

IN THE PRIVY COUNCIL

No.18 of 1976

O N A P P E A L

FROM THE COURT OF APPEAL OF FIJI

B E T W E E N :

1. MUNI DEO BIDESI
2. SURYA MUNIDLAL BIDESI
3. CHANDRA PRAKASH BIDESI
4. SHAR PAL BIDESI
(all sons of Bidesi) (Plaintiffs) Appellants

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- AND -

THE PUBLIC TRUSTEE OF FIJI (Defendant) Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal from an Order of the Court of Appeal of Fiji (Gould V.P. Marsack J.A. and McMullin J.A.) dated 25th July 1975 dismissing with costs an appeal by the Appellants from an Order of the Supreme Court of Fiji (Tuivaga J.) dated 27th November 1974 dismissing the Appellants' claim for revocation of the Probate granted to the Respondent of the Will of Bidesi, late of Suva, Fiji, and granting Probate thereof in solemn form.

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2. The fundamental issue in the action was a question of fact, whether or not the Testator knew and approved of the contents of the Will at the time he executed it. It has been recognised throughout the proceedings that the onus lay on the Respondent to prove this. Tuivaga J. found the requisite knowledge and approval proved. The Court of Appeal of Fiji upheld that finding. At the hearing of this Appeal the Respondent will adopt the judgments in the Fiji Court of Appeal and will respectfully submit that Your Lordships' Board should not in any event interfere with the concurrent findings of the Courts below.

3. The facts as found by Tuivaga J. may be summarised as follows:-

(1) The Testator lived in Fiji. He died on 13th November 1957 aged about 71 years.

P.243
11.38-43

- P.242
11.1-15 (2) The Testator's first wife died in 1925. By her he had five children, the Appellants, and a daughter. By his second wife, who became his widow, he had ten children.
- pp.455-458 (3) The Will in question was dated 18th April 1957. It was primarily in favour of the Testator's widow and the children of his second marriage. The children of his first marriage took no benefit under it.
- p.284
11.10-25 (4) The Will was drawn up on the instructions of the Testator by Mr. Wheatley, then Deputy Registrar-General in Fiji, who took no interest under it. 10
- (5) For the purposes of giving instructions for the making of the Will the Testator visited Mr. Wheatley at the Office of the Public Trustee and there gave him full instructions from which the Will was drawn up and which were accurately reflected in it.
- p.287 1.35
to p.288
1.5 (6) The Will was executed in the office of the Public Trustee. It was read over and explained to the Testator before execution. It was duly executed in accordance with the Wills Act, 1837. 20
- p.270 1.51
to p.271 1.5 (7) The Testator's knowledge of English, the language in which the instructions for the Will were given and taken and in which it was written and read over and explained without an interpreter, was sufficient for these purposes.
- p.289 11.7 &
8 and 11.47-
50 (8) The Will was the product of the Testator's own wishes. He knew and approved of the contents of it. 30
4. The material events following the Testator's death including the interlocutory proceedings in this action were as follows:-
- p.247 11.4-
10 (1) On 21st December 1957 the Third Appellant acting on behalf of the Appellants lodged a caveat against the grant of Probate and on 14th May 1958 and 29th October 1958 he lodged further caveats for the same purpose.
- pp.247 to 255 (2) In the meantime discussions and correspondence took place concerning the possibility of a variation of the trusts of the Will. 40
- p.256 11.34-
44 (3) On 16th March 1959 the Third Appellant unreservedly agreed to probate of the Will being granted and on 21st April 1959 a grant of Probate in common form was made accordingly to

the Respondent.

- (4) Between 21st April 1959 and 25th June 1966 the Appellants dealt with the Respondent as the duly appointed executor of the Testator. p.260 ll.24-43
- (5) On 25th June 1966 the Appellants commenced these proceedings for revocation of the grant and for the grant of Letters of Administration on the footing that the Testator had died intestate. pp.3 & 4
- 10 (6) Under Substance of Case the Appellants pleaded that the Will was neither read over nor explained to the Testator, that he neither did nor could read it himself before it was executed, and that he was not aware of its nature and effect. pp.4 & 36
- (7) By his Defence the Respondent pleaded that the Will was read over and explained to the Testator and he understood the full meaning nature and effect and approved the contents thereof before he signed the same as his true last Will and testament in the presence of witnesses. p.6 ll.37-44
- 20 (8) By his Defence the Respondent further pleaded (a) that the Appellants were estopped from maintaining the action, (b) that the Appellants had acquiesced in the grant of probate and in the continued administration of the estate by the Respondent and (c) laches; and filed Particulars of these Defences. p.7 ll.5-21
- (9) The Respondent counterclaimed for a decree of Probate in solemn form. p.7 l.27
- 30 (10) On 1st September 1967 an unopposed order was made by Tuivaga J. for Mr. Wheatley's evidence to be taken before a Special Examiner in Australia where he was then residing, his Doctor having certified that he had suffered a coronary occlusion and should not travel to Fiji. The said order provided that the depositions so taken could be read and given in evidence by either party at the trial. p.14 ll.18-21
- 40 (11) On 15th December 1967 Mr. Wheatley's evidence was taken before M.E. Warburton Esq. sitting as a Special Examiner at Sydney, New South Wales: he was examined and re-examined by Counsel for the Respondent and was cross-examined by Counsel for the Appellants. pp.477-506
- (12) On 4th December 1972 Tuivaga J. dismissed a submission on behalf of the Appellants that p.37 l.31 to p.38 l.46

the Respondent's Solicitors Messrs. Cromptons and their associate Mr. Mitchell should not be permitted to act for him at the trial on the grounds that they had previously acted for three of the Appellants.

p.44 11.10-30 & p.45 (13) On 5th December 1972 Tuivaga J. on the application of the Respondent ordered that the issues of estoppel acquiescence and laches be tried before the other issues in the action and counterclaim and that the evidence of the trial of the former issues be treated as evidence in respect of the latter. 10

p.291 5. The trial extended over twenty-five days. The last-mentioned Order did not in the event affect the course of the trial. On 27th November 1974 Tuivaga J. gave a full and careful judgment to the following effect:-

p.263 11.25-28 (a) He accepted the plea of acquiescence. 20

p.266 11.32-34 (b) He accepted the plea of laches. 20

p.266 1.46 to p.267 1.1 (c) He dismissed the plea of estoppel.

p.284 11.10-15, p.287 1.35 to p.288 1.5, (d) He held that the Testator knew and approved the contents of the Will and that it was duly executed.

& p.289 11.728 & 11.47-50 6. On 15th April 1975 Tuivaga J. heard argument on costs and ordered costs against the Appellants.

pp.292 to 295 7. The Appellants raised fifteen grounds of appeal, which may be summarised under the following hearings:- 30

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Findings of Fact

Under grounds (a) (c) (g) (h) (i) (j) and (m) and (n) the Appellants attacked the learned Judge's findings of fact as to the Testator's knowledge and approval of the Will. Under grounds (b) and (n) they attacked the learned Judge's finding of fact as to the Will having been duly executed.

Procedural Matters

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Ground (d) criticised the order for separate trial of the issues of estoppel acquiescence and laches and the departure from the terms of that order. Ground (k) was that the learned Judge ought to have acceded to the submission regarding representation mentioned in paragraph 4(12) above.

Admission of Evidence

Under grounds (e) and (f) it was contended that Mr. Wheatley's depositions should not have been admitted

in evidence and that the evidence of a telephone call to him in Australia by a Mrs. Andrews on 11th December 1972 should not have been admitted.

Acquiescence and Laches

Ground (1) was that the learned Judge erred in law in his findings on the issues of acquiescence and laches.

Costs

Ground (o) was that the Order for costs was wrong.

10 8. The main judgment in the Fiji Court of Appeal was delivered by McMullin J.A. After referring to the essential facts as having been set out in the judgment of Tuivaga J. and tracing the history of the litigation, he explained fully his reasons for rejecting each ground of appeal, other than those relating to acquiescence and laches which he said it was unnecessary for him to consider in view of his judgment on the fundamental issue of knowledge and approval. Of the learned Judge's finding on that issue he said "It would have been difficult for him
20 take any other view". pp.301-333
p.301 l.33
p.301 l.39
to p.306 l.5
p.306 l.6 to
p.332 l.13
p.332 ll.14
to 38
p.332 l.43,4

9. In his judgment Marsack J.A. said he was in complete agreement with McMullin J.A.'s judgment. He referred to the evidence as being "thoroughly adequate for the purpose of a grant of Probate in solemn form." Gould V.P. delivered a judgment concurring with that of McMullin J.A. pp.334 & 335
p.335 l.29-31
p.336

30 10. On the hearing before Your Lordships' Board the Respondent will respectfully submit that the decisions of the learned Judge and of the unanimous Court of Appeal were right and ought to be affirmed. The Respondent will refer to the judgment of Tuivaga J. for the details of the facts found by him; and the Respondent will refer in detail to and will rely on the reasoning contained in the long and careful judgment of McMullin J.A. in the Court of Appeal.

11. In addition the Respondent will respectfully submit that the grounds of appeal as summarised above should be rejected for the following further reasons:-

40 Findings of Fact

(1) The Respondent will rely on the general rule against disturbing findings of fact in which the Courts below concur. Although the learned trial Judge did not see Mr. Wheatley give his evidence, he did see other witnesses whose evidence agreed with his (Mr. Gregg the Public Trustee and p.275 l.48

to 277 1.13
p.277 1.14 to
279 1.9
p.268 11.2-
24 and 11.25
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p.269 1.43 to
p.270 1.21
p.269 11.21
to 42 and p.
279 1.10 to
p.283 1.35
p.270 1.22
to p.271 1.5
p.242 1.28
to p.243 1.37
p.270 11.24-
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Mrs. Andrews who were present at the execution of the Will and Mr. Tetzner Mr. Murray and Mr. Marlow who gave evidence as to the Testator's knowledge of English) and he saw the Appellants give their evidence which he rejected in favour of Mr. Wheatley and the said other witnesses.

(2) A specific reason for applying the general rule in this case is that the learned trial Judge plainly relied to some extent on local knowledge, and the members of the Court of Appeal were no doubt similarly assisted. The Testator was a self-made man who could neither read nor write and whose natural language was not English. He made a fortune in the building industry. Tuivaga J. described him as "a man of great ability and a determined one at that". In finding that he had acquired a sufficient knowledge of spoken English by the time he made his Will the learned Judge was fortified by his assessment of the likelihood or otherwise of a man in the Testator's circumstances having required such knowledge.

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p.288 1.40 to
289 1.8

(3) Likewise in finding that the Will was genuine and the decision to make no provision for the Appellants deliberate, the learned Judge must have drawn on local knowledge of Hindu character and social behaviour (he described the Testator as a "deeply religious man in the best Hindu traditions").

p.242 11.40-
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Procedural Matters

The Respondent will rely on the reluctance of your Lordships' Board to review the decision of a local court on questions of procedure.

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Admission of Evidence

(1) In so far as the arguments in support of the appeal on this issue are of a procedural nature, the Respondent will rely on the principle last above-mentioned.

p.271 11.8-13

(2) The Respondent will rely on the statement in the judgment of the learned trial Judge that the order for Mr. Wheatley's evidence to be taken before a Special Examiner was made by agreement between the parties; and on the express provision in the Order authorising either party to read and give the depositions so taken in evidence at the trial.

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p.14 11.18-21

Acquiescence and Laches

The Respondent will if necessary support the learned trial Judge's decision on acquiescence for the

reasons given by him in his Judgment and respectfully submit that this does afford a good defence to the Appellants' claim to revocation of the grant, although it would not by itself have justified a grant of probate in solemn form.

p.260 1.18
to p.263
1.38

12. The Respondent accordingly respectfully submits that the appeal should be dismissed and the decision of the Court of Appeal affirmed for the following (among other)

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R E A S O N S

- (1) BECAUSE there are no grounds for disturbing the findings of fact made by the learned trial Judge and upheld by the unanimous Court of Appeal of Fiji that the Will was duly executed and that the Testator knew and approved the contents thereof.
- (2) BECAUSE the Appellants' claim for revocation of the Probate was therefore rightly dismissed and the grant of Probate in solemn form rightly made.
- (3) BECAUSE there are no grounds for disturbing the learned trial Judge's decisions on the procedural points complained of by the Appellants.
- (4) BECAUSE the depositions of Mr. Wheatley's evidence and the evidence of Mrs. Andrews' telephone conversation with him in Australia were rightly admitted.,
- (5) BECAUSE the Appellants were debarred by their acquiescence from seeking revocation of the grant of Probate.
- (6) BECAUSE the decisions of the Courts below relating to costs were right.
- (7) BECAUSE the decisions of the learned Judge and the majority of the Court of Appeal were right for the reasons given in their respective judgments.

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JOHN JOPLING

IN THE PRIVY COUNCIL No.18 of 1976

ON APPEAL
FROM THE COURT OF APPEAL OF FIJI

B E T W E E N :

BIDESI and OTHERS

-v-

THE PUBLIC TRUSTEE OF FIJI

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
London WC2A 3UL.
Solicitors for the Respondent