of acting in good faith, diligence and honesty on behalf of the estate if the distribution of the gifts to the beneficiaries is in this case, taking such a long time. It is the fiduciary responsibility of the Petitioner as the Administratrix in good faith, to ensure that the testator's wishes through gifts or bequests are carried out in a timely manner.

[82] In all the circumstances, I have come to the conclusion that this Petition is without merit and I make Orders as follows:

[83] ***Orders***

1. *Leave to appeal is granted.*
2. *The appeal is dismissed.*
3. *Petitioner to transfer the property described as Certificate of Title 36280, to the Respondent within 60 days*
4. *Costs of $5,000.00 is awarded against the Petitioner.*



The Honourable Mr. Justice Salesi Temo
Acting President of the Supreme Court

The Honourable Madam Justice Lowell Goddard
Judge of the Supreme Court

The Honourable Mr. Justice Filimone Jitoko
Judge of the Supreme Court