

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 762 of 1980

Between:

JOHN GIRDHARI LAL
s/o Deo Narain

Plaintiff

- AND -

TURBERT DUTTA
s/o Bhagwan Ram Dutta

Defendant

Action No. 413 of 1982

Between:

JOHN GIRDHARI LAL
s/o Deo Narain

Plaintiff

- AND -

1. TURBERT DUTTA
s/o Bhagwan Ram Dutta

Defendants

2. VIRENDRA CHANDRA DUTTA
s/o Bhagwan Ram Dutta3. VEECE ENTERPRISES LIMITED
a limited liability company
having its registered office
at Suva.

Mr. S.M. Koya for the Plaintiff
 Mr. K.C. Ramrakha for the 1st Defendant
 Mr. H.M. Patel for the second and third defendants.

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J U D G M E N T

These two actions were consolidated and tried together and it was agreed by counsel that only the issue of liability be tried in both actions and that, if the defendants or any of them are held to be liable to the plaintiff in damages, that the Chief Registrar assess the damages.

The Indorsement of Claim endorsed on the writ in the earlier action is a most unusual one and reads more like a Statement of Claim. It can not be said to comply with Order 2 rule (1)(a) of the Rules of the Supreme Court which calls for the writ to be endorsed "with a concise statement of the nature of the claim made or the relief or remedy required in the action...."

The prolixity of the Indorsement has this advantage so far as this judgment is concerned. It sets out in some detail the facts alleged by the plaintiff in support of his claim and is as follows:-

"The Plaintiff says that the Plaintiff and DAVID PREM CHANDRA son of Hiralal were partners of the firm known as "CLASSIC HOME FURNISHERS" for a number of years before 21st January, 1977, that as at the aforementioned date the Defendant was an Accountant assisting the book-keeping work of the said firm, that the Defendant fraudulently inserted his name as a partner when the said firm applied for the registration of the change in the composition of the said firm with the intention of showing that the Plaintiff and the said DAVID PREM CHANDRA only were the partners thereof, that the said DAVID PREM CHANDRA retired from the said partnership on or about the 16th May, 1977. that on or about the 16th or 17th May, 1977 the Defendant fraudulently caused in an Application for the change in the composition of the said firm following the said DAVID PREM CHANDRA'S retirement only, to be shown that the Plaintiff also retired from the said firm but from that date the Plaintiff says he alone was and has been the sole owner thereof that the Defendant is now falsely claiming that he is the sole owner and partner of the said firm, that during the course of the business, the said firm among other things acquired Crown Lease-hold land No. 4863 known as "Lot 74 Plan S. 1339 Vatuwaqa Industrial Sub-Division containing 1 Rood 04.9 perches" on which there is substantial building and also Crown Lease-Land No. 5348 known as "Lot 26 on Plan S. 1339 Vatuwaqa Industrial Sub-Division and containing

18.3 perches on which there is a substantial building that at all material times the said firm carried on business of making furniture, maintenance of building and internal decoration and partitioning of buildings and there now subsists a dispute as to who the rightful partners of the said firm are and as to the ownership of the said Leasehold lands and other properties belonging to the said firm and the Plaintiff WHEREFORE claim:-

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- (a) A declaration that as from 25th May, 1977 that the Plaintiff has been and is the sole rightful partner of the firm known as "CLASSIC HOME FURNISHERS".
 - (b) A declaration that the said Crown Leasehold lands and all other goods, chattels and stock acquired by the said firm as "CLASSIC HOME FURNISHERS" are the properties of the said firm and that the Defendant has held them as a constructive Trustee for and on behalf of the Plaintiff.
 - (c) An Order that the Defendant do carry Transfer and assign to the Plaintiff all the aforementioned properties and execute registrable transfers under the Land Transfer Act in respect of Crown Lease No. 4863 and Crown Lease No. 5348 as and when demanded by the Plaintiff.
 - (d) Further or other relief which this Honourable Court may seem just.
 - (e) Costs of this action."

Many of the stated facts are not in dispute but the plaintiff alleges the defendant acted fraudulently which the defendant, Turbett Dutta, whom I shall hereinafter refer to as Dutta, denies. He denies any dishonesty and alleges that the plaintiff and the said David Prem Chandra retired from the firm known as Classic Home Furnishers leaving him as sole continuing partner or more correctly as sole proprietor of the business and its assets. Since the institution of the earlier action, Crown Lease 5348 (Lot 26) which at one time was mortgageed to the Bank of New Zealand, has been sold by the Bank exercising power of sale under the mortgage. The lease was issued to Dutta "trading as Classic Home Furnishers."

Crown Lease 4863, (Lot 64) was transferred by KOOLSTORE (Fiji) Limited to Dutta on 19th June, 1978 and transferred by Dutta to his brother Virendra Chandra Dutta, one of the defendants, in 1978. The lease was finally transferred to VEECEE ENTERPRISES LIMITED, also one of the defendants, on the 3rd February, 1982.

These transactions gave rise to the second action. The Statement of Claim in that action repeats many of the facts alleged in the prior action and then refers to the transactions in respect of the Crown Leases and alleges a conspiracy between the three defendants to defeat his claim in the prior action and his claim to his interest in Crown Lease 4863.

It appears to me that a decision in the first action in favour of the defendant Dutta will determine the issues in the later action. To a great extent the determination of the issues in the first action will depend on whether the plaintiff or Dutta is to be believed. If credibility is the major issue there would appear to be no legal issues to consider if the plaintiff is not believed.

There are three other major issues in the earlier action as under:-

1. Was Dutta at any time a partner in the firm of Classic Home, and if so
2. Did the plaintiff and the said David Prem Chand retire from the partnership leaving Dutta sole proprietor of the business, and if so
3. Did Dutta procure admission to the partnership and/or the retirement of the plaintiff and/or the said David Prem Chand by fraudulent and dishonest means as alleged by the plaintiff.

In dealing with the first issue I will also consider the third issue so far as it affects the first issue.

There is no dispute that the plaintiff and the said David Prem Chand were partners in the firm known as Classic Home Furnishers for some time before the 21st January, 1977.

Those two partners applied for Registration under the Business Names Act by application (Exhibit B1) dated 25th November, 1975. The date of the commencement of the business is recorded as the 1st November, 1975.

The next relevant document (Exhibit B2) is a certified true copy of the Statement of Change of the registered particulars of the said firm effected by the application dated 25th November, 1975.

One change which is not in dispute is the entry showing the change of the locality of the principal place of the business. On the initial registration the particulars show "555 Kings Road, Suva". The second document indicates that on 1.11.76 that address was changed to "State Theatre Basement, Ratu Mara Road, Samabula, Suva."

The other change is the recording of Dutta, whose occupation is given as "Accountant", as a new partner. The date of change stated is 1.1.76. The document is dated 21st day of January, 1977 and is signed by all three partners, that is the two parties to the first action and the said David Prem Chand.

In respect of B2 the plaintiff pleaded as follows:-

"THAT in the month of January, 1977 the Defendant by false representations and without the Plaintiff's knowledge as to the Defendant's true intention obtained the Plaintiff's signature as well as that of the said DAVID PREM CHAND on a document and stated that the said document was necessary to register the firm as a limited liability company under the Companies Act. The Plaintiff

and the said DAVID PREM CHAND did not know the true nature of the said document whereas the Defendant did. The Defendant made the said representations well knowing that they were untrue or false or not caring whether they were true or not. The said false representations were made with the intention to induce the Plaintiff and the said DAVID PREM CHAND to execute the said document. The Defendant did not explain the true nature of the said document or the contents thereof to the Plaintiff and the said DAVID PREM CHAND. The Plaintiff did not come to know the true nature of the documents until sometime before the Writ of Summons was issued in this action. At no time before or at the time of the signing of the said document the Plaintiff or the said DAVID PREM CHAND agreed that the Defendant should become a partner in the said firm. It later transpired that the document was a Statement of Change in the composition of the said firm. The said document was prepared by the Defendant and he had the same registered under Registration Number 1304 on 21st January, 1977 under Registration of Business Names Act, Cap 218. In it, he had falsely shown he was an incoming partner."

David Prem Chand was not called as a witness by the plaintiff or Dutta.

It is not in dispute however, that David Prem Chand was literate. He could read and write and speak English. On more than one occasion the plaintiff stated that David Prem Chand had told him about a document the plaintiff wished him to sign, whereas the plaintiff alleges he is uneducated and can only sign his name and can not otherwise read or write other than figures. His reading ability, he said, is limited but he could read a ruler but he has, he says, little knowledge of English.

There is no evidence before me that David Prem Chand did not understand and know what he was doing when asked by Dutta to sign B.2. On the face of the documents which he did sign David Prem Chand must be taken to have concurred in Dutta being admitted into the partnership.

When the plaintiff came to give evidence regarding B.2 he admitted his signature was on the document. He

mentioned an alleged fact which should have been pleaded. He first contended that when B.2. was first presented to him to sign by Dutta the "page was empty" in other words blank.

Quite apart from the unfavourable impression the plaintiff created as to his credibility, B.2. itself establishes beyond any doubt that he was not telling the truth about being presented with a piece of blank paper to sign. There are five corrections on the second page of B.2. which are all initialled by the three partners, David Prem Chand, the plaintiff and Dutta.

Two of those five corrections relate to amendments regarding Dutta's particulars - corrections to the name and his address. The plaintiff was shown the five corrections and he acknowledged his initials by ringing his initials with red pencil.

I do not accept the plaintiff's story that he was presented with a piece of blank paper and was tricked into admitting Dutta into the firm as a partner.

There are other documents put in by the plaintiff himself which indicate without any doubt that Dutta was admitted into the partnership.

Barclays Bank Partnership Form dated 23.12.75 which was signed by the 3 partners commences as follows:-

"We, the undersigned TURBETT DUTTA f/n B.R. DUTTA, JOHN GIRDHARI LAL f/n DEO NARAYAN and DAVID PREM CHAND f/n HARILAL being the individual partners trading under the style or firm of CLASSIC HOME FURNISHERS (hereinafter called 'the firm' appoint you our bankers....")

When David Prem Chand retired from the partnership, to which I will refer later, the plaintiff and Dutta signed a similar bank form dated 27/11/79 in respect of the firm's

account with the Bank of New South Wales in which they disclosed that they were the only partners in the said firm.

I do not believe the plaintiff on this issue. His allegation of fraudulent conduct by Dutta has not been established. The clear documentary evidence refutes the plaintiff's allegation that Dutta was never a partner.

On the first issue I hold as a fact that Dutta was admitted into the partnership as a partner with effect from 1.1.76. This change was recorded on 21st January 1977 when B.2 was registered.

The second issue is concerned with two documents. In order of time the first is a purported dissolution agreement signed by the three partners dated 17/5/77 (Exhibit B.22) and the second (Exhibit B.3) is a further application, also dated 15/5/77, recording the alleged retirement of the plaintiff and David Prem Chand from the firm.

The plaintiff makes no mention of B.22 in his pleadings but he does refer to B.3 in terms similar to those expressed in relation to the earlier alleged fraudulent conduct. He pleaded as follows:-

"THAT sometime in the early part of May 1977, the said DAVID PREM CHAND intended to retire from the said firm. The said DAVID PREM CHAND consulted the Defendant on the subject. On or about the 16th or 17th of May, 1977, the Defendant fraudulently made representations to the Plaintiff and the said DAVID PREM CHAND that the document which the Defendant was producing to them for execution was a document which showed that the said DAVID PREM CHAND was retiring from the said firm and the Plaintiff was remaining as the sole partner thereof. The Plaintiff and the said DAVID PREM CHAND did not know the true nature of the document or its contents but on the faith of the representations made by the Defendant the Plaintiff and the said DAVID PREM CHAND executed the same. The Defendant made the said representations well knowing that they were untrue or false or not caring whether they were true or not. The said representations were

made with the intention of inducing the said Plaintiff and the said DAVID PREM CHAND to execute the same so as to enable the Defendant to become the sole partner. The said document was prepared by the Defendant and it now shows that he had inserted that the Plaintiff and the said DAVID PREM CHAND were retiring from the said firm and the Defendant was remaining as the sole continuing partner thereof. The Defendant caused the said document to be registered as a Statement of Change of particulars under the said Act under Number 14239."

When the plaintiff was shown B.22 he admitted his signatures thereon but said only his and David Prem Chand's names were on the document when he was asked to sign and he signed because he knew David Prem Chand was leaving the business. He did not on this occasion plead or allege the document was otherwise a blank. The inference to be drawn from what he said in evidence is that Dutta added his name after the plaintiff signed. A perusal of the document indicates that it was quite impossible to add Dutta's name. It appears twice in the body of the agreement.

Prem Chand, as stated earlier, was literate. He has not come forward to establish the plaintiff's allegations as pleaded that fraudulent representations were made to him by Dutta. Prem Chand was in fact retiring and did retire.

B.3 which was signed by all three parties on the same day as Exhibit B.22 confirming resignations of the plaintiff and Prem Chand was not registered until 17th June 1977.

There is a very significant alteration to B. 3 which all three partners initialled. The form as typed had omitted that Dutta was a "continuing partner". Those two words were printed in ink and obviously added after the document was typed. The addition was initialled by the three former partners.

In his examination-in-chief when shown B.22 the plaintiff said:

"Dutta gave me document. Dutta explained it to me. He said there was so much debt and I would remain in the firm."

That evidence can not be said to be consistent with or lend much support to the alleged facts he pleaded except that according to the plaintiff he was to remain in the firm.

In cross-examination the plaintiff disclosed that B.22 was prepared to get Prem Chand out of the firm as he was not working. He at first professed not to know who prepared it but his memory as to what he had already said in evidence only a short while before was faulty and let him down on more than one occasion. He went on to state as follows:

"Dutta made the paper and told us about the debt and told David unless you pay this debt you must get out of the business. It was written that \$16,000 was the debt. Dutta told the Company was under debt for \$16,000 he made the paper to show David to chase him out of the Company. I agreed. Before I signed paper Dutta discussed it with me."

The only matter he left out of the story he told on oath was that Dutta falsely told him that the document he was signing left him (the plaintiff) as sole 'partner' or owner of the firm.

The plaintiff's evidence indicates he was made aware of virtually all the facts in B.22 except the crucial fact that he by signing was also retiring.

Throughout his evidence the plaintiff endeavoured to establish that he spoke or wrote virtually no English. I am satisfied he understands a great deal more English than he would admit to.

It was noticeable on more than one occasion while being cross-examined, that he answered a question put to him in English in Hindi before the interpreter had time to interpret the question.

Mr F.S. Lateef, Barrister & Solicitor, who gave evidence for the defendants, testified that he knew the plaintiff and has spoken to him on several occasions. They would always converse in English. He said plaintiff had no difficulty in speaking or understanding English. Mr Lateef had met the plaintiff a few weeks before and on that occasion the plaintiff spoke in Hindi.

One more matter that leaves me in no doubt and confirms my view of the plaintiff's lack of credibility is the plaintiff's affidavit prepared by Mr Koya's firm which was sworn on the 28th September 1981 and filed in support of his application for an interim injunction.

The jurat to that affidavit is as follows:-

" Sworn by the said John Girdhari Lal at
Suva this 28th day of September, 1981."

Mr Koya is far too experienced a practitioner to prepare or have prepared an affidavit for a client who is alleged to be virtually illiterate and understanding very little English which is in breach of Order 41 rules 1 and 2 Rules of the Supreme Court. Mr Koya made use of this affidavit as evidence and would have been aware that it could not be so used without the mandatory form of certificate required by Order 41 r.2. if in fact his client was illiterate or spoke virtually no English.

Mr Lateef who took the plaintiff's oath had no need to alter the jurat to indicate he had read over and explained the contents of the affidavit to the defendant in the Hindi language.

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I could continue giving further examples of facts and evidence that support my view that the plaintiff is entitled to no credence except where documents and admissions by the defendant, Dutta, indicate that the plaintiff is telling the truth.

I am satisfied and find as a fact that both the plaintiff and the said David Prem Chand retired from the business on the 16th May, 1977 and that from that date Dutta owned and continued the business with the plaintiff assisting him on the practical side.

I am further satisfied that the plaintiff has failed to establish his claim that Dutta acted dishonestly by falsely or fraudulently misrepresenting the nature of documents which the plaintiff was asked to sign resulting firstly in Dutta becoming a partner in the firm and secondly in the resignation of the plaintiff and the said David Prem Chand from the firm.

In action 762 of 1980 the plaintiff is not entitled to any of the three declarations he seeks and his claim is dismissed with costs to the defendant Dutta.

My finding in this action results in the plaintiff's claim in action 413 of 1982 also being dismissed where the claims to relief are very similar.

I hold as a fact that the plaintiff at no time had any interest in Crown Leases 4863 and 5348 both of which were acquired by Dutta in 1978 more than a year after the plaintiff had retired from the business.

I have in considering the issues in this case placed little reliance on the evidence given by Dutta. He is an educated intelligent man and most of his evidence was given in a credible manner and is supported by documentary evidence. He appeared a very good witness.

The reason for ignoring his evidence is his refusal, on the advice of his Counsel, to answer questions which might have incriminated him. This refusal arose when Dutta was being cross-examined about the financial information about the firm given by him when applying for a loan from the Fiji Development Bank. Although no mention was made of what offence Dutta may have committed, Mr Ramrakha no doubt had in mind section 41 of the Fiji Development Bank Act relating to penalties for false statements when seeking a loan from the Board.

I am however satisfied from documentary evidence that Dutta applied for the loan in his own name and acquired the two leases in his own name and not as trustee for the plaintiff. I am also satisfied from documentary evidence that all payments were made by him in respect of the mortgages he executed and the second hand machinery he purchased. Exhibit B.12 is a bundle of receipts. All but 1 receipt has only Dutta's name as being the payor. I am satisfied also that sale to his brother V.C. Dutta, one of the defendants, of CL. 4863 was for valuable consideration and was not sold below the then market value of the property.

The plaintiff's claim against the three defendants in action 413 of 1982 is also dismissed with costs to the defendants.

The second defendant in Action 413 of 1982 counter-claimed for damages.

The plaintiff made no effort to establish the alleged conspiracy by the three defendants. Documents were put in by consent but no evidence was led on this issue.

Mr Patel decided to call no witnesses. He did not however formally abandon or withdraw the counterclaim and the plaintiff is therefore entitled to have it dismissed with costs.

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The counterclaim is dismissed with costs to the plaintiff.

When these actions were adjourned for consideration of the judgment on the 24th of June 1985 Counsel agreed that there should be written submissions by 31st July, 1985 and an order to that effect was accordingly made.

Counsel for the defendants had their submissions in before that date but Mr Koya's Submissions was not filed until 10th September, 1985.

It is appreciated that he is an extremely busy man.

This judgment had been written and engrossed before Mr Koya's submissions running into 54 pages were received.

I have read and considered Mr Koya's submissions into which he has put a lot of effort. If I had accepted the plaintiff's story it would have been necessary to consider legal issues and the cases relied on by Mr Koya.

I have not only read his submissions twice but I have for the fourth time read the record of the evidence given at the hearing.

One reason for reading the Record again was Mr Koya's statement on page 1 of his Submissions that "The plaintiff and the first defendant were cousins...". This statement was made to lend support to the statement that "the plaintiff relied on him heavily when it came to preparation of documents."

I have no recollection of this stated kinship and I have no record of it having been stated.

The evidence the plaintiff gave was that he came to know Dutta before 1976 but he did not know him well.

and he was not his (the plaintiff's) friend at that time. This evidence does not indicate the parties were cousins.

Another statement made by Mr Koya on the first page is that the plaintiff asked the first defendant Dutta, to prepare necessary papers "when he wanted his firm converted into a limited liability company."

That statement would seem to indicate that the subject of incorporation was raised by the plaintiff. The evidence he gave, however, was that Dutta advised that a limited liability company must be formed and they would then have no trouble. Believing he was signing a paper to incorporate the company he signed what he alleged was a document stating that Dutta was an incoming partner.

Mr Koya makes similar remarks about the dissolution agreement indicating that the plaintiff had initiated preparation of "documents to register the retirement of David Prem Chand on the latter's desire to retire."

The story the plaintiff told in Court put all the initiative on Dutta. Far from David Prem Chand wishing to retire the plaintiff told a tale of deception in which he reluctantly concurred in a plan devised by Dutta to get Chand out of the business. He allowed Dutta to mention in the document that the firm owed \$16,000 which he said the firm did not owe.

I had not considered it necessary to state the contents of this agreement earlier in my judgement but the contents to a great extent do highlight the plaintiff's mendacity. It states as follows:-

"This agreement is made amongst Turbert Dutta, John and David Prem Chand. All trading as Classic Home Furnishers.

It is agreed that as at 16th day of May, 1977, the company has incurred debts totalling \$16,000. The total assets estimated is \$9,000 hence leaving a deficit of \$7000 which is to be divided equally by the above three.

So that no further liabilities are incurred it is now agreed that David Prem Chand and John G. Lal are not in a position to pay off the debt, will resign as partners and Turbert Dutta will take the responsibility of paying everyone's debt in full and take over all machinery, plant, tools, stock of raw material, work in progress and debtors in full and he may dispose it in any way he sees fit.

David P. Chand shall take his DYCO Circular saw lathe and DYCO Buzzer and personal tools when leaving.

Dated this 17/5/77 and agreed by:-

David Prem Chand, (Sgd) David P. Chand
Turbert Dutta, (Sgd) T. Dutta
John G. Lal, (Sgd) J. Lal

As stated earlier David Prem Chand was not called as a witness. He was available and was, as the plaintiff stated, in Court when the plaintiff was giving evidence Chand was literate and in all probability read the document he signed. Dutta did not give me the impression that he was a man who would run the risk involved in deceiving Chand. There was no secrecy about any of his actions. The plaintiff would have the Court believe that bank officials and at least three solicitors all failed to disclose or or explain documents he was asked to sign.

I propose to make only one more reference to the facts stated by Mr Koya. He stated on page 4 of his submissions that between 17th May 1977 and June 1978 the plaintiff negotiated with KOOLSTORE FIJI LTD to obtain Crown Lease 4863.

The plaintiff in evidence said he was told that a factory in Vatuwaqa was for sale for \$45,000 which he wanted to purchase. he said it was owned by Ahmed Hussein.

This property was Crown Lease 4863 originally issued to Sayed Ahmed Hussein and presumably transferred by him to his Company in October 1972. The plaintiff made no mention in evidence in Chief about personally doing any negotiating for the property. He stated he never saw any papers and never had any discussions with Ahmed Hussein. In fact he presented a picture, which he painted several times, of not being educated and having to rely on Dutta to do everything.

On 10th March 1978 when Dutta was in India the plaintiff went to Mitchell Keil and Associates, Barristers and Solicitors who were acting for Dutta and signed a letter drafted by Mr Tikaram addressed to the Director of Koolstore Fiji Limited. The letter was as follows:-

"This letter is collateral to the Sale and Purchase Agreement dated 10th March 1978 between KOOLSTORE FIJI LTD AND TURBERT DUTTA trading as CLASSIC HOME FURNISHERS whereby further to CLAUSE 2 of the said Sale and Purchase Agreement it is agreed that time for completion of development of 800 square feet is TWO months from the date hereof PROVIDED that any delay within that two month period caused by circumstances beyond the control of the purchaser such as labour dispute, strike, availability of building material exceptionally bad weather, Act of God, etc., etc., shall not be counted as forming part of the two month period.

Yours faithfully,

Sgd. J. Lal
John Girdhari Lal
for Director."

This letter speaks for itself.

The plaintiff professed not to remember if that letter had been read over and explained to him or that he had seen Mr Tikaram in Mitchell Keil & Associates office.

Mr Tikaram was acting for Dutta and he stated he explained to the plaintiff the nature of the transaction he was handling.

Further perusal and consideration of the Record and the documents and the submissions leaves me in no doubt whatsoever that the plaintiff's story can not be accepted.

No legal issues have to be considered.

The plaintiff's claim against Dutta is dismissed with costs to Dutta.

(R.G.Kermode)

J U D G E

SUVA,

4th October, 1985.