

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0053 OF 1995S  
(High Court Case No.488 of 1991)

BETWEEN

SUNDARLAL LALLU F/N LALLU RANCHOD

APPELLANT

- and -

PARVATI MANILAL LALLU RANCHOD F/N  
F/N PRANJIVAN

RESPONDENT

Mr. V. Kapadia for the Appellant  
Mr. A.K. Narayan and V.P. Maharaj for the Respondent

Date and Place of Hearing: 28 August 1996, Suva  
Date of Delivery of Judgment: 30 August 1996

JUDGMENT OF THE COURT

The Respondent's husband died on the 14 October 1980. He was the older brother of the Appellant. For many years the two brothers had jointly carried on at Levuka the successful business of merchants and theatre proprietors in equal partnership. On the death of her husband the Respondent was appointed the sole Executrix and Trustee of his Estate, became the sole beneficiary for life, and as such an equal partner with the Appellant, both in the business and in certain properties. Under the will the Respondent's son was appointed the residuary beneficiary on her death or re-marriage.

By 1990 relations between the Appellant and the Respondent became severely strained. The Appellant was convicted of assaulting the Respondent who was forced to move out of the communal living arrangements she shared with the Appellant and

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his family behind the super market and to live in separate accommodation behind the theatre. She there established a small grocery business which she operated from her sitting room.

In early 1991 the Appellant approached certain members of the Gujerati Indian Community to assist him in dissolving the partnership with the Respondent. To this end, various meetings were arranged, several proposals were recorded, and finally a deed dated the 18 June 1991 was executed by both the Appellant and the Respondent. This deed provided that the Appellant would take all the partnership assets including the supermarket and theatre properties and all the liabilities, while the Respondent would receive a payment of \$50,000 in cash.

A few days after this deed was executed in Suva and the Respondent had returned to Levuka she was approached by two men who told her they had purchased the theatre where she was living. They enquired as to when she intended to vacate those premises. This was the first occasion, so the Respondent stated in evidence, that she realized the deed of arrangement she had signed did not provide that she receive both the theatre and \$50,000 in cash as her entitlement to the partnership dissolution.

As a result she returned to Suva, sought legal advice, and arranged to lodge a caveat against the title to the theatre property in order to protect her interests and prevent its sale.

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subsequently a writ was issued against the Appellant claiming relief in the form of audited accounts, injunction, declarations, damages and costs.

At a pre trial conference held on the 14 June 1994 Counsel agreed to the submission of two preliminary issues for determination by the High Court viz:-

2. (i) whether the Transfer Deed and other Documents referred to in Paragraphs 12 and 13 of the Statement of Claim and Paragraph 11 of the Defence were executed by the Plaintiff voluntarily (of her own free will) or was it done as a result of inducement, duress, undue influence and misrepresentation by the Defendant either directly or indirectly.
  
- (ii) Was the Plaintiff given an opportunity to seek independent legal advice, and whether the Plaintiff received separate and independent legal advice before she executed the documents referred to in 2 (1) above. [The Defendant's Solicitors do not agree that this should be a separate issue from 2 (i)].

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The trial commenced before Scott J. on the 18 October 1994 and concluded on the 9 May 1995. The learned Judge concluded his detailed analysis of all the evidence presented to him as follows:-

"I was not satisfied that the second deed was a fair just and reasonable division of the partnership assets. I was not satisfied that the Plaintiff had freely and fairly entered into it. My answers to the two questions posed are therefore in the negative."

It is against this decision that the Appellant now appeals alleging that the trial Judge erred both in law and in fact in his determination of the two issues which he had been required to adjudicate upon.

The grounds of appeal allege that the trial Judge failed in a variety of ways firstly to either restrict or correctly interpret the evidence relating to the two issues agreed upon and secondly to apply the proper principles of law relating to the alleged inducement duress undue influence and misrepresentation by the Appellant.

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Counsel for the Appellant in presenting his submissions said that as the foundation for his appeal he relied principally on the evidence of Dalpat Rathod, a businessman, Kikwoo Kapadia, an accountant with 38 years experience, and Hamendra Nagin, a Barrister and Solicitor with 17 years experience. Those 3 witnesses, he submitted, offered the Respondent the professional advice upon which she could make both an informed opinion and a judgemental decision before she executed the deed of dissolution of partnership.

It is true that the Respondent sought the advice of Dalpat Rathod. However the accounts for the years 1980 to 1989 inclusive were only prepared by the Accountants B Parshotam and Company after these pleadings had been filed. They were not available on the 18 June 1991 when the deed was signed. As a consequence Mr Rathod relied on the information given to him by the Appellant, for any advice he gave to the Respondent.

Mr Kapadia in evidence acknowledged that the Respondent had asked him whether she should sign the deed on the 18 June 1991. He advised her to sign.

However under cross-examination he agreed that -

"I had no figures. I did not verify anything. I relied entirely on the valuation provided by the Defendant."

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"It was not part of my duty to ascertain the authenticity of the figures being put up to me."

One must ask at this point that if Mr Kapadia's professional responsibility was not to make an elementary investigation into the partnership accounts, how was he able to recommend to the Respondent that she sign the deed disposing of her half interest in the partnership and as well the security of a life interest in her late husband's estate. He conceded when questioned by the learned Judge that -

"I did not consider at all the fact that she was the life tenant of her share of the partnership."

The third of the professional witnesses relied on by Counsel for the Appellant was Hamendra Nagin. He had prepared the deed and witnessed its execution on the 18 June 1991. He agreed that he was acting for both the Appellant and the Respondent. However in that capacity he stated under cross-examination -

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"whether someone was hoodwinking the other party did not concern me. I did not advise the parties on their legal duties to each other as partners. I agreed the parties were in a fiduciary relationship. I did not explain this to them."

"I did not explain to her the consequences of the agreement on estate. I still do not know the consequences. I did not give the Plaintiff a full explanation of the legal consequences of her signing."

"I knew the Plaintiff has only the life interest in the estate. I did not advise her on the consequences of the Deed."

"The Plaintiff was a Trustee. She had to act according to the trust. I did not explain that to the Plaintiff."

The Plaintiff referred to in that evidence is the Respondent in this appeal.

In analysing the legal and accountancy advice provided to the Respondent on the 18 June 1991 it must be remembered that her own evidence was - " I have very little education. I cannot read or write English properly," This evidence was challenged by Counsel for the Appellant on the grounds that the Respondent was a capable shop keeper. Of course one can be capable in numerous trades and still not read or write.

In any event we are satisfied that the Respondent received no professional advice that could be regarded as adequate or appropriate to the circumstances of this case from either Mr Kapadia or Mr Nagin. She was entitled to proper professional accountancy advice from Mr Kapadia who told her to sign the deed. Likewise she was entitled to professional legal advice from Mr Nagin who said that he was acting for her. Neither of those professionals provided the separate and independent advice to which she was entitled before she executed the deed on the 18 June 1991. There was obvious pressure on the Respondent to dissolve the partnership and as a consequence she had no opportunity to seek the independent legal advice so necessary in resolving such a complex commercial dispute.

The learned trial Judge correctly answered Issue No. 2 in the negative.

We turn now to consider the evidence in relation to the execution of the deed by the Respondent on the 18 June 1991 and whether that was voluntary or was done as a result of inducement duress undue influence and misrepresentation by the Appellant either directly or indirectly.

The Respondent in her evidence referred to very serious instances of duress over the 10 year period since her husband died. The Appellant denied some of these allegations. She further referred to examples of the influence exercised over her by the Appellant when as partners they should have had a special relationship based on good faith and good will.

Those allegations have been considered by the learned trial Judge who has had the added advantage of listening to and seeing both the Appellant and the Respondent and their respective witnesses.

In describing their relationship he said the Appellant "...exercised " dominion...." over the Respondent, and that as between them there existed "..... a marked and distinct inequality of bargaining power." He was also satisfied that those people who had been "recruited" by the Appellant to ensure

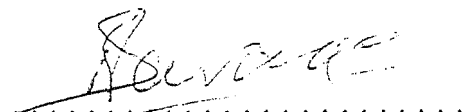
the dissolution of the partnership "substantially undermined" the ability of the Respondent to make independantly informed decisions. Based on those findings the learned trial Judge was satisfied that the Respondent had been subjected to undue influence.

On the question of misrepresentation one has only to consider the non-disclosure by the Appellant of the actual profits of the partnership for the whole of the 11 years following the death of the Respondent's husband; the failure by the Appellant to disclose any liquor sales which constituted a substantial part of the trading operations; the acquisition by the Appellant personally of the supermarket land but which he paid for out of the partnership funds; and the question of the gross profit for the 6 months trading period following the flood which seriously damaged the supermarket premises.

All these instances of non-disclosure of matters of importance in the partnership business plainly constituted misrepresentations by the Appellant of the then state of the partnership business at the time of the meetings, as a result of which the deed was executed. In result the learned trial judge found that misrepresentation had been clearly established.

We concur in that finding.

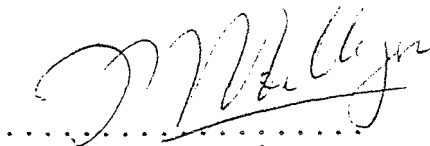
The appeal is dismissed with costs to the Respondent.



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Mr Justice Savage  
Judge of Appeal



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Mr Justice Dillon  
Judge of Appeal



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Mr Justice Hillyer  
Judge of Appeal