

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N :

- | | |
|----------------------------------|---------------------|
| 1. RAJ KUMARI (d/o Lakhan Singh) | <u>Appellants</u> |
| 2. YENKAIYA NAIDU (s/o Appana) | <u>(Defendants)</u> |

- and -

- | | | |
|----|--|---|
| 10 | THE PUBLIC TRUSTEE OF FIJI
representing the estate of
Ammal (d/o Nag Reddy) deceased | <u>Respondent</u>
<u>(Plaintiff)</u> |
|----|--|---|

CASE FOR THE APPELLANTS

- | | | |
|----|---|--------------------------|
| | | <u>RECORD</u> |
| 20 | 1. This is an appeal from the Judgment and Order of the Fiji Court of Appeal (Gould V.P., Marsack J.A., and Spring J.A.) dated the 30th day of November, 1978 which dismissed with costs an Appeal by the Appellants from a Judgment and Order of Williams J. made in the Supreme Court of Fiji on the 30th day of March, 1978 whereby he adjudged that the Appellants pay to the then Plaintiff, one Ammal d/o Nag Reddy now deceased, (hereinafter called Plaintiff), the sum of \$5459.00 and further adjudged that a conveyance or transfer dated the 11th day of May, 1977 made by the Plaintiff in favour of the second Appellant was obtained by undue influence and ought therefore to be set aside, and the documents of transfer, and the title deeds restored to the Plaintiff and that a consequential mortgage on the transfer be further rescinded. | pp 41-48

pp 27-37 |
| 30 | 2. The Plaintiff died on the 24th September, 1978 when an Appeal to the Fiji Court of Appeal was pending and an ex-parte order was made on the 3rd day of November 1978 whereby her son, Subramani Ponsami, was made a party to the action. The Appeal to the Fiji Court of Appeal proceeded on this basis. | pp 37-38 |
| | 3. On the 22nd day of July, 1980, a consent Order was made that the said Subramani cease to | pp 48 |

RECORD

p 40

act as Administrator pendente lite of the Estate of the Plaintiff and the Public Trustee of Fiji was appointed as Administrator Pendente lite in his stead for the purposes of the Appeal to the Privy Council.

4. The main issue in this case is whether the Plaintiff pleaded such facts, or otherwise by her pleadings and evidence or otherwise intended to raise a presumption of undue influence against the Appellants, and whether the learned trial Judge and the Fiji Court of Appeal were justified in reaching a conclusion that such presumption had in fact been raised, and the Appellants had failed to rebut such presumption. The matters complained of took place between 17th July, 1975 and May, 1977 (hereinafter called "The Relevant Period").

10

pp 1-8

5. By her Writ of Summons issued on the 3rd June, 1977, and by an Amended Writ of Summons delivered on the 29th day of June, 1977, the Plaintiff claimed that she owned Crown Lease Registered Number 68339 and had on the 11th day of May, 1977 executed a transfer of the Crown Lease in favour of the second Appellant. She asked that this transfer be set aside on the express ground of fraud and undue influence.

20

pp 10, 11,
15-25

6. The particulars of fraud alleged that the Appellants did not pay the sum of \$8,000.00 expressed in the transfer to the Plaintiff; that the Appellants advised and influenced the Plaintiff to believe that \$8000.00 represented a true and proper market value for the said property; prohibited the Plaintiff from seeking an independent valuation of the property and advised, influenced and made the Plaintiff to wrongly believe that it was in her best interest to sell the property.

30

p 23

p 61

7. At the trial, apart from proving a valuation of the property, the Plaintiff or her advisers made no effort to prove the above allegations of fraud, and no finding was made on the above allegations.

40

p 10, 11
25-43

8. Particulars of undue influence were that the Appellants in their position as daughter and grandson of the Plaintiff assured the Plaintiff and made her believe that what the Appellants were doing was for her own good and that both Appellants assured the Plaintiff that they would maintain, support and generally look after her as long as she lived.

50

9. Apart from proving that the Appellants were daughter and grandson of the Plaintiff, neither she nor her advisers made any effort to prove any of the above allegations.

10. The Plaintiff further alleged in the Pleadings that a total sum of \$5459.00 had been withdrawn from her Savings Bank Account whereof she purported to give credit to the Appellants for a sum of \$1227.12, and notwithstanding such averment she claimed a refund of the said sum of \$5459.00 on the express grounds of fraud and undue influence.

p 12, 11,
1-32

11. Particulars of fraud were expressed to be that the Appellants had advised the Plaintiff to withdraw all money from the Bank as it was not a safe place to keep money; advised the Plaintiff that they would use the monies so withdrawn for her purpose.

p 12 11
36-39

12. At the trial no evidence was led on the above basis, nor were the allegations of fraud proved.

13. Particulars of undue influence were expressed to be that the Appellants told the Plaintiff that they were her daughter and grandson respectively and would always look after her property and herself.

p 13 11
1 - 6

14. No evidence was led on the basis at the trial except that it was common ground that the Appellants were daughter and grandson of the Plaintiff.

15. A Claim for jewellery was dismissed and was not pursued any further by either the Plaintiff or her representative. No Appeal or cross Appeal is made from such finding.

p 13 11
7 - 23
p 35 11
43 - 48

16. It is submitted that the time that the Plaintiff commenced the proceedings she was of sound mind, memory and understanding, and that she understood the nature and effect of the various transactions between her and the Appellants. Apart from Pleading advanced age, that is, that she was ninety years of age, she did not plead that during the Relevant Period at the time of the matters complained of she was not in good health, or infirm, or that her memory or capacity was in any way impaired or that she was incapable of looking after her affairs or that she relied on the Appellants or looked to them for advice, assistance or guidance. No facts or circumstances were pleaded whereby any presumption

RECORD

was of undue influence was sought to arise against the Appellants. No evidence was led that at The Relevant Period the Plaintiff was either sick or infirm.

p 18 11-27-40
p 20 11 20-39
p 21 11 1-5
p 19 11 10-30
p 21 11-9

17. At the trial the Plaintiff departed from her pleadings. She alleged that she had been physically compelled to execute the transfer and her monies withdrawn from the Bank had in fact been stolen. At no stage did she state that she made, or intended to make, a gift of either the property or the money to the Appellants.

10

18. No allegation of conspiracy or joint enterprise was made against the Appellants, and at no time was any effort made to sift the evidence separately against the Appellants.

19. It is respectfully submitted on the pleadings, and on the evidence, that the evidence indicated that the Plaintiff was neither sick nor infirm during the Relevant Period; that she was able to go about her affairs, and fully understood the nature and effects of her various acts.

20

20. On the 31st day of January, 1978, the Plaintiff, by her solicitors, Messrs. Sharma Singh & Company, made an application that her evidence should be heard before the hearing date of 14th March, 1978. In an affidavit in support of her application, the Plaintiff deposed that her health was rapidly deteriorating and recently she had been very ill and she feared that on the 14th March, 1978 or any date thereafter due to her failing health she would not be in a position to give evidence as best as she can now.

30

p 18-19
p 21 11 14-25

21. Her application was heard on the 3rd February, 1978 and her evidence was taken on the 17th February 1978. On that day after hearing her evidence and after hearing the cross-examination, the learned trial Judge commented as follows:-

"N.B.

The witness is obviously very old and very feeble minded. She is chattering constantly and whispering. She is certainly very dependant and whenever may be needed to support her case will largely depend on 3rd parties. It is obvious that she will be virtually at the mercy of any relative or person with whom she resides or who is looking after her.

40

I have communicated the above comments to the advocates.

(Sgd. J.T. Williams
JUDGE)

50

22. It is respectfully submitted that the learned trial Judge made a premature finding of fact, and that in any event, the said remarks indicated that the learned trial Judge could not rely on the Plaintiff's evidence.

10

23. On the 14th March, 1978 the Plaintiff called only a valuer, Param Anan Singh, and her son, Subramani Ponsami, who stated that on the 17th July, 1975 the Plaintiff went to visit the first Appellant and stayed with her till May, 1977. No evidence was led that at any time during this period the Plaintiff was old or infirm or suffered any impairment of her memory or understanding or that she was in during this period in the same condition in which she was when she gave evidence.

20

24. Neither the transfer complained of, nor the lease documents, were put in at the trial. No evidence was led as to how the monies were withdrawn from the Bank by the Plaintiff or what happened to the monies after they were withdrawn. There was no evidence that during the Relevant Period the Plaintiff stayed with the first and/or the second Appellant all the time, that it was only the first and second Appellant who stayed at the house.

30

25. The learned trial Judge found in his Judgment that the First Appellant had invited the Plaintiff to stay with her. There was no evidence to this effect, and this finding was based on hearsay. The learned Judge further found that the first Appellant had persuaded the Plaintiff to go and stay with her. There was, it is submitted, no evidence of persuasion of any kind. He found that the first Appellant had suddenly taken an interest in her mother. There was, it is submitted, no evidence of this. He again found that the Bank account was transferred so that the Plaintiff's finances were brought close to first Appellant. There was no evidence to suggest that the first Appellant had any hand in changing the bank account. The learned Judge found it suspicious that the Plaintiff should withdraw such a large sum of money and that the Plaintiff continued to receive her rents.

40

p 30 ll
1 - 3

p 24 ll 1-10

p 33 ll-24-35

p 33 ll
39 - 43

p 33 ll
50 - 53

50

26. The learned Judge said that the Plaintiff could not explain the withdrawals from the Bank and that she could not go to the Bank unless escorted and physically assisted and there is no doubt that she was not alone when those withdrawals were made. He concluded that she was

p 34 ll
10 - 20

RECORD

senile and that the Appellants were in a position to victimise her by exercise of undue influence. The learned Judge presumed that the deposit of \$1000.00 was met from a withdrawal made on the same day, and concluded that the Appellants had taken the money withdrawn from the Bank. He accepted the evidence of the Plaintiff that the first Appellant was always asking for money. The Plaintiff in fact did not use the word always.

p 33 ll 4-19 27. It is submitted that the learned trial Judge concluded after his own physical examination of the Plaintiff that she was in the same state during The Relevant Period; further he made certain findings which were not warranted by the evidence namely that she was senile then, and could not go about her affairs with assistance. 10

28. There was no amendment to the Statement of Claim and the Plaintiff continued to claim \$5459.00 (and not \$6,709.00 which was the sum total of the withdrawals). It is submitted that the proper amount of the claim for which judgment could have been entered on the Pleadings was the sum of \$5459.00 less \$1227.12, that is \$3231.88. 20

p 44 ll 16-23 29. It is further submitted that there was no basis on which judgment for this money could have been entered jointly and severally against the two Appellants. The Fiji Court of Appeal found that the sum of \$1770.00 drawn on the 11th May, 1977 was in fact handed to the first Appellant but it is submitted there was no evidence to support this. 30

30. The learned Judge failed to take into account the admissions made by the Appellant in her own affidavit sworn the 31st day of January, 1978 and thereby erred in concluding that during The Relevant Period she was senile.

p 45 ll 20-38
p 52-53 31. The Fiji Court of Appeal likewise concluded that there was no evidence of any supervening illness or other cause of mental or bodily change as would be liable to effect any significant change to a woman of her age occurring in the period of nine months. It is further stated that during the term of her stay the old lady was not only mentally weak but was unable to leave the premises of her own motion. It is submitted that this also ignored the effect of the said affidavit sworn by the Plaintiff on the 31st day of January, 1978. 40

p 18 ll-17-20 Although the Plaintiff in her evidence said that she was once sick her affidavit clearly showed that her condition was deteriorating and that recently she had been very ill and this evidence was not taken into account by the Fiji Court of Appeal or the learned trial Judge. 50

32. The evidence showed that the Plaintiff had gone voluntarily to live with her daughter, the first Appellant; that she had executed documents before a lawyer and law clerk; that she was able to go about her affairs and at least until the trial began she was well and not sick or infirm. It is submitted that it was not unnatural for the Plaintiff as an elderly person to provide for her daughter or grandson after she had stayed with them for over twenty-two months. It is submitted that the case of Tufton -v- Sperni (1952) 2 T.L.R. 516 applies. At page 530 Jenkings L.J. said:-

"It would of course be wrong to work backwards from the undeniable fact of an unconscionable bargain and endeavour to construct some fiduciary relationship between the parties on the strength of which to set it aside. That is a temptation which must be firmly resisted. It must be shown that the transaction in question did in fact arise out of some special relationship between the parties and that the relationship was a fiduciary one. Moreover, it must be shown not merely that there was a fiduciary relationship of some sort, but that the fiduciary relationship was of such a character as to warrant the interference of the Court."

33. It is submitted that neither in fact nor in law any presumption of undue influence arose by reason of the age or the relationship between the parties (Beanland -v- Bradley 1854 2Sm G 339; Lewis -v- Pead 1789 1 Ves 19).

34. The Fiji Court of Appeal unanimously dismissed the Appeal. It is submitted that notwithstanding this finding and notwithstanding the cases of Shrimati Bibhabati Devi v. Kumar Roy 1946 A.C.508 and Stool of Abinabina v. Chief Kojo Enyimadu 1953 A.C. 207, this appeal ought to be allowed.

35. On the 26th day of January, 1979 an Order was made granting the Appellants leave to Appeal to Her Majesty in Council.

36. The Appellants respectfully submit that this Appeal ought to be allowed with costs, and the Judgments of the Fiji Court of Appeal and the Supreme Court of Fiji set aside, for the following among other

R E A S O N S

1. BECAUSE the Appellants were misled and prejudiced by a sudden finding as to the

infirmity and mental state of the Plaintiff in the middle of the trial.

2. BECAUSE the Judge's said remarks indicated to the Appellants that the evidence of the Plaintiff could not be relied upon.
3. BECAUSE on the Pleadings, and on the Plaintiff's own admissions, during the Relevant Period the Plaintiff was compos and not infirm or incapable or senile.
4. BECAUSE the Fiji Court of Appeal and the Supreme Court of Fiji failed to take into account the uncontested evidence that the Plaintiff was able to go about her business during the Relevant Period, and became ill and infirm shortly before the trial. 10
5. BECAUSE the evidence failed to raise any presumption of undue influence.
6. BECAUSE the Plaintiff failed to lead any other evidence of undue influence or fraud
7. BECAUSE, in any event, on the Pleadings, Judgment should only have been entered for \$3231.88. 20

K.C. RAMRAKHA

No. 6 of 1979

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N :

1. RAJ KUMARI (d/o Lakhan Singh)
2. YENKAIYA NAIDU (s/o Appana)

Appellants
(Defendants)

- and -

THE PUBLIC TRUSTEE OF FIJI
representing the estate of
Ammal (d/o Nag Reddy) deceased

Respondent
(Plaintiff)

CASE FOR THE APPELLANTS

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
London SW1E 6HB.

Solicitors for the Appellants.