

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF  
GUYANA

CIVIL JURISDICTION

**2019-HC-DEM-CIV-FDA-2042**

In the matter of the Deceased Persons Estates'  
Administration Act, Chapter 1201 of the Laws of  
Guyana

-and-

In the matter of the Estate of PARBATI PERSAUD  
also known as PARBATTI PERSAUD also known as  
PARBAI PERSAUD, deceased

-and-

In the matter of an Application by DEODATT  
PERSAUD, in his capacity as the Executor of the  
Estate of PARBATI PERSAUD also known as  
PARBATTI PERSAUD also known as PARBAI  
PERSAUD, deceased, by Order of Court of the  
Honourable Chief Justice Ian Chang on the 14th  
October, 2009 and by Resealed Grant of Probate by  
the High Court of the Supreme Court of Judicature on  
the 23rd November, 2009

Claimant

-and-

PREMDAAT PERSAUD

Defendant

-and-

MIKAIL VISHNU PERSAUD

Added Defendant

The Honourable Justice Navindra A. Singh, Puisne Judge

Ms. Abiola Wong-Innis for the Claimant/ Applicant

Mr. Stephen Fraser S.C. for the Defendants/ Respondents

**Delivered April 30<sup>th</sup> 2021**

DECISION

Parbatti Persaud, deceased, died on July 27<sup>th</sup> 2003 testate leaving a Will dated April 27<sup>th</sup> 1993 [hereinafter referred to as the Will] wherein the Claimant and Ascelia Rohini Kissoon were appointed the Executors and Trustees of the Will.

The Claimant is now the sole Executor of the Will of the said Estate in Guyana pursuant to a resealing of the grant pursuant to an Order of the High Court of the Supreme Court of Judicature of Guyana dated October 14<sup>th</sup> 2009 in Action No. 1102 S/A of 2009 [Demerara].

The Claimant instituted this action on December 23<sup>rd</sup> 2019 as a Fixed Date Application applying for an order granting him permission to sell a property in Guyana which forms part of the Estate of Parbati Persaud, deceased.

The said property is known as and located at sub-lot “A” part of the west half of lot numbered 225 Camp and New Market Streets, Georgetown, Guyana held by County of Demerara Transport No. 2015 of 1956 [hereinafter referred to as the Property].

On February 17<sup>th</sup> 2020, the Court ordered that the matter continue as though filed as a Statement of Claim since the Court determined that a trial was necessary to properly adjudicate on issues raised in the Affidavit of Defence.

Case Management Orders were made made and the matter was adjourned to July 7<sup>th</sup> 2020 for a Pretrial Review to be conducted.

The Defendants filed a Defence and Counterclaim on March 4<sup>th</sup> 2020 claiming *inter alia* that the claim is *res judicata*.

By June 11<sup>th</sup> 2020 the Claimant's Reply and Defence to Counterclaim, all parties' Affidavit of Documents and Witness Statements were filed.

The Defendants then applied on June 20<sup>th</sup> 2020 for Summary judgment dismissing the Claim on the ground that it is *res judicata*, which Application was dismissed on October 16<sup>th</sup> 2020.

As a result of the Defendants application for Summary judgment, the Pre-Trial Review was postponed and eventually conducted on November 4<sup>th</sup> 2020.

At the Pre-Trial Review the Claimant and the Defendants raised certain issues with the Court which in the Court's view should be determined before embarking on a trial, if a trial was still possible and/ or necessary after such determination.

The Claimant submitted that based on the Witness Statements the issues raised in the Defence and Counterclaim of the Defendants are *res judicata* and should accordingly be dismissed and judgment entered for the Claimant without a trial.

The Defendants submitted that the Claim is intituled under the **Deceased Persons Estates' Administration Act; CAP 12:01** of the Laws of Guyana relying specifically on **sections 24 and 42** thereof, under which sections the Court has no jurisdiction to make the Orders sought by the Claimant since the terms of the Will created a Trust for sale and thereby took the power of sale outside of the provisions of **Deceased Persons Estates' Administration Act**.

It must be stated first and foremost that should it be determined that the Court cannot grant any Orders under the **Deceased Persons Estates' Administration Act**, the Court certainly has jurisdiction to make any Orders it deems fit in

accordance with **section 25 of the High Court Act; CAP 3:02** of the Laws of Guyana, which provides;

*“The Court shall, in every cause or matter pending before it, have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as the Court may think just, all the remedies or relief whatsoever to which any of the parties appear to be entitled in respect of any and every claim properly brought forward by him or them respectively in the cause or matter; so that, as far as possible, all matters so in controversy between those parties respectively may be completely and finally determined, and all multiplicity of proceedings concerning any of those matters avoided.”*

### **ISSUE I**

Does the Will create a Trust for sale of the Property.

### **FACTS**

Under the Will the Claimant and Kissoon were appointed *“the executors and trustees of this my will hereinafter called “MY TRUSTEES”*”.

The Will provides that all of the property owned by the Testatrix be devised to *“... my trustees UPON TRUST to sell, call in and convert into money all such parts thereof as shall not consist of money ...”*

The Will further provides that *“MY TRUSTEES” “shall stand possessed”* of all such monies that are left over after the payment of the Testatrix’ debts, funeral and testamentary expenses, *“UPON TRUST”* for named beneficiaries *“in equal shares”*.

### **ANALYSIS**

It is clear that the Testatrix wanted all of her assets liquidated and upon the payment of her debts and expenses any remaining monies be distributed equally as provided in the Will.

The persons she describes as “*MY TRUSTEES*” are burdened with no greater duty or responsibility as the Executor of any Estate would usually be charged with as can be seen by the provisions of **Section 42 of the Deceased Persons Estates’ Administration Act** which provides;

*“If no provision be made in the will of the deceased to the contrary, or if the terms of appointment of an administrator be not opposed thereto, every executor and administrator shall have full power to sell all the property, goods and effects of the deceased and to transport any immovable property for the purpose of the realisation and distribution of the estate.”*

It is in fact quite clear that statutorily [**section 42** above] the Executor/Administrator effectively holds a deceased’s estate on trust for sale.

This is very significant to note since this coupled with the statement “*the executors and trustees of this my will hereinafter called “MY TRUSTEES”*” strongly suggests that the Testatrix did not intend to create a Trust but rather the words “Trust” and “Trustees” were used without the intending the usual legal connotations.

### **CONCLUSION**

The Court does not find that the Will created a Trust for sale of the Property.

### **FURTHER ANALYSIS**

Notwithstanding the foregoing, the Court in any event finds that assuming that the Will does create a Trust for sale of the Property the Claimant is entitled and in fact duty bound, as Executor and Trustee, to sell the property and carry out the wishes of the Testatrix.

Since Co-Trustees are required to act jointly, the obvious question is whether the Court can grant an Order permitting the Claimant to act without the other Trustee, Ascelia Kissoon.

Based on the evidence before the Court, it is undisputed by the parties that Ascelia Kissoon has refused to act or perform any duty or function under the Will, whether as Executrix or Trustee.

In fact the Defendants herein instituted High Court Action No. 174 of 2010 (Demerara) against the Defendant in his capacity as the Executor of the Estate of Parbatti Persaud, deceased, claiming specific performance of an agreement of sale and purchase dated February 8<sup>th</sup> 2001 for the Property.

The Defendants did not join Ascelia Kissoon as a party in that Action.

The Defendants claimed therein that by that agreement of sale and purchase they had purchased the Property from Parbatti Persaud.

The refusal by Ascelia Kissoon to act as Executrix and Trustee of the Will is further confirmed by the Order of the High Court of the Supreme Court of Judicature of Guyana dated October 14<sup>th</sup> 2009 in Action No. 1102 S/A of 2009 [Demerara].

In these circumstances the Court finds that it can, if merited, grant the Claimant the power to sell the Property and complete the administration of the Estate.

## **ISSUE II**

Whether the Orders sought by the Defendants are *res judicata*.

## **LAW**

**Henderson v Henderson** [1843 - 1860] All ER 378

**Garraway v Williams and Rambarran** [2011] CCJ 12 (AJ)

**Thorner v Major** [2009] 1 WLR 776

## **FACTS**

The Defendants had instituted High Court Action No. 174 of 2010 (Demerara) against the Defendant claiming specific performance of an agreement of sale and purchase dated February 8<sup>th</sup> 2001 for the Property.

The Defendants claimed therein that by that agreement of sale and purchase they had purchased the Property from Parbattie Persaud.

Following a trial of that Action Justice Rishi Persaud dismissed the claim on May 20<sup>th</sup> 2011 having found that the agreement of sale and purchase was not genuine.

The Defendants appealed Justice Persaud's ruling and on July 20<sup>th</sup> 2018 that appeal was dismissed by the Court of Appeal.

That dismissal by the Court of Appeal was not appealed to the Caribbean Court of Justice.

## **ANALYSIS**

Apart from the issue settled in this Court's ruling dated October 16<sup>th</sup> 2020 in this Action and the issues determined in **ISSUE I** above, the Defendants, in their Defence and Counterclaim, claim to be entitled to relief under the doctrine of Proprietary Estoppel and/ or that they have acquired adverse possessory title to the Property.

The Claimant asserts that the Defendants ought not to be allowed to pursue their claim for relief under the doctrine of Proprietary Estoppel since it is *res judicata*. Proprietary estoppel usually arises where a representation is made that consists of a promise of an interest in land. Where the owner of land (A) knowingly allows her rights to be infringed by another (B) who has acted in respect of the land to his detriment (for example, by spending money on the land) in the mistaken belief that it belonged to B, A could not afterwards be allowed to assert her own title to the land.

The three-fold test that has developed is based not on B's mistake but on an agreement between A and B or on A's encouragement of B's expectation.

The court will inquire:

- (a) whether an equity in favour of B arises out of the conduct and relationship of the parties;
- (b) what is the extent of the equity, if one is established; and
- (c) what is the relief appropriate to satisfy the equity.

The doctrine is succinctly stated by Lord Walker in **Thorne v Major**;

*“Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation*



*or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.”*

It is clear that the pleadings and evidence [witness statements] of the Defendants in reliance upon the doctrine of Proprietary Estoppel herein are based upon the same material facts relied upon in their Action for specific performance [High Court Action No. 174 of 2010 (Demerara)].

The Defendants contend that Parbatti Persaud by words, which were memorialised by a written agreement of sale and purchase, put them into possession on the assurance that the Property is/ will be theirs.

That fact scenario and agreement of sale and purchase were considered by the Court in High Court Action No. 174 of 2010 (Demerara) when it rejected the agreement of sale and purchase.

The principle of *res judicata* was stated concisely by the Court in **Garraway v Williams and Rambarran**;

*“In order for the doctrine to be applicable three essential conditions must be satisfied: there must be an earlier decision covering the issue; there must be a final decision on the merits of that issue; and the earlier suit must involve the same parties or parties in privity with the original parties.”*

That Court found, as this Court does, that Wigram VC provided a comprehensive explanation of the principle in **Henderson v Henderson**, where he stated;

*“I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring*

*forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. **The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.*** [Bold mine]

Counsel for the Defendants submits that “*The case at bar is not one in which the estoppel is based on the promise of an interest in land.*” which is indeed baffling since that is precisely what they are claiming as per paragraphs 36 and 37 of their Defence and Counterclaim.

It appears that Counsel for the Defendants advanced that submission to further submit that in those circumstances reliance on the doctrine of Proprietary Estoppel is only available to the Defendants as a Defence and in the aforementioned previous Action they were the Claimants (Plaintiffs).

Apart from the fact that this is not an accurate representation of the law, this submission is indeed disingenuous since the Defendants have Counterclaimed in this Action [paragraph 44 (11)] on this very doctrine.

However, notwithstanding that, in High Court Action No. 174 of 2010 (Demerara) the Claimant [herein] had in fact Counterclaimed for Possession [Defence and

Counterclaim dated June 11<sup>th</sup> 2010 - attached to the Defendants Affidavit in Defence in this Action] and therefore, in accordance with Counsel for the Defendants submission, the Defendants had the opportunity to plead this issue determined by the Court.

It is very unfortunate that Senior Counsel has chosen to be less than frank with the Court.

### **CONCLUSION**

The Defendants are precluded from relying on the doctrine of Proprietary Estoppel on the principle of *res judicata*.

### **ISSUE III**

Whether the Defendants claim of acquiring adverse possessory title to the Property ought to be dismissed summarily based on the pleadings and evidence before the Court.

### **FACTS**

In addition to the facts stated above, the Defendants' Counterclaim for "*A declaration that the estate's title to disputed property has been extinguished ...*"

Counsel for the Defendants submitted that "*the Defendants do not claim adverse possession against the estate. Adverse possession is claimed against the trustees for sale to whom the property was bequeathed, namely Rohini Kissoon and Deodatt Persaud.*"

## ANALYSIS

Counsel for the Defendants' submission is diametrically opposed to the Defendants' pleadings and this clearly points to the Counsel's acceptance that a claim of adverse possession cannot be maintained against the Estate of Parbatti Persaud, deceased in light of High Court Action No. 174 of 2010 (Demerara) since this necessarily means that the Defendants cannot begin to pursue a prescriptive claim until twelve years had elapsed from the resolution of that claim [which was July 20<sup>th</sup> 2018] acknowledging the Estate's title.

Though it is not necessary to address Counsel for the Defendants' submission, since "the Trustees of the Estate" are not parties in this Action and therefore a Counterclaim against "them" do not exist, profound legal analysis is unnecessary to address Counsel's vacuous submission and so as a matter of completeness it will be briefly addressed.

Accepting the Defendants contention that the Will created a Trust for Sale with respect of the Property, it cannot be that the Defendants can simultaneously pursue the remedy of specific performance against Deodatt Persaud in his capacity as Executor of the Estate of Parbatti Persaud, deceased and be in adverse possession against Deodatt Persaud in his capacity as Trustee of property owned by Parbatti Persaud, deceased, such Trust being created in the Will of Parbatti Persaud, deceased.

Apart from the fact that the Property was never vested in the names of Deodatt Persaud and/ or Rohini Kissoon as Trustees, the submission conflicts violently with common sense since the Defendants by their claim in High Court Action No. 174

of 2010 (Demerara) recognised the Estate of Parbatti Persaud, deceased title to the Property.

Whether they frame their claim against the Estate of Parbatti Persaud, deceased **or** the Executor of the Estate of Parbatti Persaud, deceased **or** the Trustee of the Estate of Parbatti Persaud, deceased the claim is against the same legal person.

As stated before, it is obvious that Counsel for the Defendants recognise that the Defendants cannot legitimately claim to have acquired adverse possessory title against the Estate of Parbatti Persaud, deceased and so has concocted a legal illusion with deception as its object.

#### **CONCLUSION**

The Defendants claim of acquiring adverse possessory title to the Property against the Estate must be summarily dismissed.

#### **ISSUE IV**

The Defendants seek “*A declaration that the deceased’s will applied only in respect of her property in the United Kingdom.*”

#### **FACTS**

The Will clearly states “*I DEVISE AND BEQUEATH all the real and personal property of or to which I shall be possessed or entitled at my death except property hereby or by any codicil hereto otherwise specifically disposed of ...*”.

#### **ANALYSIS**

It cannot possibly be stated more clearly that the Will is not restricted to the United Kingdom or any property where ever located.

Further, as previously stated, the grant was resealed by the High Court of Guyana and that resealing of the grant has never been challenged by the Defendants.

In fact in High Court Action No. 174 of 2010 (Demerara) the Defendants filed suit against the Claimant in his capacity as the Executor of the Estate of Parbatti Persaud, deceased.

### **CONCLUSION**

The Will applies to all property, including the Property, owned by the Parbatti Persaud at the time of her death.

In the circumstances the Defence and Counterclaim are dismissed and the Claimant is hereby permitted to sell property known as and located at sub-lot “A” part of the west half of lot numbered 225 Camp and New Market Streets, Georgetown, Guyana more fully described in County of Demerara Transport No. 2015 of 1956 at private treaty in accordance with the terms of the Will of Parbatti Persaud, deceased dated April 27<sup>th</sup> 1993.

The Defendants filed an Application on March 22<sup>nd</sup> 2021 seeking an Order that this Action be stayed until the hearing and determination of 2021-HC-DEM-CIV-P-39. For all of the reasons afore-stated, that Application is dismissed.

The Court awards costs to the Claimant in the sum of \$2,000,000.00 against the Defendants which shall be paid on or before June 21<sup>st</sup> 2021.

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Justice N. A. Singh