

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-001241

IN THE MATTER OF ss 43 and 52 of the Trustee Act 1956

BHAVANA LAXMAN, MUKESH
PARSHOTAM AND MAHENDRA
HARIKISUN
Applicants

Hearing: (On the papers)

Appearances: D Smyth for the Applicants

Judgment: 31 July 2009 at 4:30pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 31 July 2009 at 4:30pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:

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[1] Bhavana Laxman, Mukesh Parshotam and Mahendra Harikisun have filed an original application seeking orders under ss 43 and 52 of the Trustee Act 1956.

[2] No opposition to the application has been filed with the Court, and Mr Smyth, appearing on behalf of the applicants, has requested that the matter be dealt with on the papers.

Factual background

[3] By deed of trust dated 21 August 1997, Deepak Laxman appointed Anil Laxman, Bhavana Laxman, and Mukesh Parshotam as trustees of the A-B Laxman Family Trust and settled funds on them in their capacity as trustees. The trust has not as yet vested.

[4] One of the assets of the trust is a property situated at 33 Exminster Street, Blockhouse Bay, Auckland. Anil Laxman, Bhavana Laxman, and Mukesh Parshotam are recorded as being the registered proprietors of the property.

[5] Anil and Bhavana Laxman were man and wife. They and their children are the primary beneficiaries of the trust. Unfortunately they separated in January 2004 and their marriage was dissolved on 20 July 2005.

[6] Bhavana Laxman has filed an affidavit. She has sworn that she does not know where Anil Laxman is. Bhavana Laxman now resides in Brisbane, Australia. It also seems that Anil Laxman lived in Australia – his solicitors were in Brisbane, he worked as a pharmacist in Australia, the certificate of divorce in relation to the marriage was issued by the Federal Magistrates Court in Australia at Brisbane, the Magistrates Court of Queensland at Holland Park issued a protection order against him, and the Family Court of Australia at Brisbane has made orders in relation to the couple's children.

[7] It is asserted in the memorandum filed in support of the application that Anil Laxman left New Zealand and that he has been unable to be located since 2004, when he was last seen leaving for Singapore. The affidavit, however, does not

support these assertions. Rather Bhavana Laxman has sworn that she does not know where her former husband is now.

[8] In the event orders for substituted service were made by Associate Judge Faire. He required that an advertisement be placed in both the New Zealand Herald and the Courier Mail in Brisbane. That has occurred. No papers have been filed in the proceedings by Anil Laxman.

Appointment of new trustees

[9] The deed of trust provides as follows:

13.(1) THE power of appointment of new Trustees (“the power of appointment”) shall be vested in ANIL LAXMAN or in such person as he may by deed or by will nominate.

Obviously Anil Laxman’s disappearance creates some difficulty in this regard.

[10] Section 43 of the Trustee Act 1956 provides as follows:

- (1) Where a trustee (whether original or substituted, and whether appointed by the Court or otherwise)—
 - (a) Is dead; or
 - (b) Remains out of New Zealand for the space of 12 months during which no delegation of any trusts, powers, or discretions vested in him as such trustee remains in operation under section 31 of this Act; or
 - (c) ...
 - (d) Refuses to act therein; or
 - (e) ...
 - (f) Is incapable of so acting; or
 - (g) ... then—

the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees for the time being, or the personal representatives of the last surviving or continuing trustee, may by deed appoint a person or persons (whether or not being the person or persons

exercising the power) to be a trustee or trustees in the place of the first-mentioned trustee.

[11] It is clear from Bhavana Laxman's affidavit that Anil Laxman either is and remains out of New Zealand, or that he is refusing to act, or that he is incapable of acting as a trustee.

[12] On 18 April 2008, the remaining trustees, Bhavana Laxman and Murkesh Parshotam entered a deed of replacement and appointment of new trustee. The deed recorded that Anil Laxman had been absent from New Zealand for more than 12 months, that he had given no notice of his intention to return to New Zealand, and that he had been unable to be contacted. Bhavana Laxman and Murkesh Parshotam as the continuing trustees appointed a Mahendra Harikisun as a new trustee, to replace Anil Laxman. Mr Harikisun accepted appointment as the new trustee. The deed declared that all the rights of Anil Laxman in the trust fund were to vest in Mr Harikisun, as the new trustee, and the continuing trustees. The deed recorded that Anil Laxman's rights as a beneficiary under the trust were not varied by the deed.

[13] On the same day, a further deed of replacement and appointment of trustees was signed. The deed recorded that Mr Parshotam wished to be discharged from the trust. Bhavana Laxman and Mahendra Harikisun were happy to continue as trustees. They consented to the discharge of Mr Parshotam from the trust, and declared that his rights in the trust property were to vest in them as the remaining trustees.

The application

[14] As noted, Anil Laxman, Bhavana Laxman and Mukesh Parshotam in their capacity as trustees are the registered proprietors of the property situated at 33 Exminster Street, Blockhouse Bay. Bhavana Laxman, Murkesh Parshotam and Mahendra Harikisun seek a vesting order under s 52(1) of the Act vesting the property at Exminster Street in the names of Bhavana Laxman and Mahendra Harikisun as the continuing trustees.

[15] I am satisfied that such order is appropriate. Both Bhavana Laxman and Mahendra Harikisun are now the trustees of the A-B Laxman Family Trust. The property at 33 Exminster Street, Blockhouse Bay is an asset of the trust. Bhavana Laxman and Mahendra Harikisun have been appointed out of Court under the statutory power contained in s 43 of the Trustee Act 1956. Mr Anil Laxman cannot be found, and he is no longer a trustee pursuant to the execution of the deed of replacement and appointment of new trustee dated 18 April 2009.

[16] Accordingly, I make an order vesting the property situated at 33 Exminster Street, Blockhouse Bay, Auckland, being all the land in certificate of title NA1946/8, North Auckland Land Registry, in Bhavana Laxman and Mahendra Harikisun.

[17] The applicants sought to reserve their costs of and incidental to the application.

[18] It seems to me that the applicants are entitled to their costs out of the assets of the trust. I direct that they file a memorandum advising whether or not costs are sought, and if costs are to be sought, detailing what costs are claimed within 10 days of the date of release of this judgment. I will then deal with the matter on the papers.

Wylie J