

33, 1949

No. 13 of 1947.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.T.

ON APPEAL

12 NOV 1956

FROM THE SUPREME COURT OF FIJI.

INSTITUTE OF ADVANCED
LEGAL STUDIES

30923

IN THE MATTER of the ESTATE of NANHU son of BIRMA of Nasea, Labasa
(partner in the firm of JAGANNATH NANHU & COMPANY) in the Island of
Vanua Levu in the Colony of Fiji, Merchant, deceased.

BETWEEN

JADURAM (father's name LALLU) of Labasa in the Colony of Fiji
Executor of the Will of JAGANNATH (son of BIRMA) now deceased
Executor of the Will of the said NANHU deceased (Defendant) - *Appellant*

AND

RAMDASSI, widow of the said NANHU deceased (Plaintiff) - - *Respondent.*

RECORD OF PROCEEDINGS

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In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

IN THE MATTER of the ESTATE of NANHU son of BIRMA of Nasea, Labasa (partner in the firm of JAGANNATH NANHU & COMPANY) in the Island of Vanua Levu in the Colony of Fiji, Merchant, deceased.

BETWEEN

10 JADURAM (father's name LALLU) of Labasa in the Colony of Fiji Executor of the Will of JAGANNATH (son of BIRMA) now deceased Executor of the Will of the said NANHU deceased (Defendant) - - - - *Appellant*

AND

RAMDASSI, widow of the said NANHU deceased (Plaintiff) *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

AMENDED ORIGINATING SUMMONS.

Amended this 8th day of August 1946 pursuant to Judge's Order 20 dated the 29th day of July 1946.

(Sgd.) B. L. GREGG,
Registrar, Supreme Court. .

IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

IN THE MATTER of the ESTATE of NANHU son of BIRMA of Nasea, Labasa (partner in the firm of JAGANNATH NANHU & COMPANY) on the Island of Vanua Levu in the Colony of Fiji, Merchant, deceased.

Between RAMDASSI widow of the said NANHU deceased Plaintiff

30

and

JAGANNATH son of BIRMA, executor of the will of the said NANHU deceased - - Defendant.

LET the above-named JAGANNATH son of Birma of Nasea, Labasa on the Island of Vanua Levu in the Colony of Fiji, as executor of the last

No. 1.
Amended
Originating
Summons,
17th June
1946.

No. 1.
Amended
Originating
Summons,
17th June
1946,
continued.

will and testament of the above-named NANHU deceased within twenty-one days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of RAMDASSI widow of the said Nanhu deceased, also of Nasea, Labasa aforesaid, who claims to be interested as a legatee under the will of the said Nanhu deceased for the determination of the following questions :

(A) Whether upon the true construction of the following provisions contained in the will of the said Nanhu deceased, namely :—

10

“ I appoint my brother Jagannath son of Birma Merchant who is also my partner to be my sole executor and trustee I give devise and bequeath unto my said trustee all real and personal property of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have a disposing power at the time of my decease absolutely save only with the proviso that he shall, during her lifetime, allow my wife Ramdassi to live in the dwelling-house at Nasea where she and I now live and shall supply her out of my estate with money and goods sufficient to maintain her during her lifetime in the manner in which she had lived with me in my lifetime but having regard always to the estate of our business and to any economic conditions which may affect the same and further that he shall himself make a will leaving the whole of his estate to me should he predecease me and otherwise to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath or, in the event of the death of either, to the survivor of them should my said brother Jagannath predecease me I give devise and bequeath the whole of my estate including such property as I shall inherit from the said Jagannath and remain possessed of at the time of my decease to be divided equally between my said wife Ramdassi and said Bacheoni the wife of the said Jagannath and I direct that if either the said Ramdassi or the said Bacheoni shall predecease me that the whole of my estate shall go to the survivor of them, and in such an event or events, I appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees ”

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30

and in the events which have happened a trust is created ?

(B) Whether the trust in question is revocable by the defendant Jagannath who has accepted the benefit of the bequest under the said provisions in his own favour ?

40

(C) Whether in view of the fact that the defendant Jagannath has accepted the benefit of the bequest in his own favour the said trust attaches only to the estate of the said deceased or to the defendant's own property belonging to him at the time of the death of the said deceased as well ?

(D) If the said trust attaches to both the aforesaid properties, whether the defendant takes only a life interest in the said properties ?

(E) If the defendant takes a life interest only, whether he holds the remainder in trust for the plaintiff Ramdassi and the defendant's wife Bacheoni in equal shares absolutely; and, if so, whether the said interest in remainder is vested from the moment of Nanhu's death, or contingent on both or either of the plaintiff and the defendant's wife Bacheoni surviving the defendant after his death and the survivors or the survivor of them taking the whole property absolutely?

10 (F) If the trust attaches only to the estate of the said deceased Nanhu, whether the said trust confers any interest in the said trust property on the defendant?

(G) If the answer to (F) is in the negative, whether the defendant in that case holds the trust property in trust for the plaintiff and the defendant's wife Bacheoni in equal shares absolutely?

20 (H) If the answer to (F) is in the affirmative, whether the defendant takes only a life interest with remainder over to the plaintiff and the defendant's wife Bacheoni in equal shares absolutely; and if so, whether the said interest in remainder is vested from the moment of Nanhu's death, or contingent on both or either of the plaintiff and the defendant's wife Bacheoni surviving the defendant after his death and the survivors or the survivor of them taking the whole property absolutely?

(I) Whether the defendant, whatever the nature of the trust, has any power to dispose of the trust property contrary to the terms of such a trust?

Dated the 17th day of June 1946.

By the Court.

(Sgd.) F. G. FORSTER,

Deputy Registrar.

30 (L.S.)

This summons was taken out by Messrs. HASAN & HASAN of Renwick Road, Suva, Solicitors for the above-named RAMDASSI.

The defendant may appear hereto by entering appearance either personally or by Solicitor at the Registrar's Office at Suva.

NOTE.—If the defendant does not enter appearance within the time and at the place above-mentioned, such order will be made and proceedings may be taken as the Judge may think just and expedient.

No. 2.
Affidavit
of
Defendant,
12th
August
1946.

No. 2.
AFFIDAVIT of Defendant.

IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

IN THE MATTER of the ESTATE of NANHU son of BIRMA of Nasea, Labasa (Partner in the firm of JAGANNATH NANHU & COMPANY) on the Island of Vanua Levu in the Colony of Fiji, Merchant, deceased.

Between RAMDASSI widow of the said NANHU deceased Plaintiff

and

10

JAGANNATH son of BIRMA executor of the will of the said NANHU deceased - - - Defendant.

I, JAGANNATH (son of BIRMA) of Nasea Labasa in the Colony of Fiji make oath and say as follows :

1. I am the defendant as executor of the will of Nanhu deceased named in the originating summons herein.

2. While ill as an inmate of the Labasa Hospital during the month of August 1937, and shortly before I left that Hospital to go to Lautoka Hospital to undergo an operation there, I signed a document which is now in the possession of my solicitors and is in the following terms :

20

THIS IS THE LAST WILL AND TESTAMENT of me JAGANNATH SON of BIRMA of Labasa on the Island of Vanualevu in Fiji Merchant I hereby revoke all former Wills and other Testamentary writings of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have a disposing power at the time of my decease and I declare this to be my last and only Will and Testament I Appoint my brother and partner Nanhu son of Birma of Labasa merchant to be my sole Executor and Trustee I Give Devise and Bequeath unto my Trustee all real and personal property of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have a disposing power at the time of my decease absolutely save only with the proviso that he shall, during her lifetime, allow my wife Bacheoni to live in the Dwelling house at Nasea where she and I now live and shall supply her out of my estate with money and goods sufficient to maintain her during her lifetime in the manner in which she has lived with me in my lifetime but having regard always to the state of our business and to any economic conditions which may affect the same and further that he shall himself make a Will leaving the whole of his Estate to me should he predecease me and otherwise to be divided equally between my said wife Bacheoni and Ramdassi the wife of the said Nanhu or, in the event of the death of either to the survivor of them absolutely Should my said brother Nanhu predecease me then I Devise and Bequeath the whole of my estate

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including anything which I may inherit from the said Nanhu to be divided equally between the said Bacheoni and the said Ramdassi or, in the event of the death of either, then to the survivor of them.

No. 2.
Affidavit
of
Defendant,
12th
August
1946,
continued.

In witness whereof I have hereunto set my hand this 21st day of August 1937 (One Thousand Nine Hundred and Thirty-Seven) (1937).

JAGANNATH.

H. B. GIBSON.

M. MAHADEO.

10 Signed by the said Jagannath Son of
Birma the Testator as and for his last
and only Will and Testament in the
presence of us both present at the same
time who at his request in his presence
and sight and in the sight and presence
of each other have hereunto subscribed
our names as attesting witnesses the
foregoing having first been interpreted
by us to him in the Hindustani
20 language, the word " amongst " having
first been crossed out on the reverse
side hereof

JAGANNATH.

H. B. GIBSON,
Solicitor,
Labasa.

M. MAHADEO,
Interpreter,
Labasa.

3. I signed that document in the circumstances hereinafter related.

30 4. Mr. H. B. Gibson, Solicitor of Labasa came to Labasa Hospital to see me, shortly before I left it to go to Lautoka Hospital. He was accompanied by his clerk and brought with him the document referred to in paragraph 2.

5. Mr. Gibson told me that my brother Nanhu had made a will leaving all his property to me and that Nanhu wanted me to make a will leaving all my property to him. I had not given Mr. Gibson any instructions, nor had I made any arrangements with my brother Nanhu about my will nor about my property.

40 6. I was agreeable to make such a will and I signed the document he had brought with him as I understood Mr. Gibson to say that the will which he had with him meant that all my property on my death went to my brother Nanhu.

7. Mr. Gibson did not explain to me or tell me that Ramdassi, wife of Nanhu, or my wife Bacheoni was mentioned in the document which I signed.

No. 2.
Affidavit
of
Defendant,
12th
August
1946,
continued.

8. After I had signed the paper in the hospital Mr. Gibson took it away with him.

9. After my operation at Lautoka Hospital and recovery I returned to Labasa.

10. I did not at any time after my return to Labasa have any discussion with my brother Nanhu about his will or my own will.

11. After my brother Nanhu died in May 1943, Mr. B. M. Gyaneshwar, Solicitor of Labasa, who was acting in obtaining Probate of Nanhu's will, read to me the contents of that will which was the first occasion on which I became aware of the actual contents and that Ramdassi and Bacheoni 10 were mentioned in the will.

Sworn at Suva this 12th day of August 1946 through the sworn interpretation of Rambhir Parmeshwar and I certify that this affidavit was read over in my presence in the Hindustani language to the deponent who seemed perfectly to understand the same and who affixed his signature in my presence : } JAGANNATH.

HARI CHARAN,
A Commissioner of the Supreme Court of
Fiji for taking affidavits.

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2/- stamp
cancelled.

This affidavit is filed the 14th day of August 1946 by GRAHAME & Co., Solicitors, of Central Chambers, Suva, for and on behalf of the defendant JAGANNATH and it is intended to use this affidavit on the hearing of the Originating Summons herein in support of the defence by the defendant.

STATEMENT OF FACTS.

IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

No. 3.
Statement
of Facts,
16th
August
1946.

IN THE MATTER of the ESTATE of NANHU son of BIRMA, of Nasea, Labasa (partner in the firm of JAGANNATH NANHU & COMPANY) in the Island of Vanua Levu in the Colony of Fiji, Merchant, deceased.

Between RAMDASSI widow of the said NANHU, deceased Plaintiff

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and

JAGANNATH son of BIRMA, executor of the will
of the said NANHU, deceased - - Defendant.

WE the undersigned respectively solicitors for the plaintiff and the defendant in this matter agree to admit for the purpose of and on the trial of this matter only the following facts :—

1. From the year 1925 and up to the 27th May 1943 Jagannath of Labasa in the Colony of Fiji and his brother Nanhu carried on business in partnership as Merchants and Storekeepers at Labasa in the name and style of Jagannath, Nanhu & Co.

20 2. The said Nanhu executed his will at Labasa on the 21st day of August 1937 which was drawn by H. B. Gibson Solicitor in the terms following :—

THIS IS THE LAST WILL AND TESTAMENT of me NANHU son of Birma of Labasa on the island of Vanua Levu in Fiji Merchant I Hereby revoke all former Wills and other Testamentary writings by me heretofore made and I declare this to be my last and only Will and Testament I Appoint my brother Jagannath Son of Birma Merchant who is also my partner to be my sole executor and trustee I Give Devise and Bequeath unto my said trustee all real and personal property of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have a disposing power at the time of my decease absolutely save only with the proviso that he shall, during her lifetime, allow my wife Ramdassi to live in the Dwelling house at Nasea where she and I now live and shall supply her out of my estate with money and goods sufficient to maintain her during her lifetime in the manner in which she has lived with me in my lifetime but having regard always to the state of our business and to any economic conditions which may affect the same and further that he shall himself make a Will leaving the whole of his Estate to me should he predecease me and otherwise to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath or, in the event of the death of either, to the survivor of them Should my said brother Jagannath predecease me I Give Devise and Bequeath the whole of my estate including such property as I shall inherit from the said Jagannath and remain

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No. 3.
Statement
of Facts,
16th
August
1946,
continued.

possessed of at the time of my decease to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath and I Direct that if either the said Ramdassi or the said Bacheoni shall predecease me that the whole of my estate shall go to the survivor of them and, in such an event or events, I Appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees.

In witness whereof I have hereunto set my hand this 21st day of August One Thousand Nine Hundred and Thirty-Seven.

H. B. GIBSON. 10

NANHU

M. MAHADEO.

Signed by Nanhu son of Birma the Testator as and for his last and only Will and Testament in the presence of us both present at the same time who at his request in his presence and sight and in the sight and presence of each other have hereunto subscribed our names as attesting witnesses the foregoing having first been interpreted by us to him in the Hindustani Language

NANHU

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H. B. GIBSON,
Solicitor,
Labasa.

M. MAHADEO,
Interpreter,
Labasa.

3. The said Nanhu died at Labasa aforesaid on the 27th day of 30 May 1943.

4. Probate of the said will was granted by the Supreme Court of Fiji on the 3rd day of March 1944 to the said Jagannath as executor thereof.

5. The estate of the said Nanhu was sworn by Jagannath for the purpose of assessment of death duty thereon at £6,030.17.5, which, according to his Declaration, was the value of Nanhu's half interest and share in the partnership of Jagannath Nanhu & Co.

6. Jagannath after the death of Nanhu took for himself as his own property the half share of Nanhu in the partnership property of Jagannath 40 Nanhu & Co., comprising

- (A) All stock-in-trade of the said business
- (B) Furniture and fittings
- (C) Book debts
- (D) "Talkie" moving picture equipment
- (E) Cash in hand

and by transmission as executor of the said Nanhu was registered on the 1st September 1944 in the Register of Titles as the proprietor of an undivided half share in the seven leasehold properties and all buildings standing thereon of the partnership namely :—

No. 3.
Statement
of Facts,
16th
August
1946,
continued.

1. Native Lease No. 5083.
2. Native Lease No. 6995.
3. Native Lease No. 2660.
4. Native Lease No. 955.
5. Crown Lease No. 280.
- 10 6. Crown Lease No. 305.
7. Crown Lease No. 427.

7. On the 1st day of July 1944 the said Jagannath took into partnership his son-in-law Jaduram in the business known as Jagannath Nanhu & Co.

8. On the 19th September 1944 the said Jagannath as executor of Nanhu deceased transferred the undivided half share of Nanhu in the said leasehold properties to himself.

9. On the 25th June 1945 the said Jagannath sold the said Native Lease No. 5083 to one Madhuri for the sum of £25.0.0.

20 10. On the 27th July 1945 the said Jagannath transferred the other six leaseholds described in paragraph 6 to his son-in-law Jaduram in consideration of Natural love and affection and also gave and transferred to Jaduram all his Jagannath's interest and share in the partnership business and assets of Jagannath Nanhu & Co.

11. On the 10th August 1945 the transfer referred to in the preceding paragraph was registered in the Register of Titles together with three encumbrances over the said Six leasehold properties securing to Ramdassi the plaintiff in this matter, to Jagannath the defendant in this matter and to Bacheoni the wife of the said Jagannath, respectively an annuity of 30 £120.0.0 each.

Dated the 16th day of August, 1946.

HASAN and HASAN

Solicitors for the Plaintiff.

GRAHAME & CO.

Solicitors for the Defendant.

No. 4.

No. 4.

SUMMONS 20th August 1946 for date of Trial.

[Not printed]

No. 5.

No. 5.

SUMMONS 2nd September 1946 to postpone Trial.

[Not printed]

No. 6.
Affidavit
of Harold
Brockett
Gibson,
31st
August
1946.

No. 6.

AFFIDAVIT of Harold Brockett Gibson.

IN THE SUPREME COURT OF FIJI.

No. 23 of 1946. 10

IN THE MATTER of the ESTATE of NANHU Son of BIRMA of Nasea, Labasa (Partner in the firm of JAGANNATH NANHU & COMPANY) on the Island of Vanua Levu in the Colony of Fiji Merchant deceased.

Between RAMDASSI widow of the said NANHU deceased Plaintiff

and

JAGANNATH son of BIRMA executor of the Will of the said NANHU deceased - Defendant.

I, HAROLD BROCKETT GIBSON of Nasea in the district of Labasa in the Colony of Fiji Solicitor make oath and say as follows :— 20

1. That the facts concerning the execution of the last will and Testament of Jaganath (Jagannath) on 21st day of August 1937 are as follows to the best of my knowledge and belief :—

(A) That on the day, which was a Saturday, Nanhu son of Birma, came to my office and stated that his brother and partner Jagannath was in the Labasa Hospital and wanted to alter his Will.

(B) That the said Will which was dated the 14th day of August 1933 contained reference to Piyarelal the only son of Jagannath

and Nanhu told me that the alteration required was the deletion of all reference to the said Piyarelal and the giving of all power to himself Nanhu and after his death to the wives of both brothers.

No. 6.
Affidavit
of Harold
Brockett
Gibson,
31st
August
1946,
continued.

10 (c) That I do not remember that I did draw and can find no record of having drawn any document at the interview and my memory is that I went with Nanhu to see Jagannath at the Labasa Hospital, when there was some discussion between the brothers.

(d) That Nanhu was then in good health but appeared to have some concern regarding Jagannath's state of health and he had made no reference whatsoever regarding his own will and no will of Nanhu had been drawn or executed before we went to the Hospital.

(e) That the discussion as far as I remember it was that Nanhu wished Jagannath to leave all his property to him absolutely with provision only for the maintenance of Jagannath's wife and that Jagannath agreed only after Nanhu promised to make a like Will in his, Jagannath's, favour.

20 (f) That I returned to my office and completed the Will of Jagannath and also completed the Will of Nanhu and later went to the Hospital again with Nanhu and my clerk Nirdu Mahadeo when both Wills were signed and executed in the presence of both the Testators and in the sight and presence of myself and my said clerk Mahadeo after the said Mahadeo had fully interpreted in Hindustani the contents of both Wills in the presence and hearing of both parties.

30 (g) That although I did bring the two original Wills back to my office complete carbon copies of both were handed at the time to each Testator and I have reason to believe that such complete carbon copies were placed in the safe of the business in Labasa of Jagannath Nanhu & Company and that Jagannath had ready access to the same at all times, and I, on good grounds believe that he actually did have his own Will read to him in Hindustani on occasion other than that upon which he signed it and the reading by Mr. B. M. Gyaneshwar referred to in paragraph 11 of the affidavit of the said Jagannath dated 12th day of August 1946 sworn and filed herein.

Sworn before me at Labasa in the district
of Labasa this 31st day of August
1946. A.D. } H. B. GIBSON.

40 B. M. GYANESHWAR,
A Commissioner of the Supreme
Court for taking affidavits.

2/- stamp
cancelled.



IN THE SUPREME COURT OF FIJI.
Civil Jurisdiction.

No. 23 of 1946.

Wednesday, 18th September, 1946.

RAMDASSI - - - - - Plaintiff

Vs.

JAGANNATH - - - - - Defendant.

Mr. Said Hasan for the plaintiff.

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Mr. G. F. Grahame for the defendant.

Hasan : Plaintiff's case is that certain trusts have arisen which defendant is bound to carry out because he has taken probate and accepted benefit under the will.

Cannot repudiate bonds imposed on him.

(1) There was a contract between the two brothers to make mutual wills in terms contained in the wills.

(A) That contract can be inferred from the terms of the mutual wills without external evidence.

(B) If external evidence were necessary it is contained in 20 Gibson's affidavit.

(2) If no contract Defendant on Nanhu's death has accepted the terms of Nanhu's will. He cannot take it in part. He must take the whole.

Statement of admitted facts filed.

Then there are the two affidavits—Defendant and Gibson.

Read will of Nanhu.

(Grahame : Tender Probate of Nanhu's will and will of Jagannath.) Jagannath's will substantially the same but minor differences in wording. No provision to appoint the widows executrices. 30

Effective portions of the two wills identical.

Clear that brothers intended to pool this property so that whole would go to same beneficiaries after both their deaths.

Intention was that whole estate should be treated as a trust after the death of the first brother.

Court gives effect to intent of parties if it can be clearly gathered from language used by the parties.

Re Lane's Estate, A.E.R. 1946, 1. 735.

Apply same principles if any doubt as to intention of parties when they made these wills. 40

In the events which have happened since the making of the wills—Defendant having taken benefits under will of deceased—he is bound to carry out the terms under which he accepted the benefits.

Provisions in will create a trust which attaches not only to deceased's property but also to Defendant's property. Nature and effect of trust is to give life interest to Defendant in the combined property with remainder to the two widows absolutely in equal shares.

Provisions in the will in the nature of a contract between the parties which Defendant has not rescinded but has in fact confirmed by taking benefits.

No. 7.
Judge's
Notes,
continued.

Legard v. Hodges, E.R. vol. 30, p. 447 (1 Ves. Jun. 478).

Will of Nanhu is the evidence of the agreement.

Dufour v. Pereira, E.R. 21 p. 332. (Dickens 420).

Stone v. Hoskins, P. 1905, p. 194.

Dennyson v. Mostert, Privy Council vol. IV p. 236 (at p. 253).

Wilford's Estate : Taylor v. Taylor, 1879, 11 Ch. D. p. 267.

10 *Mary Heys deceased*, 1914, P. 192 (at 198).

Agreement does not make will irrevocable.

In re Oldham, Ch. D. 1925, p. 75.

In re Hagger, 1930, 2 Ch. D. 190.

In this case the wills are themselves the evidence of the agreement. Nanhu makes his will subject to Defendant making a similar will.

If wills not evidence of agreement assume that Defendant's statement in his affidavit is true that he came to know of Nanhu's will for the first time when he went to Gyaneshwar to obtain probate of Nanhu's will. Then he need not have accepted the terms of the will. But he went on

20 to take probate and take benefits.

That constituted Defendant a trustee. He accepted the terms of the will.

Gray & others v. Perpetual Trustee Co. 1928 A.C. 391.

Law does not compel me to prove agreement. Equitable interests have arisen.

If a trust is created does it attach to Defendant's property as well as Nanhu's ?

If Defendant predeceased him testator left his property to his widow and Defendant's widow jointly. It is therefore logical to suppose he

30 contemplated the property being pooled.

Lewin on Trusts (1939 Ed.) p. 48, 52, 92.

In light of *In re Hagger*, effect of Nanhu's will was to confer life interest on Defendant and vested interest in remainder to the widows.

In any case there is interest in remainder in the two widows.

Defendant in any case bound after accepting the will.

Case for Plaintiff.

Grahame : Jarman I. 428. (7th Ed.).

In re Dayrell 1904 2 Ch. 496 (499).

Skill and knowledge of draftsman must be imparted to testator.

40 Clear that this will was drawn by Mr. Gibson.

Root of the matter in Mr. Gibson's affidavit, par. (E)—testator was only concerned with the maintenance of his widow.

Gibson has not said he explained the contents of the will.

Intention of testator was to give all his property to Defendant subject to Defendant providing for the maintenance of testator's widow.

Nothing to show Gibson had instructions to create a trust or to vest a limited *estate* in anybody.

Plaintiff's alleged right may arise—

50 (1) From testamentary law—an express trust declared by Nanhu's will. Does that will create a trust ?

(2) In equity—resulting from application of principle of constructive trusts.

This could only arise from a contract and there can be no question of breach till Defendant is dead.

In pursuance of the agreement they have made their wills which are before the Court.

Defendant has made his will.

Is there an express trust in Nanhu's will? To do so must construe will. What was testator's intent? Was it to create a trust? It must be clearly expressed—nothing in the will to support it. Will gives the whole estate to Defendant absolutely subject to certain changes binding on Defendant for maintenance of Plaintiff.

10

Must construe will so as to give effect to every word.

Will uses the word "absolutely." Then uses "proviso."

Use of word "trustee" does not of itself create a trust.

In re Diggles 39 Ch. 253.

—question of embarrassment and difficulty which would arise from creating a trust. This was a partnership business conducted by the two brothers. Substantial business—£12,000. No directions whatsoever to trustee of an estate this size! No power to continue the business!

Object to Hasan's interpretation on ground of uncertainty. *Underhill on Trusts* (9th Ed.) p. 20.

20

What is a trust?

(per Rigby L.J.) *In re Williams* 1897, A.C. 28.

This will was a conditional devise to Defendant on condition he maintained widow and made reciprocal will (for widows) but otherwise absolutely and beneficially. This condition of will is contemplated by Rigby J. at p. 35 of *re Williams*.

Thursday, 19th September 1946.

SECOND DAY.

Grahame: To establish a trust there must be imperative words and clear directions.

30

Condition that devise should give by will does not create a trust—though if condition broken a trust does arise.

"Absolutely"—*re Williams* at p. 36.

Here we have a gift "absolutely" plus conditions which do not create or necessitate a trust.

Defendant has in fact made a will which is before the Court.

No gift over in Nanhu's will of the remainder (if any) in the event of Ramdassi or Bacheoni not being alive at Defendant's death. If they die—you have resulting trust for benefit of Defendant or his personal representative.

40

Jarman I 460—parol evidence not admissible.

University College of North Wales v. Taylor, 1908, p. 140.

Boyes v. Cook, 14 Ch. D. 56 (see *Jarman* at 479).

Jarman I 482.

No words in will which can be read as giving Defendant a life estate only or as creating a trust over the property of the testator and of a third party.

Other side must establish (A) there is a contract (B) it was a term of the contract neither testator would revoke the will.

If there was a contract it was to make mutual wills—the Defendant 50 has made a will accordingly and has done all he contracted to do.

Defendant's will still stands. Till Defendant breaks his contract no right of action arises in respect of the contract. It cannot arise till Defendant does and only then if he has made a later and different will.

No. 7.
Judge's
Notes,
continued.

To create a trust in equity there must have been a contract between the two testators and an intention on the part of both to impose a legal obligation on the other not to revoke his will.

As regards the contract it must be binding in law. Anything less insufficient. *In re Oldham* 1925 Ch. 83, *Grey v. Perpetual Trustee Co.* 1928 A.C. *Dufours v. Pereira* was a case of a joint will—not of mutual

10 wills. *Camden* went on the terms of the joint will establishing a contract. *Walpole v. Orford* 1937 3 Ves. 402. It was found that no binding contract and so will of surviving testator was effective.

Mere agreement to make wills in same terms is not a contract to make mutual wills. *Grey v. Perpetual Trustee Co.* 1928 A.C. at p. 394.

Plaintiff says intention was to pool the property and that it should go to the same parties after death. No evidence of any intention to "pool" property.

In re Hagger, 1930, 2 Ch. 190.

Joint will.

20 *In re Heys*, 1914, P. , p. 192.

Refer Australian decision in *Grey v. Perpetual Trustee Co.* (per Higgins J.) *Argus L.R.* 1927. 370. (C.L.R. XXXIX, p. 494).

Go over facts. What evidence is there of a contract to make mutual wills.

After Gibson's affidavit.

On true construction of Nanhu's will was a trust created by its terms?

Hasan in reply: Immaterial whether wills are joint or separately executed.

In the words of Piazzi—Smith 1898 P. p. 7.

30 Grahame now adopting Gibson's affidavit.

No doubt as to nature of agreement between the parties—clear from terms of the will.

Give the word "trustee" its ordinary meaning—every word must be given a meaning.

Word "absolutely."

Comiskey v. Bowring Hanby, 1905, A.C. 84.

Snell's Equity (1939) p. 82.

Nanhu's will contemplates continuance of business—see provision for maintenance of Ramdassi.

40 By accepting benefit of Nanhu's will Defendant has accepted the conditions.

Snell—p. 591.

Trust relates to Defendant's own estate as well as to what he took under the will.

Fry "Specific Performance" (6th) 496, para. 1061.

Equitable interests have arisen which bind Defendant.

C. A. V.

No. 8.
Judgment,
11th
October
1946.

No. 8.
JUDGMENT.

IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

Between RAMDASSI - - - - - Plaintiff
and
JAGANNATH - - - - - Defendant.

JUDGMENT.

This summons raises certain questions, which it is not necessary to state in terms at this stage, relating to the Estate of one Nanhu, the 10 deceased husband of the Plaintiff and brother of the Defendant. In effect what has to be decided is the true construction of Nanhu's will and what equitable rights and obligations have flowed from it and from the actions of Defendant in taking probate of it and accepting benefit under it.

The facts are not in dispute. Deceased, who died on 27th May, 1943, had on 21st August, 1937, made a will the material portions of which read as follows :—

“ THIS IS THE LAST WILL AND TESTAMENT of me NANHU son of BIRMA of Labasa on the Island of Vanualevu in Fiji Merchant I hereby Revoke all former wills and other Testamentary writings 20 by me heretofore made And I Declare this to be my last and only Will and Testament I Appoint my brother Jagannath Son of Birma Merchant who is also my partner to be my sole executor and trustee I Give Devise and Bequeath unto my said trustee all real and personal property of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have a disposing power at the time of my decease absolutely save only with the proviso that he shall, during her lifetime, allow my wife Ramdassi to live in the Dwelling House at Nasea where she and I now live and shall supply her out of my estate with money and goods sufficient 30 to maintain her during her lifetime in the manner in which she has lived with me in my lifetime but having regard always to the state of our business and to any economic conditions which may affect the same and further that he shall himself make a Will leaving the whole of his Estate to me should be predecease me and otherwise to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath or, in the event of the death of either to the survivor of them Should my said brother Jagannath predecease me I Give Devise and Bequeath the whole of my estate including such property as I shall inherit from the said Jagannath 40 and remain possessed of at the time of my decease to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath And I Direct that if either the said Ramdassi or the said Bacheoni shall predecease me that the whole of my estate shall go to the survivor of them and, in such an event or events, I Appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees.”

What was the intention of the testator when he made his will in these terms? That intention is, if possible, to be deduced from the terms of the will itself and, to my mind, to do so is not a task of undue difficulty. He appoints Defendant to be "my sole executor and trustee," and gives to his "said trustee" the whole of his estate "absolutely save only with" a certain "proviso." That proviso is divided into two parts. The first is that Defendant shall allow Plaintiff to live in a certain dwelling-house and supply her "out of my estate" with a sufficient maintenance, and the second is the Defendant shall make a will leaving his whole estate to the

10 testator, should he survive Defendant, or, should testator first die, to testator's widow and Defendant's widow to be divided equally between them or, in the event of the death of either, to the survivor.

If the foregoing be a fair summary of the terms of the will, how can it be said that no trust was intended by the testator as regards the interest that passed under it? The will may or may not be skilfully drawn (I express no opinion on the point) but it appoints Defendant "trustee" as well as executor, it provides that Plaintiff's maintenance for the whole of her lifetime shall come out of the estate and it only gives what it does give to Defendant subject to certain "provisoes" which can only mean

20 "conditions." Nor does any difficulty arise from the consideration that the gift to Defendant as "my trustee" is given "absolutely save only with" the provisos. A gift of personal property (and here all the estate is personal property) to a trustee "absolutely" is not unusual (see "Encyclopædia of Forms and Precedents," Vol. XV, p. 404), and though it gives the trustee an unlimited interest at law (which in this case it is necessary he should have if he is to carry out the terms of the trust) the question of whether or not it gives him an unlimited interest in equity is entirely dependent on the terms of the will as a whole.

In my view, then, it is clear on the terms of the will considered in

30 detail and as a whole that the testator intended to create a trust, and on the face of it there are no grounds for saying that it is bad for want of certainty. Its precise terms will be for consideration later, but the intention to create a trust is certain, that that trust was intended to affect his whole estate is certain, and that it was to benefit the widow, Defendant, and Defendant's widow to clearly ascertainable extents is no less certain. It is true that the will is gravely lacking in precision as to the powers given to the trustees to deal with the estate, but that is a difficulty which could have been (and still can be) overcome by an appropriate application to the Court and is by no means fatal to the creation of the trust.

40 Nor is it any less clear that Defendant accepted the trust. Whatever its terms be, and I am coming to that presently, he took probate of the will as executor and he accepted substantial benefits under it, and in these circumstances he cannot be heard now to say that he did not accept the trusts imposed upon him.

To answer the question of what these trusts are it is necessary to revert to testator's intentions so far as they are to be deduced from the terms of the will but only in so far as they related to the circumstances as they existed at the time of his death, that is to say with Plaintiff, Defendant and Defendant's wife Bacheoni all alive, for it is as at the time

50 of his death that his will must be supposed to speak.

As far as these three persons are concerned it seems abundantly clear that the intentions of testator were as follows. Plaintiff, for the joint

No. 8.
Judgment,
11th
October
1946,
continued.

lives of Defendant and herself, was to have her maintenance as described in the will, and on the death of Defendant, if she survived him, was to take either the whole or a half share of the balance of the estate according to whether Bacheoni was or was not then alive. Bacheoni, if she survived Defendant, was to have either the whole or a half share of the balance of the estate according as to whether she did or did not survive Plaintiff. And Defendant was to have the rest. That is to say, for the joint lives of himself and Plaintiff, he was to have all that was left out of the life interest in the estate after satisfying the maintenance of Plaintiff. If he survived Plaintiff he was to have the whole interest in the estate subject only to the succession rights of Bacheoni, and if these rights determined during his lifetime by reason of the death of Bacheoni he was to have the whole estate absolutely. 10

These, in my opinion, were the intentions of testator as regards his own estate, these are the trusts which I find in his will and these are the trusts upon which Defendant must be held to have accepted the trusteeship to which he was appointed by the will.

Having reached these conclusions, it will be a matter of little difficulty to answer the questions contained in the summons so far as these relate to the estate of the deceased, but there remains the question of whether any trust has been created affecting the property of Defendant which has at no time formed part of the estate. 20

Whether or not there was an agreement made between the testator and the Defendant in 1937 to make mutual wills, there can be no doubt that when on the death of the testator in 1943 Defendant took probate of the will and acted as executor of it and took benefits under it he did so subject to the conditions contained in it. One of these was that he would make a will leaving the whole of his estate to Plaintiff and Bacheoni. It is admitted that that is a condition with which he was bound to comply, it is admitted that some years before the death of testator he had in fact made a will which did comply with it, and I understand it to be admitted that that will has, up to the beginning of these proceedings at any rate, not been revoked. On the authorities cited on behalf of the Plaintiff, it may well be that he is not at liberty to revoke that will, or at any rate that on his death the Court will, if so moved, intervene to see that his estate is dealt with as if it had not been revoked. 30

It is, however, an altogether different thing to say that the condition in Nanhu's will as intended by the testator and understood by the Defendant was that as from testator's death Defendant's estate other than what he took under the will should be subject to trusts of any sort. Counsel for the Plaintiff, in the course of a long and learned and wholly admirable argument, laid great stress on the different versions of what Lord Camden is said to have said in the case of *Dufour v. Pereira* (Dick. 418). But the circumstances there were not on all fours with those in the present case. That case was decided in 1769, long before the Married Women's Property Act, and all the wife's property flowed from her deceased husband's will. As His Lordship, dealing with the facts, says (in the Dickens report): "the husband by the mutual will assents to his wife's right and makes it separate." Here, on the other hand, we are concerned with property which came to Defendant other than under testator's will. 40 50

On a consideration of the authorities cited by counsel the conclusion cannot be avoided that the question is not a question of what does or does

not arise by mere operation of law but a question to be decided on the facts of each individual case. In *Gray vs. Perpetual Trustee Co.* (1928 A.C. 391) Viscount Haldane discussed the decision in *Dufour v. Pereira* (*supra*), he pointed out that in that case an agreement not to revoke mutual wills had been inferred, and went on to say: "The agreement (i.e., not to revoke mutual wills), which does not restrain the legal right to revoke, was the foundation of the right in equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at." Later His Lordship stated

10 the conclusion of the Board in the following words: "The case . . . is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shewn to have been made . . . The mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in equity than a right to damages at law."

No.-8.
Judgment,
11th
October
1946,
continued.

That the question is primarily one of fact is illustrated by the two cases cited of *In re Hagger* (1930 2 Ch. 190) and *In re Oldham* (1925 Ch. 75),

20 and indeed, on any other basis, it would be difficult, if not impossible, to reconcile these two decisions with each other. In *Hagger* there was a joint will by husband and wife containing a long recital setting out that they had been engaged for many years past in a certain business to which they had devoted their joint energies and as a result had acquired certain properties and moneys which they had always treated as their joint property and of which no division had ever been made. Clauson, J., in his judgment stated the facts and, after some preliminary observations, went on to say: "It is perfectly clear that when the husband and wife made this joint will they contemplated that the property which they were

30 pooling would all go to the same beneficiaries, whether in its inception it was the property of the husband or the property of the wife." In the event he held that the whole of the joint property was affected by certain trusts. In *Oldham*, on the other hand, which was a case where a husband and wife had made mutual wills but where the surviving wife had revoked her will after her husband's death, Astbury, J., examined the authorities at length and pointed out that the mere fact that two wills are made in identical terms does not of necessity imply any agreement beyond that so to make them. He considered the evidence before him, and, after observing that he could not "build up a trust on conjecture," came to the

40 conclusion that he had no sufficient means for deciding with certainty what, among many possible inferences, was the sole inference that should be drawn from the circumstances of the case and that accordingly there was no implied trust preventing the wife from disposing of her property as she pleased.

In this present case, so far as the estate of testator is concerned, the position is clear but it cannot be said that there is anything approaching the same degree of clarity regarding Defendant's own property. Nothing is to be drawn from the recital of the will beyond the fact that Defendant was testator's brother and partner, there is not a scrap of evidence as to the

50 terms of the partnership between them, there are no words anywhere in the will even suggesting, far less making, a specific imperative condition that Defendant should set up any sort of trust affecting his own estate during

No. 8.
Judgment,
11th
October
1946,
continued.

his lifetime or that anything should be paid to anybody out of his estate during his lifetime. If such had been his intention testator could well have said in his will, "I give my partner my estate on condition that as from my death he holds the whole of the partnership assets in trust for himself and my widow and his own wife." He could even have said, "I give him my estate on condition he pays my widow's maintenance out of the profits of our partnership and makes a will giving the whole of the partnership assets to my widow and his own widow." But he has not said either of these things, he has said nothing at all, and with respect I propose to adopt the words of Astbury, J., and say that I refuse to build up a trust 10 on conjecture as to what he intended to say and did not say.

The answers, then, to the questions raised in the Summons will be as follows :—

(A) On the true construction of the Will of Nanhu deceased, executed on 21st August, 1937, and in the events which have happened, a trust is created.

(B) The said trust cannot be revoked save either under the sanction of the Court or with the consent of all parties interested under the said trust and being *sui juris*.

(C) The said trust attaches only to the estate of the said 20 Nanhu deceased.

(D) Subject to the life interest of Plaintiff the Defendant takes a life interest in the property to which the trust attaches together with an interest in the whole estate absolutely contingent on his surviving Plaintiff and his wife Bacheoni.

(E) As the Defendant does not take a life interest only, this question does not arise.

(F) The trust confers interest on the Defendant as set out previously.

(G) As the answer to (F) is in the affirmative, this question does 30 not arise.

(H) The interest taken by Defendant is as set out in (D) above. Subject in the case of each of them to their surviving Defendant, Plaintiff and Defendant's wife Bacheoni take an interest absolutely to the trust property as it exists at the death of Defendant, each of them as to one-half of the said property, or, if only one of them survive Defendant, then such one as to the whole of the property.

(I) The Defendant has no power to dispose of the property which is affected by the said trust save under the sanction of the court or with the consent of all parties interested under the said 40 trust and being *sui juris*.

There remains the question of costs. I see no reason why the costs of both parties should not come out of the estate, and it is ordered accordingly.

(Signed) J. B. THOMSON,
Judge.

Suva, Fiji.

11th October, 1946.

HASAN : Ask for Plaintiff's costs as between solicitor and client to come out of estate.

Andrews v. Barnes, 188, 39 Ch., p. 133.
Easton v. Landor, 1893, L.J. Vol. LXII, Ch. 164.
In re Beddoe, 1893, 1 Ch. 547.

No. 8.
Judgment,
11th
October
1946,
continued.

McFARLANE : Do not oppose. Ask for similar order.

ORDER : Solicitor/client costs both sides to come out of estate.

(Sgd.) J. B. THOMSON, J. 11/10/46.

No. 9.

DEFENDANT'S NOTICE OF APPEAL.

No. 9.
Defendant's
Notice of
Appeal,
23rd
October
1946.

10

IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

IN THE MATTER of the ESTATE of NANHU son of BIRMA of Nasea, Labasa (partner in the firm of JAGANNATH NANHU & COMPANY) on the Island of Vanua Levu in the Colony of Fiji, Merchant, deceased.

Between RAMDASSI widow of the said NANHU deceased Plaintiff
and

20 JAGANNATH son of BIRMA executor of the will
of the said NANHU deceased - - - Defendant.

TAKE NOTICE that this Honourable Court will be moved on Wednesday the 30th day of October 1946 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard by Mr. D. M. N. McFarlane of Counsel for the above-named Jagannath for leave to appeal to His Majesty in Council from the judgment dated 11th day of October, 1946 of His Honour Mr. Justice Thomson.

Dated the 23rd day of October, 1946.

(Sgd.) GRAHAME & CO.,
Solicitors for the above-named Defendant.

30 To RAMDASSI the above-named Plaintiff and her solicitors Messrs. HASAN and HASAN.

(L.S.)

No. 10.
Plaintiff's
Notice of
Appeal,
26th
October
1946.

No. 10.

PLAINTIFF'S NOTICE OF APPEAL.

IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

**IN THE MATTER of the ESTATE of NANHU son of BIRMA of
Nasea, Labasa (partner in the firm of JAGANNATH NANHU
& COMPANY) on the Island of Vanua Levu in the Colony of
Fiji, Merchant, deceased.**

Between RAMDASSI widow of the said NANHU deceased Plaintiff

and

10

JAGANNATH son of BIRMA executor of the will
of the said NANHU deceased - - - Defendant.

TAKE NOTICE that this Honourable Court will be moved on
Wednesday the 30th day of October 1946 at 10 o'clock in the forenoon or
so soon thereafter as Counsel can be heard by Mr. Said Hasan of Counsel
for the above-named plaintiff Ramdassi for leave to appeal to His Majesty
in Council from the judgment dated 11th day of October 1946 of His
Honour Mr. Justice Thomson.

Dated the 26th day of October 1946.

(Sgd.) HASAN and HASAN,

20

Solicitors for the above-named plaintiff RAMDASSI.

To JAGANNATH the above-named Defendant and
his solicitors Messrs. GRAHAME & Co., of Suva.

(L.S.)



No. 11.

ORDER granting Defendant conditional Leave to Appeal to His Majesty in Council.
IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

IN THE MATTER of the ESTATE of NANHU son of BIRMA of Nasea, Labasa (partner in the firm of JAGANNATH NANHU & COMPANY) on the Island of Vanua Levu in the Colony of Fiji, Merchant, deceased.

No. 11.
Order
granting
Defendant
conditional
Leave to
Appeal to
His
Majesty in
Council,
30th
October
1946.

Between RAMDASSI widow of the said NANHU deceased Plaintiff

10

and

JAGANNATH son of BIRMA executor of the will
of the said NANHU deceased - - Defendant.

Before HIS HONOUR MR. JUSTICE THOMSON in Chambers.

Wednesday the 30th day of October, 1946.

UPON READING the notice of motion herein and UPON HEARING Mr. D. M. N. McFarlane of Counsel for the defendant and UPON HEARING Mr. Said Hasan of Counsel for the Plaintiff IT IS ORDERED that the defendant be at liberty to appeal to His Majesty in Council from the judgment of this Honourable Court herein dated the 11th day of 20 October, 1946 UPON CONDITION that the defendant within three months from the date hereof enter into good and sufficient security to the satisfaction of this Honourable Court in the sum of FIVE HUNDRED POUNDS (£500. 0. 0) for the due prosecution of the appeal and the payment of all such costs as may become payable to the plaintiff in the event of the defendant not obtaining an order granting final leave to appeal or the appeal being dismissed for non-prosecution or in the event of His Majesty in Council ordering the defendant to pay the plaintiff's costs of the appeal and UPON CONDITION that the defendant within three months from the 30 date of this order shall take the necessary steps for the purpose of procuring the preparation of the record and despatch the same to England.

By the Court.

(Sgd.) F. G. FORSTER,

Dep. Registrar.

(L.S.)

No. 12.
Order
granting
Plaintiff
conditional
Leave to
Appeal to
His
Majesty in
Council,
30th
October
1946.

No. 12.

ORDER granting Plaintiff conditional Leave to Appeal to His Majesty in Council.
IN THE SUPREME COURT OF FIJI.

No. 23 of 1946.

IN THE MATTER of the ESTATE of NANHU son of BIRMA of Nasea, Labasa (partner in the firm of JAGANNATH NANHU & COMPANY) on the Island of Vanua Levu in the Colony of Fiji Merchant deceased.

Between RAMDASSI widow of the said NANHU deceased Plaintiff

and

10

JAGANNATH son of BIRMA executor of the will
of the said NANHU deceased - - - Defendant.

Before HIS HONOUR MR. JUSTICE THOMSON in Chambers.

Dated the 30th day of October 1946.

UPON HEARING the notice of motion herein AND UPON HEARING Mr. Said Hasan of counsel for the plaintiff AND UPON HEARING Mr. D. M. N. McFarlaine of counsel for the defendant IT IS ORDERED that the plaintiff be at liberty to appeal to His Majesty in Council from the judgment of this Honourable Court dated the 11th day of October 1946 UPON CONDITION that the appellant within three 20 months from the date of this order enter into good and sufficient security to the satisfaction of this Honourable Court in the sum of £250-0-0 for the due prosecution of the appeal and the payment of all such costs as may become payable to the respondent in the event of the appellant not obtaining an order granting final leave to appeal or the appeal being dismissed for non-prosecution or in the event of His Majesty in Council ordering the appellant to pay the respondent's costs of the appeal AND UPON CONDITION that the appellant within three months from the date of this order shall also take all necessary steps for the purpose of procuring the preparation of the record and despatching the same to England. 30

By the Court.

(Sgd.) F. G. FORSTER,
Deputy Registrar.



No. 13.

ORDER IN COUNCIL granting Respondent Special Leave to Defend in forma pauperis.

In the
Privy
Council.

AT THE COURT AT BUCKINGHAM PALACE.

The 21st day of May, 1947.

Present

THE KING'S MOST EXCELLENT MAJESTY
LORD PRESIDENT MR. TOMLINSON
LORD CHAMBERLAIN SIR RAYMOND EVERSLED
MR. WILMOT

No. 13.
Order in
Council
granting
Respondent
Special
Leave to
Defend
in *forma
pauperis*,
21st May
1947.

10 WHEREAS there was this day read at the Board a Report from the
Judicial Committee of the Privy Council dated the 6th day of May 1947
in the words following viz. :—

L.S.

20 “ WHEREAS by virtue of His late Majesty King Edward the
Seventh's Order in Council of the 18th day of October 1909 there
was referred unto this Committee a humble Petition of Ramdassi
widow of Nanhu in the matter of an Appeal from the Supreme
Court of Fiji between Jagannath son of Birma (Defendant) Appellant
and the Petitioner (Plaintiff) Respondent (Privy Council Appeal
No. 13 of 1947) setting forth : that this is a Petition for leave to
defend this Appeal *in forma pauperis* : that on the 30th October
1946 it was ordered in the Supreme Court of Fiji that the Appellant
should be at liberty to appeal to Your Majesty in Council from an
Order of the said Supreme Court dated the 11th October 1946 upon
giving security in the sum of £500 and upon the usual conditions :
that on the 30th October 1946 similar liberty to appeal to Your
Majesty in Council was given to the Petitioner upon giving security
in the sum of £250 but the Petitioner is not able to give such security
and does not ask for special leave to cross-appeal *in forma pauperis* :
30 that the Petitioner desires to defend the Appeal but as appears
from an Affidavit lodged with the Petition excepting her wearing
apparel and the interest she has in the subject of this Appeal the
Petitioner is not worth £25 : And humbly praying Your Majesty
in Council to grant the Petitioner leave to defend *in forma pauperis*
this Appeal from the Order of the Supreme Court of Fiji dated the
11th October 1946 :

40 “ THE LORDS OF THE COMMITTEE in obedience to His late
Majesty's said Order in Council have taken the humble Petition
into consideration and the Solicitors for the Appellant having
signified in writing their consent to the prayer thereof Their Lordships
do this day agree humbly to report to Your Majesty as their opinion
that leave ought to be granted to the Petitioner to defend *in forma
pauperis* the Appeal against the Order of the Supreme Court of Fiji
dated the 11th day of October 1946.”

*In the
Privy
Council.*

Order in
Council
granting
Respondent
Special
Leave to
Defend in
*forma
pauperis,*
21st May
1947,
continued.

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the Colony of Fiji for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

No. 14.
Order in
Council
reviving
the Appeal,
26th
January
1948.

No. 14.

ORDER IN COUNCIL reviving the Appeal.

10

AT THE COURT AT BUCKINGHAM PALACE.

The 26th day of January, 1948.

Present

THE KING'S MOST EXCELLENT MAJESTY

VISCOUNT HALL

SIR MALCOLM MACNAGHTEN

MR. SECRETARY CREECH JONES

MR. BUCHANAN

MR. SECRETARY WOODBURN

MR. KIRKWOOD

MR. MCNEIL

L.S.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 12th day of January 20 1948 in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Jaduram (father's name Lallu) in the matter of an Appeal from the Supreme Court of Fiji between Jagannath son of Birma (Defendant) Appellant and Ramdassi widow of Nanhu (Plaintiff) Respondent (Privy Council Appeal No. 13 of 1947) setting forth that the above Appeal is pending before Your Majesty in Council: that the Appellant has died as appears from a Supplemental Record which has arrived 30 at the Privy Council Office from which it also appears that by an Order of the Supreme Court dated the 2nd July 1947 it was declared that Jaduram (father's name Lallu) is the proper person to be substituted on the Record in the place of the deceased Appellant :

And humbly praying that Jaduram (father's name Lallu) may be substituted in the above Appeal for the deceased Appellant and that the Appeal may be revived accordingly :

*In the
Privy
Council.*

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“THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and the Solicitors for the Respondent having signified in writing their consent to the prayer thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that Jaduram (father's name Lallu) ought to be substituted in place of Jagannath son of Birma deceased as Appellant and that this Appeal ought to stand revived accordingly.”

No. 14.
Order in
Council
reviving
the
Appeal,
26th
January
1948,
continued.

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the Colony of Fiji for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Exhibits.

EXHIBITS.

“ B. ”

“ B ”—Will of Jagannath.

Will of
Jagannath,
21st
August
1937.

THIS IS THE LAST WILL AND TESTAMENT of me JAGANNATH Son of Birma of Labasa on the Island of Vanualevu in Fiji Merchant I Hereby Revoke all former Wills and other Testamentary writings of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have a disposing power at the time of my decease and I declare this to be my last and only Will and Testament I Appoint my brother and partner Nanhu Son of Birma of Labasa Merchant to be my sole executor and Trustee I Give Devise and Bequeath unto my Trustee all real and 10
personal property of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have disposing power at the time of my decease absolutely save only with the proviso that he shall, during her lifetime, allow my wife Bacheoni to live in the Dwelling House at Nasea where she and I now live and shall supply her out of my estate with money and goods sufficient to maintain her during her lifetime but having regard always to the state of our business and to any economic conditions which may affect the same and further that he shall himself make a Will leaving the whole of his Estate to me should he predecease me and otherwise to be divided equally between my said wife Bacheoni 20
and Ramdassi the wife of the said Nanhu or, in the event of the death of either, to the survivor of them absolutely Should my said brother Nanhu predecease me then I Devise and Bequeath the whole of my estate including anything which I may inherit from the said Nanhu to be divided equally between the said Bacheoni and the said Ramdassi or, in the event of the death of either, then to the survivor of them.

In Witness whereof I have hereunto set my hand this 21st day of August 1937 (One thousand Nine Hundred and Thirty-Seven (1937)).

JAGANNATH.

H. B. GIBSON.

30

M. MAHADEO.

Signed by the said Jagannath son of Birma the Testator as and for his last and only Will and Testament in the presence of us both present at the same time who at his request in his presence and sight and in the sight and presence of each other have hereunto subscribed our names as attesting witnesses the foregoing having first been interpreted by us to him in the Hindustani Language, the word “ amongst ” having first been crossed out on the reverse side hereof

JAGANNATH.

40

H. B. G.
M. M.

H. B. GIBSON,
Solicitor,
Labasa.

M. MAHADEO,
Interpreter,
Labasa.

" A "—Probate and Will of Nanhu.

*Exhibits.*Duty Paid
£465-4-8.The Commissioner of Stamp Duties.
12 Apr. 1944." A."
Probate
and Will of
Nanhu,
4th March
1944.IN HIS MAJESTY'S SUPREME COURT OF FIJI.
Probate.Sworn at
£12,061.14.11.

10 IN THE ESTATE of NANHU (Son of BIRMA) of Nasea, Labasa
(Partner in the firm of JAGANNATH NANHU & COMPANY)
on the Island of Vanua Levu in the Colony of Fiji Merchant
deceased.

BE IT KNOWN that on the 3rd day of March 1944 the Last Will and
Testament a copy whereof is hereunto annexed of Nanhu son of Birma
of Nasea, Labasa (Partner in the firm of Jagannath Nanhu & Company)
on the Island of Vanua Levu in the Colony of Fiji, Merchant deceased who
died on the 27th day of May 1943 at Nasea, Labasa aforesaid was proved
and Registered in the Probate Registry of His Majesty's Supreme Court
of Fiji And that administration of all and singular the personal estate
and effects of the said deceased was granted by the Court aforesaid to
20 JAGANNATH son of Birma of Nasea, Labasa on the Island of Vanua Levu
in the Colony of Fiji, Merchant the sole executor named in the said will
he having been first sworn well and faithfully to administer the same.

Extracted
by:—
B. M.
Gyaneshwar
Solicitor,
Labasa.

(Sgd.) O. C. K. CORRIE,

Chief Justice.

Will registered Mar. 4 1944.

(L.S.)

(Sgd.) B. L. GREGG,
Dep. Registrar General.

1391.

30 LET Probate of the Will of NANHU Son of BIRMA as contained in this copy
thereof PASS.

(Sgd.) O. C. K. CORRIE,

Chief Justice.

40 THIS IS THE LAST WILL AND TESTAMENT of me NANHU son of
BIRMA of Labasa on the Island of Vanualevu in Fiji Merchant I Hereby
Revoke all former Wills and other Testamentary writings by me heretofore
made And I Declare this to be my last and only Will and Testament
I Appoint my brother Jagannath Son of Birma Merchant who is also my
partner to be my sole executor and trustee I Give Devise and Bequeath
unto my said trustee all real and personal property of whatsoever nature and
wheresoever situate of or to which I may be entitled or over which I may
have a disposing power at the time of my decease absolutely save only with
the proviso that he shall, during her lifetime, allow my wife Ramdassi to
live in the Dwelling house at Nasea where she and I now live and shall
supply her out of my estate with money and goods sufficient to maintain

Exhibits.
 "A."
 Probate
 and Will of
 Nanhu,
 4th March
 1944,
continued.

her during her lifetime in the manner in which she has lived with me in my lifetime but having regard always to the state of our business and to any economic conditions which may affect the same and further that he shall himself make a Will leaving the whole of his Estate to me should he predecease me and otherwise to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath or, in the event of the death of either, to the survivor of them Should my said brother Jagannath predecease me I Give Devise and Bequeath the whole of my estate including such property as I shall inherit from the said Jagannath and remain possessed of at the time of my decease to be divided equally between 10 my said wife Ramdassi and Bacheoni the wife of the said Jagannath And I Direct that if either the said Ramdassi or the said Bacheoni shall predecease me that the whole of my estate shall go to the survivor of them and, in such an event or events, I Appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees.

In Witness whereof I have hereunto set my hand this 21st day of August One thousand Nine Hundred and Thirty-Seven.

H. B. GIBSON.

NANHU.

M. MAHADEO. 20

Signed by Nanhu son of Birma the testator as and for his last and only Will and Testament in the presence of us both present at the same time who at his request in his presence and sight and in the sight and presence of each other have hereunto subscribed our names as attesting witnesses the foregoing having first been interpreted by us to him in the Hindustani Language

NANHU.

30

H. B. GIBSON,
 Solicitor,
 Labasa.

M. MAHADEO,
 Interpreter,
 Labasa.

No. 32826 Transmission regd. 1 Sept. 1944
 at noon of N.L.'s 6995, 955, 2660, 5083.
 C.L.'s 427, 280, 305.

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(Sgd.) E. C. WOODWARD,
 Dep. Registrar of Titles.

