

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0081 OF 2000S  
(High Court Civil Action No. 227 of 1990L)

BETWEEN:

ALI AHMED

*Appellant*

AND:

MOHAMMED IBRAHIM

*Respondent*

Coram:

Reddy, P  
Smellie, JA  
Penlington, JA

Hearing:

Tuesday, 19<sup>th</sup> November 2002, Suva

Counsel:

Dr. M. S. Sahu Khan for the Appellant  
Mr. V.M. Mishra for the Respondent

Date of Judgment:

Friday, 29<sup>th</sup> November 2002

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JUDGMENT OF THE COURT

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Introduction:

This litigation has been bedeviled by delay inertia and confusion on the part of the parties and their advisers. Unfortunately the delivery of the judgment under appeal was also long delayed.

The matter cries out for resolution. It must be taken in hand and resolved

This Court's orders are designed to achieve that end while at the same time, (as far as possible given the tangled web of circumstances), do substantial justice between the parties.

**Undisputed Facts**

The appellant and the respondent are two of seven sons of Khairati who died on 8 August 1974 aged 80. By his will executed on the 19 August 1967 the deceased left his estate equally to his seven sons.

The appellant is a beneficiary. The respondent is both beneficiary and the executor of the estate to whom probate was granted.

Today more than 25 years later the estate has not been wound up and distributed. Furthermore there is disagreement as to the assets in the estate, their worth and in some cases their whereabouts. The appellant as plaintiff in the Court below commenced an action in 1990 seeking the following relief.

- “(a) For an Order that the Defendant do furnish a proper detailed account of the Estate affairs showing all income and proper disbursements thereto from the date of deceased's death.***
- (b) For an Order for distribution of the Estate.***
- (c) Damages for breach of trust.***

- (d) *For an Order for removal of the defendant as trustee and the appointment of a new trustee in place of the Defendant for the purpose of completion of the administration of the Estate.*
- (e) *Any injunction restraining the Defendant from uplifting any monies from the Fiji Sugar Corporation from the Cane Contract numbers 434 and 397 (Varoko Sector) and 6532 (Cuvu Sector) and/or dealing with the Estate in a manner which defeats the interest of the Plaintiff.*
- (f) *Damages.*
- (g) *Such further or other relief that this Honourable Court may seem just and proper.*
- (h) *Costs."*

The defence filed pleaded a partnership and relied upon an arbitration clause in the partnership agreement for the resolution of any dispute. There was also some confusing and inept pleading in paragraph 4 of the statement of defence. An application for amendment of same was made during the hearing before us and we will return to that a later stage in this judgment.

The litigation experienced a very checkered career. The respondent was ordered to file accounts in 1994 and after much delay at the 11th hour filed, not the estate, but partnership accounts. He was also enjoined from uplifting the proceeds of sales of sugar cane from some 7 properties in dispute pending the hearing of the case.

It is also undisputed that a partnership agreement between the deceased and his widow and their 7 sons was entered into on 19 August 1967 the same day as the will was executed.

**Disputed Facts**

Although the signing of the partnership agreement on 19 August 1967 cannot be disputed - whether or not the 7 properties were part of the deceased estate or had become partnership assets is disputed. The appellant relying on para. 4 of the statement of claim which on its face admits the properties were part of the estate wants his 1/7th share of them. Indeed on the 7 March 1991 (after the action has been commenced) the appellant and the respondent entered into an agreement as beneficiary and executor respectively, which purported to secure to the appellant a 1/7th share in the properties. (Exhibit P 22). Counsel for the appellant said that this evidence was adduced to show the 7 properties were in fact part of the father's estate. But as the pleadings show no order was sought confirming that arrangement or seeking specific performance of all or any part of it. It appears in fact to have been partly performed. But of course if the properties belonged to the partnership rather than the estate Exhibit 22 cannot affect the rights of the partnership.

The issue of which entity (estate or partnership) owned the 7 properties at the date of death in 1974 is at the heart of this litigation. The delay in resolving it is

largely responsible for the appalling situation which faces the Court today a quarter of a century after the deceased's death.

It is time to cut the Gordian knot. We have no doubt the 7 properties passed from their then owners to the partnership on the 19 August 1967 which of course was the day the deceased executed his will.

Our reasons for reaching this firm conclusion are as follows:

The partnership deed says so. Clause 9 of the same reads:

*"9. The property and assets belonging to any partners in connection with their said business (the particulars whereof are specified in the first schedule hereto) shall become and be the property and assets of the firm and any encumbrance and other debts and liabilities mentioned in the Second Schedule shall become and be debts and liabilities of the firm and any partner shall upon the request at any time of the other partners hereto and at the costs of the firm convey, assign, or otherwise assure the said property and assets in such manner as effectually to vest the same (subject to the mortgages and charges affecting the same respectively and also subject to the approval of the Fiji Sugar Board or any other Ordinance in relation to management and/or control of assignment of or dealing with Sugar Cane Contract in force at all material times in the said Colony) in the partners and as part of their partnership estate, and shall hold, the same in trust for the firm and shall be indemnified by the firm against the rent reserved by and all covenants and conditions on the part of the lessee contained in the leases of the premises upon which the said business is carried on as aforesaid, and/or freehold titles to vest the property if required to the partnership."*

The first schedule referred to in the above clause sets up the 7 properties as follows:

- (a) *Certificate of Title Number 7200 Valele and Namurulai lai (part of) lot 2 on deposited Plan 1068-16 sures 5 roods 5 perches.*
- (b) *Certificate of Title Number 62251 Lot 1 on Deposited Plan 903-1 acre 0 rood 0 perch.*
- (c) *Certificate of Title Number 77351 Lot 12 on Deposited Plan 1705 - 4 acres 3 roods 0 perch.*
- (d) *Lease Number 60430 Lot 34 Matamatacawa Subdivision on Deposited Plan 1890-22 acres 0 rood 0 perch. (The abovementioned lands being owned by the first partner the said Kahiratti).*
- (e) *Lease Number 60298 Matamatacawa Subdivision Lot 35 on Deposited Plan 1890-22 acres 1 rood 0 perch. (The abovementioned land being leased by the second and third partners the said Mohammed Ibrahim and Masiban).*
- (f) *Tenancy held of the South Pacific Sugar Mills Limited Numbered as 52 at Maro being rice land 10 acre (the abovementioned land being owned by the fourth partner the said Mohammed Tahir).*
- (g) *Lease Number 97738 Matamatacawa (part of) being lot 6 on Deposited Plan 1890-25 acres (the abovementioned land being owned by the eighth partner the said Ali Ahmad)."*

The father's will executed on a same day as the deed of partnership reads in clause 3 of the same as follows:

*"3. Subject to the terms and covenants of a DEED OF PARTNERSHIP dated the 19th day of August, 1967 I GIVE DEVISE AND BEQUEATH all and singular my real and personal property whatsoever wheresoever situate or being and of what nature or kindsoever including any property over which I may have a power*

*of appointment or disposition TO and UNTO my sons MOHAMMED IBRAHIM, MOHAMMED TAHIR, ALI AHMAD, MOHAMMED HUSSAIN, MOHAMMED AIYUB, MOHAMMED ABDUL GAFFAR AND MOHAMMED HASSAN in equal shares share and share alike absolutely."*

- The 7 properties appear and are described exactly as they are in the partnership deed in the administrator's record which is a Exhibit D(3). The assets of the partnership in which the deceased had a 1/9th interest being shown as at 19 December 1975 as worth \$69,670 and some cents.
- Partnership continued according to its terms after the deceased death. The partnership accounts treat the land from which income was derived as partnership assets.
- There is no credible evidence to suggest that in any way at all, the properties did not pass to the partnership or alternatively that in some way that it was not explained that they could have come back into the deceased's estate on his death despite continuation of the partnership.

#### The Respondent's Amendment Application

With some encouragement from the bench Mr Mishra very belatedly applied to amend his pleadings to remove the admissions in para 4 of the statement of

defence that the 7 properties were part of the estate. Counsel pointed out that despite those apparent admissions the thrust of the statement of defence was that the properties were partnership assets. There is some substance in that submission. But pleadings are intended to clearly and accurately indicate to the opposing party the position being taken. The formulation of para. 4 as originally pleaded was inexcusably inaccurate and confusing. Dr. Sahu Khan opposed the application submitting to that to allow an amendment now, 12 years after statement of defence was filed and on appeal would be grossly unfair.

The principles applicable to the exercise of the Court's discretion when dealing with an application from amendment are well settled:

*"It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings." ( Jenkins L.J. in G.L. Baker Ltd. v. Medway Building & Supplies Ltd. [1958] 1 W.L.R. 1216,*

*"It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights..... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party.(Bowen L.J. in Cropper v. Smith (1883) 26 Ch.D. 700 at p.710-711.*

More recently in Ketteman v. Hassel Property (1997) 1 A.C. 189 at 220 Lord

Griffiths in the House of Lords said:



*"Whether an amendments should be granted is a matter of the discretion for the trial judge and he should be guided in the exercise of his discretion by his assessment of where justice lies. Many and diverse factors will bear upon this discretion. I do not think it possible to enumerate them all or wise to attempt to do so."*

It is also well established however, that a party who seeks to amend belatedly and whose lax conduct has caused the other side inconvenience or expense should pay costs.

The justice of this case requires that the amendment be allowed. It is obviously necessary to resolve the real controversy between the parties. The appellant is not in our judgment significantly prejudiced. The case as the pleadings and final submissions of counsel show was fought by the respondent on the basis that the properties were partnership, and not estate, assets. The respondent, however, is entitled to costs which in other circumstances we would have awarded in the sum of \$500.00. But the respondent signed the deed of partnership which had been drawn by the solicitors who are presently acting for him on this appeal. In our judgment the respondent has unrealistically clung to the pleading point to justify a stance not in accordance with the true position. A position which, if he did not know it, he ought to have. The costs award in the circumstances reduces to \$250.00.

### The Judgment Under Appeal

It is a short judgment in which two conclusions are reached.

- (1) That the action was misconceived.
- (2) That the 7 properties were in fact partnership assets and the estate of the deceased only owned a small share of the partnership. Costs were assessed summarily against the defendant/appellant in the sum of \$2,500.

### The Appeal Succeeds

The action was not misconceived. The plaintiff in the Court below, appellant in this case, was entitled to orders removing the respondent as executor and appointing a reliable trustee and awarding costs. This is an evitable conclusion in the circumstances. No trustee who prevaricates for 25 years, who fails to apply to the Court for directions and allows matters to drift on the way the respondent has here, can expect to escape the severe criticism of the Court and as a last resort removal from office.

The Court's view is that an independent and professional trustee should be appointed. The Public Trustee in the Republic of Fiji is appointed and directed to

expeditiously wound the estate up. The award of costs against the appellant in the Court below is set aside and costs in the sum of \$750.00 are awarded to the appellant on this appeal in this Court. The case is remitted to the High Court at Lautoka with leave to either party or one or more of the remaining partners in the partnership to apply for any ancillary orders that may be necessary as a consequence of this judgment and the orders to be made.

#### Where to From Here? ( The Estate)

In the judgment in the Court below the learned Judge used the expression "the partnership is for another day." We will come to that. We having expressed the clearest of views to the effect that the 7 properties were not estate property, the Public Trustee would be wise and justified to conduct his administration and distribution of the estate on that basis. As the estate only owned 1/9th interest in the partnership and partnership\_accounts are available, the ascertaining of appellants modest interest in his father's estate should be a relatively simple matter. The Registrar is directed to provide a copy of this judgment and the Exhibits D3, P8A, P8, P10, P11A, P13A, and P 14A, P15B to P21 inclusive and Ex. P1 to the Public Trustee forthwith and leave is given to the Public Trustee to search and copy the record should he require it.

#### Where to From Here? (Partnership)

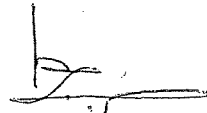
This is an observation of the Court which is not binding on the parties. In our view, however, it is beyond question that after all this time and given the confused and

uncertain nature of the records the remaining partners would be unwise to engage in further litigation unless that is absolutely unavoidable. They would be much better to seek out a wise, fair person in whom they can place trust and by way of mediation reach an amicable solution. The alternative will be more years of litigation during which the substance of the partnership is likely to be consumed largely if not entirely by costs. The parties will appreciate that this observation of the Court, is in fact in line with the view expressed in the judgment under appeal. The learned Judge in the Court below came close to getting the answer in this matter entirely right. Where he failed, and where we have now corrected him, was in not appreciating that the action was about the estate and however minuscule the interest of the plaintiff (appellant), he was nevertheless entitled as a beneficiary to have the Court's support to have his father's estate properly administered and his share made available to him.

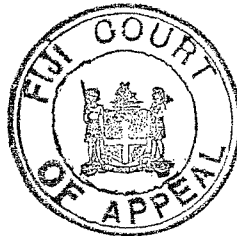
Orders:

1. The Respondent is removed as executor of his father's Estate.
2. The Public Trustee is appointed Executor and Trustee and directed to wind up and distribute the Estate as promptly as possible.
3. The case is remitted to the High Court at Lautoka with leave reserved to either party the Public Trustee or any surviving partners in the partnership to apply for ancillary orders as required.

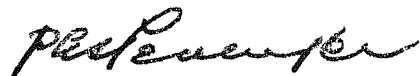
4. The Appellant is awarded costs as follows:
- (a) On the amendment application \$250.00.
  - (b) On the appeal \$750.00.



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Reddy, P



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Smellie, JA



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Penlington, JA

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant  
Messrs. Mishra, Prakash and Associates, Ba for the Respondent