

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Jurisdiction HPP Action No. 59 of 2019**

**BETWEEN:**                   **SASHI PRASAD** of Chaudhary Drive, Koronivia, Nausori, Fiji, Retired Administrative Officer, as Administrator of the Estate of **AKASH SHANIL SHARMA**, late of Chaudhary Drive, Koronivia, Nausori, Fiji.

**FIRST PLAINTIFF**

**AND:**                         **BAADAL PRASAD SHARMA** of Chaudhary Drive, Koronivia, Nausori, Fiji, Legal Officer, as Beneficiary of the Estate of **AKASH SHANIL SHARMA**, late of Chaudhary Drive, Koronivia, Nausori, Fiji.

**SECOND PLAINTIFF**

**AND:**                         **SAGAR SHANIL PRASAD SHARMA** of Kalokalo Crescent, Nasinu, Fiji, Unemployed.

**DEFENDANT**

**BEFORE:**                   **Hon. Mr. Justice Vishwa Datt Sharma**

**COUNSELS:**               **Mr. Young M.    -   for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs**  
                                  **Mr. Nair D        -   for the Defendant**

**Date of Decision:**       **Thursday, 25<sup>th</sup> January, 2024 @ 9.30am**

**DECISION**

*[Originating Summons for Substantive Orders And Summons to Strikeout Plaintiffs Originating Summons and Notice of Motion]*

**[A] INTRODUCTION**

1. The First and Second Plaintiffs filed an Originating Summons and a Notice of Motion coupled with the First Plaintiff's Affidavit in Support on 29<sup>th</sup> July 2019 and sought for the following Orders:
  - (a) *The Defendant to furnish and verify full accounts of all income and expenses from 17<sup>th</sup> April 2018 of the partnership business, KASH, HIRE AND RENTALS;*
  - (b) *The Defendant to verify all such accounts by ways of affidavit evidence;*
  - (c) *The Defendant to pay 50% profit of the partnership business to the First Plaintiff received since 17<sup>th</sup> April 2018;*
  - (d) *The Defendant to pay off Loan obtained on 23<sup>rd</sup> April, 2018 after the death of Akash from Fiji Development Bank and the Estate should not be liable;*
  - (e) *The payment of the sum of money in the Loan Agreement to the First Plaintiff, refer to as Annexure 6 in the Affidavit in Support of the First Plaintiff;*
  - (f) *The successor of the Estate of Akash Shanil Sharma, namely Second Plaintiff be admitted as a new partner in the partnership business;*
  - (g) *Alternatively, if Order 6 sought is not viable then the ownership of the business to be transferred to the Second Plaintiff;*
  - (h) *Alternatively, if Order 6 and 7 sought is not viable, then the partnership be dissolved and sold to an independent third party at the agreement of both the Defendant and the Plaintiff. The profit of this transaction to be given to the Second Plaintiff;*
  - (i) *The cost of this application be paid by the Defendant;*
  - (j) *Any other relief or orders that this Honourable Court may deem just and fit to make.*
2. *This application is made pursuant to section 10, 30, and 34 of the Partnership Act 1910 and Order 85 of the High Court Rules and the inherent jurisdiction of this Honourable Court.*
3. Subsequently, the Defendant filed his Summons and the Affidavit in Support on 12<sup>th</sup> August 2019 seeking to strikeout the Plaintiffs Originating Summons and the Notice of Motion.

**[B] BACKGROUND**

- Akash Shanil Sharma passed away on 17<sup>th</sup> April 2018.
- The Plaintiff Sashi Prasad as the Administrator of his Estate vide Letters of Administration Grant No.62841 on 06<sup>th</sup> November 2018.

- Akash, Second Plaintiff and the Defendant are the Plaintiff's children.
- The Second Plaintiff is the Beneficiary of Akash's Estate as the Successor of Akash in the partnership business namely, KASH, Hire and Rentals.
- A partnership agreement was executed between the Defendant and Akash Shanil Sharma (Elder Brother) on or about 07<sup>th</sup> March 2017. The agreement was for the establishment of a rental car business and finance was sought from the Fiji Development Bank.
- The partnership agreement provided that each partner (Sagar Shanil Prasad Sharma and Akash Shanil Sharma) in the business was to share 50% profit and loss.
- Partnership agreement did not have a clause as to what happens to the business upon the demise of any partner. Section 34 of the Partnership Act 1910 applies which states;

*"that subject to an agreement between the partners, every partnership is dissolved after the death of any partner" (underline is mine).*

- A loan was taken from FDB Bank. The bank required 20% deposit of \$18,860.00 for 5 rental vehicles before the loan was approved. The Plaintiff paid the deposit of \$18,860.
- The Plaintiff has been advised that the Estate is equally liable to pay the FDB loan which the business has taken from FDB.
- That pursuant to Section 10 of the Partnership Act 1910, the Estate is equally liable in a due course of administration for debts and obligations of the rental business.
- Akash Sharma was involved in an accident on 15<sup>th</sup> April 2018, thereafter hospitalised and took demise on 17<sup>th</sup> April 2018.
- The Plaintiff seeks the Orders as per the Substantive Originating Summons and Notice of Motion whereas the Defendant is seeking for striking out of the Plaintiff's Substantive Originating Summons and the Notice of Motion.

#### **[C] DETERMINATION**

4. This action arises out of a family partnership agreement executed between the two brothers, Akash Shanil Sharma and Sagar Shanil Prasad Sharma executed on 07<sup>th</sup> March 2017.
5. There are three applications for this Court to determine:
  - i. Substantive Originating Summons filed by the First and Second Plaintiff;

- ii. Notice of Motion filed by the First and Second Plaintiffs; AND
  - iii. Defendant's Summons to strikeout the Plaintiff's Originating Summons and the Notice of Motion.
6. The substantive Originating Summons hinges on the Partnership Agreement executed on between the two brothers, the Defendant, Sagar Shanil Prasad Sharma and the deceased, Akash Shanil Sharma on 07<sup>th</sup> March 2017. (Annexure "SP4" within the Affidavit of the Plaintiff, Sashi Prasad).
  7. Whereas, the Summons to Strikeout the Plaintiffs substantive Originating Summons is sought on the grounds of: *no reasonable cause of action, scandalous, frivolous and vexatious and an abuse of the process of this Court.*
  8. Upon the demise of the Plaintiff's son, Akash Shanil Sharma on 17<sup>th</sup> April 2018, Father, Sashi Prasad was issued with a Letters of Administration Grant no. 62841 in Akash Shanil Sharma's Estate on 06<sup>th</sup> November 2018 vide Letters of Administration Application No.62841.
  9. Plaintiff, Sashi Prasad was removed as the Administrator of the deceased's Estate of Akash Shanil Sharma on 14<sup>th</sup> December 2021 vide HPP Action No. 72 of 2021.
  10. On 08<sup>th</sup> February 2022, the Second Plaintiff, Baadal Prasad Sharma was granted with the subsequent Letters of Administration Grant in the Estate of Akash Sharma vide Letters of Administration Application No.68762.
  11. The issues for this Court to determine are:
    - Whether the Defendant, Sagar Shanil Prasad Sharma should pay 50% profit of the partnership business to the First Plaintiff, Sashi Prasad since 17<sup>th</sup> April 2018?
    - Whether the Defendant should pay off the loan obtained on 23<sup>rd</sup> April 2018 after the death of Akash Shanil Sharma from Fiji Development Bank and the Estate of Akash Sharma should not be held liable?
    - Whether the successor of the Estate of Akash Shanil Sharma, Second Plaintiff, Baadal Sharma be admitted as a new partner in the partnership business?
    - Whether the ownership of the business should be transferred to the Second Plaintiff, Baadal Prasad Sharma?
    - Whether the partnership between the two brothers Akash Shanil Sharma and Sagar Shanil Prasad Sharma be dissolved and sold to an independent third party at the agreement of both, the Defendant and the Plaintiff and the profit of this transaction to be given to the Second Plaintiff, Baadal Sharma?

**[D] THE LAW**

12. Reference is made to Sections 10, 30 and 34 of the Partnership Act 1910:

**"Section 10 provides - Liability of partners and their estates**

*10. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied but subject to the prior payment of his separate debts."*

**Section 30 provides - Accountability of partners for private profits**

*30.-(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connexion.*

*(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner and before the affairs thereof have been completely wound up either by any surviving partner or by the representatives of the deceased partner.*

**Section 34 provides Dissolution by bankruptcy, death or charge**

*34.-(1) Subject to an agreement between the partners every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.*

*(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt."*

13. It cannot be disputed that the Partnership Agreement executed on 07<sup>th</sup> March 2017 between Akash Shanil Sharma and Sagar Shanil Prasad Sharma had a commencement date of execution of the Partnership Agreement of 07<sup>th</sup> March 2017 and shall continue thereafter. However, it did not provide for a termination date.
14. In absence of any termination date, **Section 34(1)** of the **Partnership Act 1910** kicks in and becomes operational, that is, "**...every partnership is dissolved as regards all the partners by death or...**".
15. The Defendant in his Affidavit filed on 02<sup>nd</sup> September 2019, has agreed at paragraph 14 "**that the partnership has been dissolved after the death of Akash Shanil Sharma**".
16. The Partnership Agreement did not have any clause as to what happens to the business after the death of any partner. Therefore, **Section 34** of the **Partnership Act 1910** applies, which states that "subject to an agreement between the partners, every partnership is dissolved after the death of any partner."

17. The Partnership Agreement between the Defendant and Akash provided that each partner in the business has a share of 50% profit and loss.
18. **Section 40** of the **Partnership Act 1910** requires that unless there is a Partnership Agreement to the contrary in existence, on the dissolution of a partnership, the assets of the partnership business must be sold and this money must be divided amongst the partners in the shares in which they may be entitled to.
19. According to the Plaintiff, the Defendant, Sagar Shanil Sharma collected the loan funds from the Fiji Development Bank after the death of Akash Shanil Sharma. He added that **Section 15** and **Section 44** provide that the Estate of Akash Shanil Sharma is not to be held liable for the debts taken by the Defendant including the loan from the Fiji Development Bank after Akash Sharma's death.
20. The Plaintiff alleges **fraud** against the Defendant. The Plaintiff's contention is that since Akash Sharma's signature was present in the release form authorising the release of the funds on 16<sup>th</sup> April 2018 and that Akash Sharma was hospitalised at that very time, the Defendant took the loan **dishonestly and fraudulently**. The Defendant on 23<sup>rd</sup> April 2018 collected the funds loaned from the Fiji Development Bank and that this further confirms the **dishonest and fraudulent conduct of the Defendant**. Therefore, the Defendant, Sagar Shanil Prasad Sharma alone should be liable to repay the loan from the Fiji Development Bank and that the Estate of Akash Sharma should not be held liable.
21. Reference is made to the case of **Reddy v Reddy Construction Company Ltd [2008] FJHC 301; HBC0078.2000L (29 August 2008)** states the following:

**"Indefeasibility and fraud**

[19] The onus of proving fraud rests with the party alleging it. The onus of proof, whilst still on the balance of probabilities, requires 'a higher degree of probability'. [2] Motive is never enough. A circumstantial case must be more than mere conjecture or surmise. [3] The evidence must be clear and convincing and not of 'inexact proofs, indefinite testimony and indirect inferences'. [4] There must be something in the nature of moral turpitude and personal dishonesty. [5] Something must be said of the plaintiff's pleadings. Paragraph 10 of the claim purports to list eight 'particulars of fraud' supporting the general allegation that the Declaration of Trust was illegal and fraudulent. The so-called particulars pleaded consist of nothing more than bare allegations which do not in any way sufficiently set out facts of moral turpitude and personal dishonesty on the part of Mr. Pillay and Mr. Y. P. Reddy. Paragraph 16 of the claim purports to set out nine 'particulars of fraud' supporting the general allegation that Mr. Y. P. Reddy fraudulently and acting in collusion with the company was guilty of unconscionable conduct towards the plaintiff and unjust enrichment. Again the alleged fraudulent conduct consists of general allegations which are insufficient to amount to an averment of fraud. For example how could paragraph 16 (b) 'failing to pay rent with respect to the occupation of the said land' amount to fraudulent conduct? How could (d) 'refusing to allow the plaintiff access to the said land' amount to fraudulent conduct? The same observations are made in respect of the general allegation of fraud and the twelve particulars pleaded at paragraph 18 of the amended statement of claim.

Of the twelve particulars pleaded there is not a single fact disclosed of dishonesty or moral turpitude. I concur with Mr. Young that the plaintiff has recklessly referred to the word fraud without any further allegation of facts supporting a charge of fraud."

22. In the current case, the First and Second Plaintiffs commenced the proceedings by means of a Substantive Originating Summons, which cannot be disputed is a summary proceedings, usually determined on Affidavit evidence filed by the parties to the proceedings to this Court to determine the issues therein.
23. Since there are triable issues raised herein, in particular that the Plaintiffs allege fraud against the Defendant which is a wrongful or criminal deception intended to result in financial or personal gain.
24. This is a serious allegation and the onus of proving the allegation of fraud rests with the Plaintiffs since they are the party alleging fraud on the part of the Defendant. No doubt it requires a higher degree of probability in proving the same.
25. In the circumstances, this Court holds that due to the nature of the triable issues raised by the parties, in particular fraud, it is only appropriate that this Court need to hear "viva voce" evidence from witness(s) in order to determine the pending issues and the Orders sought within the impending Substantive Originating Summons and the Notice of Motion filed herein.
26. In the interim, I have no alternative but proceed to dismiss the Plaintiffs Substantive Originating Summons and the Notice of Motion filed on 29<sup>th</sup> July 2019.
27. Further, the Defendant's Summons filed on 12<sup>th</sup> August 2019 seeking to strikeout the Plaintiffs Substantive Originating Summons and the Notice of Motion is accordingly dismissed.

#### **[E] COSTS**

28. The matter proceeded to full hearing of the Plaintiffs' Substantive Originating Summons and the Notice of Motion coupled with the Defendant's Summons to strikeout with parties to the proceedings filing written submissions and making oral submissions before this Court.
29. It is only just and fair that the parties to the proceedings bear their own costs of the action accordingly.

#### **[F] ORDERS**

1. The Plaintiffs' Substantive Originating Summons and the Notice of Motion filed on 29<sup>th</sup> July 2019 is accordingly dismissed in its entirety.

2. The Defendant's Summons filed on 12<sup>th</sup> August 2019 seeking to strikeout the Plaintiffs Substantive Originating Summons and the Notice of Motion in the like is also dismissed.
3. Each party to the proceedings to bear their own costs at the discretion of this Court.
4. The file is closed.

Dated at Suva this 25<sup>th</sup> day of January, 2024



  
VISHWA DATT SHARMA  
JUDGE

cc: Pacific Chambers, Suva / (Sashi Prasad, Koronivia, Nausori)  
Pacific Chambers, Suva / (Baadal Prasad Sharma, Koronivia, Nausori)  
Nilesh Sharma Lawyers, Suva (Sagar Shanil Prasad Sharma, Kalokalo Crescent, Makoi)P