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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 19 of 1981

Between:

1. MOHAMMED TAKI KHAN
2. MOHAMMED JALIL KHAN
3. MOHAMMED YAKUB KHAN
sons of Rahmat Ali Khan

Appellants

and

1. MOHAMMED RAFIQ KHAN
s/o Rahmat Ali Khan
2. MOHAMMED JABBAR KHAN
s/o Mohammed Shafiq Khan
3. MOHAMMED SHARIF KHAN
s/o Mohammed Shafiq Khan
4. MOHAMMED FAROOQ USMAN ALI KHAN
s/o Mohammed Shafiq Khan

Respondents

J. Reddy and B.C. Patel for Appellants.

K.C. Ramrakha and H. Patel for first Respondent.

Ram Krishna for second, third and fourth Respondents.

Date of Hearing: 15th March, 1982.

Delivery of Judgment: 2-9 April, 1982.

JUDGMENT OF HENRY, J.A.

This is an appeal against the dismissal of an action in which appellants claimed to be the proprietors of a partnership business carrying on a public bus service at Lautoka under the style of M.R. Khan Brothers. Of particular importance are the appropriate road service licences relative to such business and the lease of a piece of native land now contained in Memorandum of Lease registered as No.14472. The Supreme Court found that the pleadings and evidence resulted in the Court being "confronted with the very difficult, if not impossible task, of trying to make sense of the mass of confused pleading and relatively small amount of confused and woolly evidence". The only evidence called

was on behalf of appellants. One partner, Mohammed Jalil Khan, the second named appellant, gave evidence. Also called to give evidence was a well-known barrister and solicitor, Mr. S.M. Koya, who at all material times acted for all parties and was familiar with the transactions which are the core of the present litigation. There was no confusion arising from this evidence together with some twenty-six documents which were produced. From this evidence a reasonably clear picture emerged of the relevant transactions except for the early history of the obtaining of the said Memorandum of Lease No. 14472. It is true that a number of important items ought to have been explored. This will appear later in the judgment.

The records show that different versions of the name of the partnership appear but, although one counsel made a point of this, nothing turns on it. They all refer to the same partnership business. The partnership commenced early in 1962 when the road service business of a company called Pioneer Transport Company Limited was acquired. Before proceeding further it is convenient to describe the partners who, from time to time, were members of the partnership. It was a family concern involving five brothers and a son of one brother who was, therefore, a nephew of the others. Without disrespect it is convenient to follow the procedure in the Court below and to call each by his second given name. They are:-

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|-----------------|--|
| (1) First App. | Mohammed Taki Khan referred to as Taki |
| (2) Second " | Mohammed Jalil Khan " " " Jalil |
| (3) Third " | Mohammed Yakub Khan " " " Yakub |
| (4) First Resp. | Mohammed Rafiq Khan " " " Rafiq |
| (5) Second " | Mohammed Jabbar Khan " " " Jabbar |

(Jabbar was the son of Shafiq (No.7))

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|--------------------------|--|
| (6) Third Resp. | Mohammed Sharif Khan referred to as Sharif |
| (7) Mohammed Shafiq Khan | " " " Shafiq |

Shafiq died on July 24, 1976. His executors are Sharif and the fourth respondent. The latter need not be mentioned

again since he is only a nominal party as a representative of Shafiq.

By an agreement dated January 26, 1962 Taki, Jalil, Yakub, Rafiq, Jabbar and Shafiq acquired the said business of Pioneer Transport Company Limited. The partnership had earlier been formed under the name of Khan Brothers Transport and it is stated in the agreement that they were trading under that name. Each partner held a one-sixth share in the partnership assets. The only evidence as to active participation in the running of the business is that Taki and Jabbar were paid employees. Jabbar was the manager. The assets with which the Court is particularly concerned are the road service licences and two adjoining lots of native leasehold land situated in the industrial area of Lautoka. The evidence is not clear, but no doubt the case was conducted on the basis of a claim by appellants that this land was acquired for the partnership business. Just what its use was has not been specifically stated but it appears to be the only land which the partnership held as an asset at the material times.

The changes in the personnel of the partnership can now be set out. As earlier stated the six original partners were Taki, Jalil, Yakub, Rafiq, Jabbar and Shafiq.

- (1) The first agreement. This is dated April 8, 1965. Rafiq sold his share to Sharif (son of Shafiq). It is important to note that the land is clearly described - a form not followed in subsequent agreements. The description of the property passing is:-

"PROPERTY: Vendor's interest in M.R. KHAN BROTHERS TRANSPORT inclusive of Public Service Vehicles Thames Trader Reg. No. F947, M813, Bedford Buses Nos. 2433, 7831, B340 and C835 together with Road Service Licences Nos. 12/18/14, 12/18/15 and 12/18/23 and all that piece or parcel of land known as Lot 11 and 12 Section 36 comprised in NLTB No. 4/7/2049 (Approval of Lease) situate in the Lautoka Industrial Area. "

- (2) The second agreement. This is dated June 26, 1968. Jabbar sold his share to Taki. The transaction was an exchange because Taki sold to Jabbar the leasehold interest which Taki owned in a different piece of native land under lease no. 12682. This latter transaction was apparently carried out and Jabbar became the owner of said leasehold.
- (3) The third agreement. On July 29, 1968 Sharif sold his share to Jalil.
- (4) The fourth agreement. On October 29, 1968 Shafiq (since deceased) sold his share to Taki, Jalil and Yakub.

From the above transactions the clear result is that Taki, Jalil and Yakub became the remaining partners seemingly in unequal shares. Jabbar must have continued as manager at least until some time in 1969 because in June of that year he prepared the partnership tax return for the year ending December 31, 1968. This return clearly shows in the attached accounts that Taki, Jalil and Yakub were the only partners. Some questions arose concerning the transfer of the road service licences so all the parties concerned signed the following letter:-

"The Secretary,
Transport Control Board,
SUVA.

Dear Sir,

re: M.R. KHAN BROS & ROAD SERVICE LICENCES

We, Mohammed Taki Khan, Mohammed Jalil Khan and Mohammed Yakub Khan wish to declare that we are now the only partners of the firm of M.R. KHAN BROTHERS and we request that the names of all the retiring partners namely Mohammed Jabbar Khan, Mohammed Sharif Khan Mohammed Shafiq Khan and Mohammed Rafiq Khan be deleted from the following Road Service Licences:

1. 12/18/14
2. 12/18/15
3. 12/18/16
4. 12/18/23

We the abovenamed retiring partners of M.R. KHAN BROTHERS do hereby confirm that we are no longer partners of M.R. Khan Brothers and we also request that this application be granted.

Dated the 23rd day of October, 1968.

Yours faithfully,

Existing partners	(1. Sgd. M.T. Khan	(Taki)
	(2. Sgd. M. Jalil Khan	(Jalil)
	(3. Sgd. M.Y. Khan	(Yakub)
Retiring partners	(1. Sgd. M.S. Khan	(Shafiq)
	(2. Sgd. M.R. Khan	(Rafiq)
	(3. Sgd. M. Jabbar Khan	(Jabbar)
	(4. Sgd. M. Sharif Khan	(Sharif) "

I have added the brackets identifying the names used in this judgment.

In the first agreement a specific description of the leasehold interest was given, as set out above, but in all subsequent agreements the sale included "any interest in land". This can only refer to the land mentioned in the first agreement. There is no mention of any other land. This is confirmed by entries in a journal and in partnership accounts which will be referred to later.

Each agreement provided that the vendor would take all steps to vest the road service licences and the land in the sale and purchase, but, of course, in any case such an obligation would be implied by law because the vendor must make out a title to the property which he is purporting to sell.

The first agreement, which described the land, contained the following provisions which are relevant, namely:-

"8. THAT the Purchaser shall as from the date hereof pay for all licences wheel tax insurance land rent and rates and other outgoings whatsoever in respect of the said property.

9. THAT the Vendor and the Purchaser respectively shall make application to the Transport Control Board for the Transfer of Road Service Licences unto the Purchaser. The Vendor agrees to sign the necessary application to transfer the Road Service Licences simultaneously with the execution of this Agreement.

13. THAT this Agreement is subject to the consent of the Transport Control Board and in case of the land hereinbefore referred to the sale is subject to the consent of the Native Land Trust Board. If such consent is not obtained these present shall thereupon become null and void and any moneys paid by the Purchaser to the Vendor shall be refunded. "

The second, third and fourth agreements each contained the following provisions:-

"8. THAT the Vendor hereby agrees to do the following on demand:

- (a) execute all papers and documents required by the Transport Control Board to delete the Vendor's name therefrom and vest the Purchaser's name in his place and such other papers or documents to give full effect to this Agreement;
- (b) execute all papers and documents required by the Licensing Authorities to transfer the registration of all Motor Vehicles owned or operated by the firm of "M.R. KHAN BROS" at the present time to give full effect to this agreement;
- (c) execute and sign all application, assignment and transfer or other legal documents to transfer the Vendor's interest in any land or lands held by the firm of "M.R. KHAN BROS". "

The same mistake by using the word "therefrom" and failing to specify the licences involved has been copied from one document to the other.

The history of the acquisition of a lease of the said native land has not been properly proved, and, to some extent it is a matter of inference. The ordinary procedure is for an application for a lease to be made to the NLTB (referred to as "the Board"). It seems that the Board was

developing an industrial area with a subdivision of native land into lots each containing 27.2 perches. Such an application, in respect of Lots 11 and 12, must have been made some time in 1962 because, in the event, the lease which was ultimately granted had a term of years which commenced on January 1, 1963. It is common knowledge that the Board issues an approval notice granting provisional approval of the lease applied for. Possession usually follows shortly afterwards. In due course a registerable memorandum of lease is prepared for execution, and, when executed it is duly registered. Neither the application nor the approval notice was produced in evidence, but, when the memorandum of lease was prepared it was in the names of Yakub and Jabbar only. The Board executed the lease as lessor and Yakub and Jabbar executed it as lessees. The lease is dated March 7, 1973 - about eleven years after the application was approved.

There is ample proof that this lease refers to the approval notice more particularly described in the first agreement and set out above. The lease states that a sum of £400 had been paid as a premium. Decimal currency became the official currency of Fiji on January 13, 1969 which is some four years before the lease was executed. The rent is also expressed in sterling being £100 per annum payable half yearly on January 1 and July 1 in each year. The journal of the partnership (which was produced by counsel for Jabbar, Sharif and the executors of Shafiq) shows the following entry for December 31, 1963 - apparently the accounts for the year ending on that date:-

Land NLTB	450
NLTB rent	151-10-6

For December 31, 1964 the entry is:-

Rent and rates	151-10-6
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The Board's reference number which appears in the description of the land in the approval of lease set out in the first agreement also appears on the lease itself. The description of the land is identical in the first agreement and the lease.

Jabbar sold his interest in the partnership on June 26, 1968 (vide the second agreement). The copy of the partnership income tax return, purported to be prepared by Jabbar, for the year ending December 31, 1968 shows an asset as "Land £450". This obviously refers to the journal entry in 1963 "Land NLTB £450". In the same return Jabbar is responsible for an entry showing that the only partners are Taki, Jalil and Yakub. The inference is irresistible that the land referred to in the second agreement is the land in the said approval of lease (described in the first agreement) and that Jabbar as manager knew the partnership had paid the premium of £400 (the balance £50 is probably the first half-years rent) and that this was the only land that the partnership held and that the partnership, managed by him, was paying the rent and other outgoings.

In his statement of defence Jabbar claimed that the land in the lease was held by himself and Yakub for their own personal use and benefit. His counsel repeated that claim in this Court. Jabbar failed to produce any evidence either to prove he had ever paid one penny for the said lease or the rent or rates payable under it or that he had ever personally occupied the land or derived any income from it. If he did essay to give evidence he would have been in great difficulties to explain the entries to which attention has been drawn or to refer to any land held by the partnership other than the land in the lease now under consideration. His claim is fraudulent. The clear finding of fact which emerges, is that he and Yakub acquired the lease of the said land, first by means of an approval of lease and then by a formal memorandum of lease registered as no. 14472, as trustees for and on behalf of the partnership. The partnership paid by way of a premium a sum of £400 and all rent and outgoings have since been similarly paid. I find also that the land in lease no. 14472 is the land referred to in the second, third and fourth agreements. The land in the first agreement is clearly identified with lease no. 14472.

Mr. Koya acted as solicitor for Rafiq when the present action was commenced. He filed an amended statement of defence and counter-claim upon which the action ultimately came to trial. The action, of course, had been brought by three of the partners for whom Mr. Koya had previously acted as solicitor when the first, second, third and fourth agreements were drawn up. Each of these agreements required the consent of the continuing partners to the change in the personnel of the partnership. The effect of the said four agreements was that Mr. Koya purported to draw up documents which assigned to Taki, Jalil and Yakub the interest previously held by Rafiq, Jabbar, Sharif and Shafiq. Notwithstanding this the pleadings filed alleged that the agreements affecting Rafiq's share were illegal because legal formalities, as to consents and otherwise, necessary to perfect the assignments had not been carried out. Rafiq made the remarkable claim in a counter-claim for the following relief:-

- "(a) The sum of \$4,000.00 from the Third Plaintiff.
- (b) An account of all moneys of M.R. Khan Bros Transport Company which has been received by the Plaintiffs since 1973 and the manner in which the Plaintiffs have applied the said money.
- (c) An inquiry as to what balance of the said money remains in the Plaintiff's control after giving credit for all money properly expended in the running of the said business.
- (d) An Order that the Plaintiffs do pay to the First Defendant such sums as may be found due upon taking the said account. "

The counter-claim was amended by Mr. Ramrakha during the trial. The claim for \$4,000 was dropped but the other claims were pursued together with a claim for the dissolution of the partnership from which Rafiq had withdrawn over thirteen years earlier. By the counter-claim Rafiq sought a share of profits for a period of some 16 years. Also a share of the assets on the dissolution which he sought. His claim was based on an allegation that an agreement for

which he had got good consideration, was illegal and that when his assignee, Sharif, sold that assignment was also illegal. Rafiq was, of course, the principal, if not the only, offender so he was basing his claim on his own illegal act. It was so pleaded as the foundation of his claim. The counter-claim was a blatant and dishonest attempt to recover money to which he must have known he had no moral right. Whether or not he was informed that he could not base a claim on his own alleged illegal act I do not know. No evidence was called by Mr. Ramrakha and the counter-claim was dismissed. It was a claim made without any moral or legal foundation.

The relief which appellants now seek appears in the amended statement of claim as:-

- "(a) For a declaration that the Plaintiffs are the rightful proprietors of "the said Road Service Licences" and Native Lease 14472;
- (b) For an order that the first, second, third and fourth Defendants join the Plaintiffs and do all that may be necessary and/or required by the Transport Control Board to effect the transfer of all the rights title and interests in "the said Road Service Licences" to the Plaintiffs;
- (c) For an order that the second Defendant do all that may be necessary to effectively transfer his one undivided halfshare in Native Lease Number 14472 to the Plaintiffs or any one of them; "

The defences to these claims now put forward are:-

- (1) That the said four agreements are illegal in that
 - (a) the consent of the NLTB has not been given in terms of section 12 of the NLT Act, and,
 - (b) the transactions in respect of the road service licences are in breach of the provisions of the Traffic Act and in particular of section 36 which provides for a penalty.

- (2) That the statute of limitation bars any action, and
- (3) Appellants are guilty of laches and relief ought not to be granted.

In addition, as already stated, Jabbar claimed a joint interest in the lease as his personal property. Some claim was made that because of the use of several slight variations in the name of the partnership some fault existed in the proof offered. It is difficult to know what possible effect these variations can have when it is clear that, whatever variation of name appears, only one partnership was involved in all transactions concerning the assets now in question and the name "Khan Brothers" is a common denominator. Any contention concerning the variation in names is a mere quibble and must be rejected out of hand.

Section 12 of the NLT Act provides as follows:-

"12.(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the twenty-ninth day of September, 1948, to mortgage such lease.

(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee. "

The burden of proof is on those who assert illegality to establish sufficient facts to support the allegation. The formal memorandum of lease which emerged in 1973 (some eleven years after the term of the lease which commenced on January 1, 1963) was in the name of Yakub and

Jabbar. I have already considered the proof concerning the beneficial ownership of the leasehold interest in the said lease and concluded that it was acquired for and on behalf of the partnership and that it is partnership property and so held by Yakub and Jabbar. Section 21(1) of the Partnership Act (Cap.248) provides:-

"21(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of partnership business are called in this Act partnership property and shall be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

Provided that the legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section. "

It remains for the position of the partnership vis-a-vis the Board to be considered. It is a proper finding, as I have already said, that the premium and rent were at all times paid by the partnership. The Board had obviously opened up an industrial subdivision in the general area which was being so developed - so its officers would be expected to know about the occupancy and business of such concerns as the partnership. The payment by the partnership of the premium is an important factor. Moreover it is a proper inference that the Board has received rent from the partnership ever since 1963 - some 18 years and that neither of the named lessees ever made a payment in his own name. I am satisfied that, until the contrary is proved, there is a strong presumption that the Board was well aware that the lease was to the partnership and that the named lessees had never personally paid any of the moneys payable but that all were paid in the name of the partnership. For these reasons it can be imputed that the Board knew it was dealing, not with Yakub and Jabbar

personally, but with them as representatives of the partnership.

In the circumstances a substantial burden lay on respondents, who asserted illegality, to establish to the satisfaction of this Court that there had been a breach of section 12. At least, some responsible officer of the Board ought to have been called. A presumption arises that the transactions have been lawfully carried out. In the state of the evidence, and in the face of the course of conduct over the years to which I have already referred, in my opinion respondents have not established any breach of section 12. This defence is an afterthought put up long years after the events in an unmeritorious attempt to evade their contractual duties to give effect to agreements for which they have received the consideration bargained for. They seek to capitalise on their own default, which, of course, they may do only if the said agreements have been properly proved to be illegal. I find that such proof was not forthcoming in all the circumstances of this case so, in my view, this defence fails.

Except for the claim by Rafiq for a share in the partnership profits and assets on dissolution which claim was dismissed, none of the others has asserted any right to the road service licences. It is unnecessary to trace the numbers of the individual licences or the identity of the service vehicles used in providing services under the licences. It is sufficient to say that in 1972 the road service licences were re-issued for a period of 10 years and at all material times remained in the names of the original six partners, namely, Taki, Jalil and Yakub (appellants) and Rafiq, Jabbar and Shafiq (since deceased) trading as Khan Brothers Transport, Sabeto, Nadi. All attempts by appellants to have the four changes in the partnership reflected in the names appearing on the licences have been frustrated by those who sold their shares in the partnership yet nevertheless kept the consideration therefor. They have refused to carry out

their due obligations in each agreement to take those steps, and, being in default, now claim that, by reason of their default, the obligations under their respective agreements are illegal and void - a self-induced illegality brought about by their own default. Prior consent is not, as in the case of section 12 of the NLT Act, a condition precedent to any sale. Respondents now seek to benefit from their own default. They cannot do so unless illegality is clearly established. There is now no question about the present ownership of the road service licences. It was held in the Supreme Court, and not challenged on appeal, that the intention in the first, second, third and fourth agreements was that Rafiq, Jabbar, Sharif and Shafiq would transfer to Taki, Jalil and Yakub "all the assets (they) had in running the buses". I turn therefore to deal with the question of illegality and whether the agreements can be enforced.

The only provision in the Traffic Act which provides for a penalty, so far as counsel claimed, is section 63 which provides:-

"63(1) Subject to the provisions of this section, no person shall use or cause or permit to be used any motor vehicle as a stage carriage or express carriage except under a licence granted by the Board (in this Ordinance referred to as a road service licence) and in accordance with the terms and conditions thereof.

(2) For the purposes of this section a vehicle used as a stage carriage or express carriage shall not be deemed to be so used under a road service licence unless it is so used by the holder of the licence and in accordance with the provisions thereof.

(3) If any person uses a vehicle or causes or permits it to be used in contravention of this section or being the holder of a road service licence wilfully or negligently fails to comply with any of the conditions attached to that licence, he shall be guilty of an offence."

There is a proviso for personal representatives to continue in the event of the death of a licensee. Except for a

period from 1965 to 1968, when Sharif was a partner, the licences were operated exclusively by partners whose names appear in the original licences. They were quite clearly trading in partnership as referred to in the licences. The Court was not referred to any provision which forbade the operating of the licences in the manner in which, those of the named partners who remained in the partnership, continued to operate. The parties who did so were licensed. They apparently did so in a partnership name clearly referable to the licences. No illegality has been proved. This defence fails.

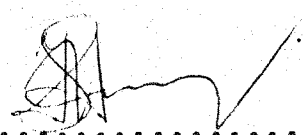
Section 4 of the Statute of Limitations does not apply in view of the fiduciary position of Yakub and Jabbar. As to laches no more need be said than that this defence has no merit. To allow such a defence would only perpetuate a most undesirable state of affairs from which, so it appears from Rafiq's counter-claim and the actions of Jabbar referred to in the judgment of Marsack J.A., the parties might seek to gain some unjust gain or enrichment or to cause possible personal loss and embarrassment to appellants. It is proper for the Court to require respondents to honour their agreements which have been carried out in so far as they have received their considerations and retired from the partnership, yet still hold, in a fiduciary capacity, a portion of the partnership assets.

I would allow the appeal and set aside the dismissal of appellants' action and grant relief as follows:-

- (a) Grant a declaration that Yakub and Jabbar have at all material times held the approval of lease (NLTB 4/7/2049 and memorandum of lease no. 14472, after it was issued some 10 years after the partnership went into possession of the land, in trust under section 21(1) of the Partnership Act, for the members of said partnership and that the members who are now

entitled are the appellants Mohammed Taki Khan, Mohammed Jalil Khan and Mohammed Yakub Khan.

- (b) That respondent Mohammed Jabbar Khan execute all such documents and do all such things as may be necessary for the purpose of vesting memorandum of lease no. 14472 in appellants and for the obtaining of the consent thereto of the NLTB.
- (c) The appellants are the proprietors of road service licences 12/18/14, 12/18/15, 12/18/16, 12/18/23.
- (d) That the respondents Mohammed Rafiq Khan, Mohammed Jabbar Khan, Mohammed Sharif Khan and Mohammed Farooq Khan execute all such documents and take all necessary steps in accordance with each of the said agreements to transfer the said road service licences into the names of appellants.
- (e) Leave is reserved to the appellants to apply to the Supreme Court for such further or other relief as may be necessary for the purposes of carrying into effect the orders made in (a), (b), (c) and (d) above.
- (f) That respondents pay the costs in this Court and in the Supreme Court such costs to be fixed by the Registrar.


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JUDGE OF APPEAL

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction

Civil Appeal No. 19 of 1981

BETWEEN:

1. MOHAMMED TAKI KHAN
 2. MOHAMMED JALIL KHAN
 3. MOHAMMED YAKUB KHAN
Sons of Rahmat Ali Khan
- Appellants

- and -

1. MOHAMMED RAFIQ KHAN
s/o Rahmat Ali Khan
 2. MOHAMMED JABBAR KHAN
s/o Mohammed Shafiq Khan
 3. MOHAMMED SHARIF KHAN
s/o Mohammed Shafiq Khan
 4. MOHAMMED FAROOQ USMAN ALI KHAN
s/o Mohammed Shafiq Khan
- Respondents

J. Reddy and B.C. Patel for Appellants
K.C. Ramrakha and H. Patel for first Respondent
Ram Krishna for second, third and fourth Respondents

Date of Hearing: 15th March, 1982
Delivery of Judgment: 2 APR 1982 1982

JUDGMENT OF MARSACK, J.A.

This is an appeal against the judgment of the Supreme Court sitting at Lautoka on 1st May, 1981, dismissing a claim by the plaintiffs - the present appellants - for a declaration (inter alia) that they are the rightful proprietors of a public service vehicle business, with the appropriate road service licences, and of Native Lease No. 14472. At the outset I am compelled to say that I find it difficult to set out the basic facts upon which the action was founded; and fully concur with what the learned trial Judge states in the course of his judgment:

"As a result the Court has been confronted with the very difficult if not impossible task of trying to make sense of the mass of confused pleading and the relatively small amount of confused or woolly evidence."

At the hearing before the Supreme Court only one of the appellants was called as a witness, and his evidence the learned trial Judge found most unsatisfactory; in his judgment he comments that this witness, Jalil -

"either was being deliberately vague and unhelpful or was incapable of understanding what had been happening to the various parties."

No witness was called for the defence.

In connection with the complicated nature of the facts involved it should be noted that the statements of claim and of defence take up a total of 28 foolscap pages of typescript.

The property in issue in these proceedings consists primarily of a motor bus service with some 21 buses, with 3 road service licences, and a native leasehold No. 14472 comprising 1r. 14.4p. known as section 36 Namoli subdivision. Registered lessees are second appellant and second respondent. The original transport business was that of the Pioneer Transport Company Limited; in 1962 that Company was dissolved and its assets sold to six persons trading as Khan Brothers Transport. It will be convenient, as was done in the judgment of the Court below, to refer to these persons by their second names. They are Shafiq, Rafiq, Taki, Jalil, Yakub and Jabbar. The road service licences in respect of this business were issued in the names of all six members of this partnership; and were re-issued in the same names in 1972. The licences run for a term of 10 years. Shafiq died on 24th July, 1976, Sharif and Farooq being executors and trustees of his estate.

The road service licences held by Pioneer Transport Company Limited were two in number, 1/74/1 and 1/76/1. Those held by those persons named were three in number: 12/18/15, 12/18/16 and 12/18/23. As to how these latter licences were acquired was not shown by the evidence, and the learned trial Judge was unable to make a finding of fact on the point.

On 28th February, 1969 the name "M.R. Khan Transport Company" was registered under the Registration of Business Names Ordinance 1923, the partners in that company being the three appellants. On 18th May, 1973, a company known as M.R. Khan Transport Company Limited was incorporated, the shareholders being the three appellants. After incorporation there was no evidence of anything done by or on behalf of the company. Thus the persons in whose names the road service licences were issued are known collectively under three different titles: M.R. Khan Brothers, M.R. Khan Brothers Transport, and M.R. Khan Transport Company Limited. In the road service licences, however, the three persons named are described as "trading as Khan Brothers Transport".

The dealings with the shares now to be detailed are drawn largely from the documents produced in the Court below, rather than from any parol evidence.

Several transfers of shares in Khan Brothers Transport were entered into by different partners over the years:

On 8th April, 1965, Rafiq sold his "interest in M.R. Khan Brothers Transport inclusive of vehicles, road service licences, and land" to Shariff for 1200 pounds. The agreement was made subject to the consent of the Transport Control Board. There is no evidence that this consent was obtained.

On 26th June, 1968 Jaffar sold his "one-sixth share in the firm of M.R. Khan Brothers" to Taki for 1200 pounds.

On 29th July, 1968 Sharif sold his "one-sixth share in M.R. Khan Brothers" to Jalil for 1400 pounds.

In October 1968 Shafiq sold again his "one-sixth share in M.R. Khan Brothers" to Taki, Jalil and Yakub for 4,000 pounds.

On 23rd October, 1968 appellants and Jabbar, Sharif, Shafiq and Rafiq made application to the Transport Control Board for a declaration that the appellants were the only partners in the firm of M.R. Khan Brothers; but no action appears to have been taken on this.

In 1972 a further application was made to the Transport Control Board for a transfer of the three road service licences to the appellants; but as the application was signed only by five of the six persons concerned the application was not granted. On 19th January, 1972 the three road service licences were renewed until 16th March, 1982, but again in the names of all six persons that had held the original licences.

Late in 1975 a company registered under the name of Taukei Transport Company Limited was incorporated, with Jabbar as Managing Director. On 10th December, 1975 Jabbar applied to the Transport Control Board to have road service licence 12/18/23 transferred to this company; but on objection by appellants, this application was rejected.

In the upshot it would therefore appear clear that for some 12 years appellants have been operating the bus service concerned without any other partners, and without any attempt by any of the respondents - except the futile action by Jabbar in 1975 - to take any part in the running of the business or to share in its profits. This is so whether the business is described as M.R. Khan Brothers, M.R. Khan Brothers Transport, or M.R. Khan Transport Company Limited. The learned trial Judge finds that this was the effect of the transactions among the parties. In the course of his judgment he says:

"From these various agreements I am satisfied that what has emerged is that the intention behind them was eventually to transfer to the three plaintiffs all the buses, all the assets, and interests the other brothers and Jabbar had in the running of the buses."

The three plaintiffs referred to are the three appellants.

Unfortunately this finding is not in itself sufficient to settle all matters in dispute among the parties. In particular the position as to the native leasehold - as to which the learned trial Judge makes no decision - is difficult to ascertain from the evidence, and requires full clarification.

The grounds of appeal filed may be shortly set out in this form:

That the learned trial Judge erred in law in refusing to make any of the following orders when the evidence had, on a balance of probabilities, established the necessary relevant facts:

- (1) that the business in dispute, M.R. Khan Transport Company, was now the sole property of the appellants;
- (2) that all respondents be ordered to join the appellants in an application to the Transport Control Board for transfer of all road service licences into the names of the appellants;
- (3) that second respondent do all that is necessary to transfer his undivided one-third share in lease 14472 to appellants or any one of them;
- (4) an injunction restraining respondents from intermeddling in the operation of the business.

At the hearing of the appeal counsel for appellants stated that they were not proceeding with the claim for injunction number (4) above.

It is to be noted that in his judgment the learned trial Judge says that because of the confused state of the pleadings and the evidence he is not in a position to make any of the orders asked for; but suggests a fresh application, setting out all the facts, to the Transport Control Board, to have the licences put in the names of the appellants only.

The whole problem of this appeal, to my mind, arises from the fact that the present situation regarding the matters in dispute is thoroughly unsatisfactory. It is obviously in the interest of all parties that their rights and obligations with regard to the business and the leasehold property should be finally and clearly determined.

On first consideration I was very doubtful as to whether it was possible for this Court to make such a determination, and was inclined to agree with the learned trial Judge that such could not be made on the weak and insufficient evidence and argument submitted to the Supreme Court. However, I have now had the advantage of reading the judgment of my learned brother Henry, which has satisfied me that it can be done in this Court. It is certainly most desirable that there should be an end to the matter. In the result I concur with the judgment to be delivered by Sir Trevor Henry.

Harb/Baron

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Judge of Appeal

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 19 of 1981

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Between:

1. MOHAMMED TAKI KHAN
2. MOHAMMED JALIL KHAN
3. MOHAMMED YAKUB KHAN

sons of Rahmat Ali Khan

Appellants

and

1. MOHAMMED RAFIQ KHAN
s/o Rahmat Ali Khan
2. MOHAMMED JABBAR KHAN
s/o Mohammed Shafiq Khan
3. MOHAMMED SHARIF KHAN
s/o Mohammed Shafiq Khan
4. MOHAMMED FAROOQ USMAN ALI KHAN
s/o Mohammed Shafiq Khan

Respondents

J. Reddy and B.C. Patel for Appellants
K.C. Ramrakha and H. Patel for first Respondent
Ram Krishna for second, third and fourth Respondents

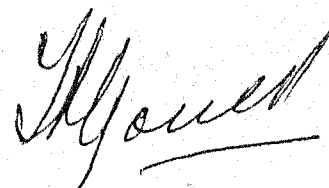
Date of Hearing: 15th March, 1982

Delivery of Judgment: 24 April, 1982

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the judgment of Henry J.A. in this matter. I am in entire agreement with his reasoning and conclusions and with the order proposed by him.

All members of the Court being of the same opinion the appeal is allowed and the order of the Court (including the order for costs) will be as proposed in the judgment of Henry J.A.



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Vice President