

IN THE FIJI COURT OF APPEAL
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0048 OF 1994
(High Court Civil Action No. 524 of 1988)

BETWEEN

SOHAN SINGH S/O JOHRA SINGH
HARBANS KUAR D/O HIRALAL

APPELLANTS

- AND -

BHAN WATI AKA MALA SINGH
D/O SAHADEO

RESPONDENT

Mr. Raman Singh for the Appellants
Mr. H.K. Nagin for the Respondent

Date of Hearing : 21 February 1996
Date of Delivery of Judgment : 1 March 1996

JUDGMENT OF THE COURT

This is an appeal against the judgment of Byrne J. delivered in the High Court on 28 September 1994. He awarded the Respondent (Bhan Wati) \$118,972.72 in respect of the share of the estate of her late husband Dr. Bhajan Singh in a partnership with his brother Sohan Singh and their mother Harbans Kuar in a shop and cinema business carried on at Labasa prior to his death on 13 June 1982. There was no written agreement and no fixed term. Pursuant to S.35 of the Partnership Act (Cap.248) the partnership was dissolved by Dr. Singh's death and the Respondent as his personal representative (he having died intestate) took out an originating summons against the Appellants seeking determination and payment to the estate of his share of the assets and profits.

Although he had contributed capital, he took no active part in running the business. The Appellants have carried it on as partners ever since his death.

The matter came before Byrne J. after largely fruitless attempts by the Respondent to obtain adequate financial information from the Appellants and to have the calculation of the estate entitlement referred to an independent professional accountant for investigation and report. At the hearing the Judge had the benefit of evidence from Mr. Shyam Narain, a qualified accountant called by the Respondent. He analysed accounts of the business for the years ended 31 December 1980 to 1988 inclusive (being the only ones made available) and calculated there was due to Dr. Singh's estate the sum of \$74,756.72 by way of undrawn capital and profits for that period. He estimated an additional \$22,108.00 for the estate's share of profit for the ensuing four years to the first date of hearing in 1993, there being no accounts produced for that period. He also valued the estate's share of goodwill at the same figure of \$22,108.00, based presumably on the same four years' purchase of the annual profits. The total came to \$118,972.72 as the amount due to the estate. We were informed that this is to be divided equally between Dr Singh's widow (the Respondent in her personal capacity) and his mother, Harbans Kuar.

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Although the notice of appeal was expressed in very general terms challenging the Judge's reliance on the accountant's evidence, the main issues in this Court were the application of SS. 43 and 45 of the Partnership Act, and whether there should have been any allowance for goodwill in a business of this nature. It should be noted that Mr. Narain ignored the partnership land and buildings in his calculation of assets because he had no valuations for them and was not prepared to accept the book values. Those assets were dealt with in a consent Order of 19 December 1988 made on an application for partition by the present Respondent, under which she was to receive \$70,000 for the transfer of the land and buildings to the Appellants.

Section 43 of the Act is as follows:-

" Where any member of a firm has died or otherwise ceased to be a partner and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets;

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It was accepted that the Respondent had opted for a share of the profits under this Section. In assessing it Mr. Narain followed what he said was normal accounting practice in these cases, by making his calculations on the basis that the former partnership had notionally continued right up to the date of the Court hearing when the final settlement of accounts could be expected. He credited the estate with one third of the profits for each year throughout that period, adding it to the deceased's notional capital account in the firm. Clearly those profits would not have been made by the surviving partners without the use of the capital and assets of the former partnership.

The approach to be taken in this situation under the United Kingdom equivalent to S.43 of the Act was discussed by Romer J. in Manley v. Sartori [1927], 1 Ch 157, 165. After referring to a passage in Lindley on Partnership, he said:-

"By that I understand the learned author to mean that where surviving partners continue to carry on the business, prima facie they are carrying it on by reason of their possession of the assets of the partnership; and the executors of the deceased partner are prima facie entitled to a share of the profits proportionate to his share in the assets of the partnership. It is for the surviving partners to show, if they can, that the profits have been earned wholly or partly by means other than the utilization of the partnership assets."

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He made it clear that the assets to be taken into account for this purpose included goodwill. Accordingly the onus was on the Appellants to satisfy Byrne J. that the estate's prima facie entitlement to a full one third share of the profits had been displaced. This they failed to do.

In this Court Mr. Singh was unable to suggest or point to any evidence justifying an appropriate allowance for whatever part the Appellants may have played in conducting the business after Dr. Singh's death. It is significant that during the latter's lifetime as a "sleeping partner" the accounts did not show any payment or allowance to them; each partner was shown as having been credited with a full one third share of the profits. It is therefore not inappropriate that the same pattern should be continued after his death in making the calculation under S.43.

The fact that such a large sum has accrued over the years up to the Court hearing appears plainly the responsibility of the Appellants in not earlier addressing his widow's claim for payment. The Judge quoted Mr. Narain's comment that it was always better in such matters to supply accounts quickly as this gives the surviving partners immediate control of the business. Instead the Appellants put forward a forged will purporting to leave the deceased's estate to Sohan Singh (the first named appellant) which was rejected in probate action 15/83 (Judgment 30/1/1987). They failed to supply accounting and

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financial information until required to do so by Court Orders and (as already noted) the accountant who gave evidence for the respondent did not have any figures for the business after 1988.

He was not cross-examined on what allowance, if any, should be made to the Appellants for their contribution to the profits earned by the business since dissolution of the partnership, nor about the effect on those profits of the transfer of the estate's interest in the land and buildings to them. They were still using the estate's capital and share of goodwill in conducting the same business. So far as we can judge, these specific matters were not raised during the hearing in any meaningful way. Mr Nagin complained about the attempt to put them forward in the appeal because he no longer had the opportunity to deal with them through his expert witness. The Appellants did not call accountancy evidence, relying only on the opinions of Sohan Singh, who obviously had no specialised knowledge or experience in this field. Byrne J. was entitled to accept and act on Mr Narain's uncontradicted evidence, with the result that the Appellants have not displaced the prima facie claim of the estate to a one-third share of the profits down to the date of hearing.

There was also a challenge to the inclusion of goodwill as an asset of the partnership. We are satisfied that in a business of this nature carried on at the same site in a large town for some years, there must be a substantial element of

goodwill. Patrons and customers can be expected to keep returning, generating a regular income stream and making it attractive for that reason to any purchaser. Mr Narain was clearly right in taking it into account as an asset and his opinion of its value based on four years' purchase of profit was not shown to be wrong.

The final matter requiring our attention is Mr Singh's submission that Byrne J. ignored the provision of S.45 of the Act dealing with the application of the assets in settling accounts between partners after a dissolution. They must go first in paying debts, then in repayment of advances to partners (there were none recorded here); next in paying to each their capital rateably; and any residue is to be divided in the same proportion as the profits. It is clear from his reference to S.45 on Page 3 of his judgment that Byrne J. was aware the assets had to be distributed on the final settlement of accounts in accordance with that Section.

The Privy Council made it plain in Chandroutie v. Gajadhar [1987] AC 147 that the estate of a deceased partner prima facie remains entitled to a share of the assets up to the date of realisation (in the present case it would be up to the final settlement of accounts), and is not confined to a share of the value of those assets as at the date of death (ibid p. 154). The accounts up to 1988 show a prosperous and apparently solvent business. The Appellants did not see fit to produce any later

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accounts or financial information covering the next four years which might have persuaded the Court that the firm became unable to meet the requirements of S.45, or that there was no residue to pay the estate's share of the goodwill. Again there was no cross-examination of Mr Narain on this aspect. In these circumstances we think the Judge was entitled to disregard those possibilities and infer that the firm continued to prosper sufficiently to satisfy S.45 in 1993.

Before we dispose of this appeal we wish to draw attention to Rule 15(3) of the Court of Appeal Rules. This Rule states -

".....every notice of appeal shall specify the precise form of the order which the appellant proposes to ask the Court of Appeal to make."

It is therefore, in general, not sufficient to merely ask that the decision of the Court below be "set aside" without stating what substantive order is being sought in substitution. To merely add the words "or such other order as the Court thinks fit" is also not of much help either if the substantive order sought is not spelt out.

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A well formulated Notice of Appeal with precise grounds of appeal are of great importance not only to the Court but also to the parties involved in the appeal.

The appeal is dismissed, with costs to the Respondent.

Moti Tikaram

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Sir Moti Tikaram
President, Fiji Court of Appeal

M. Casey

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Sir Maurice Casey
Judge of Appeal

Peter Hillyer

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Mr Justice Peter Hillyer
Judge of Appeal