

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 123 of 2011

BETWEEN : **PREM SINGH, RAKESH PRAMOD KUMAR** and **ELLE NARSHEA**
as lawful Trustees of the Bhartiya Mitra Mandali, the governing body of
Tilak High School.

PLAINTIFFS

AND : **GANGA REDDY, JAGDISH SINGH, SUREND VENKAT, DAYA**
NAND, NAVEEN KUMAR, ANIL PRASAD, JANEND SINGH,
RAKESH CHAND, SATYA DASS, KUMAR SAMI NAIKER and
PRAKASH NAIR as office bearers and members of the Bhartiya Mitra
Mandali Management Board.

1ST DEFENDANT

AND : **SWAMI KUMAR MAHARAJ**

INTERESTED PARTY

Appearances : Ms. Natasha Khan for the Plaintiffs
Mr. D.S. Naidu for the Defendants
Interested Party in Person

DIRECTIONS

INTRODUCTION

1. Tilak High School (“**THS**”) is registered as a non-government school. It is controlled by an organisation called The Bhartiya Mitra Mandali (“**TBMM**”)¹. TBMM’s formal document (Deed of Trust) drawn up on 15 March 2010 describes the organisation as a “**charitable organisation**” set up specifically for educational purposes with an open membership as defined in the TBMM constitution. The TBMM actually adopted that constitution two years earlier in 2008.
2. Because of a split in the TBMM, the management of THS, for the time being, vests temporarily in an interim management committee (“**IMC**”) headed by a very senior Ministry of Education Official in the Western Division. While all stakeholders desire

¹ As stated, TBMM is the controlling authority of THS. TBMM’s management structure might be described as follows:

- (i) TBMM is the overall managing authority. It was set up in 2010, firstly by the appointment of the Trustees followed by a Declaration of Trust by the said Trustees and the subsequent registration of the relevant Trust Deed.
- (ii) TBMM elects a Management Committee (“**MC**”) at the TBMM AGM.
- (iii) the entire administration and management of the TBMM is vested in the MC.
- (iv) the MC consists of the President, Vice Presidents, Manager, Secretary, Assistant Secretary, Treasurer, Committee Members.

to have the management on THS restored to the TBMM, this seems, at present, an indomitable ask because of the animosity that is rife in the organisation.

3. Before me now, is an interlocutory application by the interested party, one Swani Maharaj (“**Maharaj**”), seeking Orders to enable him to convene an SGM to resolve the dispute and to restore management and control of THS to the TBMM. I need only say here that Maharaj was, on his application and by Order of this Court earlier this year, joined as an interested party in this case.

HOW AN SGM IS NORMALLY CONVENED WITHIN TBMM?

4. Clause 8² of the TBMM constitution³ sets out that an SGM may be called by the Management Committee (“**MC**”) or by the Secretary on a special written requisition of at least 50% of the members of the TBMM. At present, it is difficult to follow this procedure, mainly because the parties in this case are at loggerheads as to whether or not there is in fact a valid MC, let alone a secretary, existing at the present time (see further below). Hence, anyone purporting to be the MC or the secretary would, right now, be booed off the stage so to speak if he or she were to try and call a meeting.
5. Maharaj is of the view that if the court were to grant an Order accordingly, he could convene an SGM to elect members of the MC as well as the Board of Trustees.

STRUCTURE OF TBMM

6. It may be that the root cause of all the problems within TBMM lies in the way it is set up. Neither counsel nor the parties have directed themselves to this possibility.

² Clause 8.1 stipulates as follows:

8.1 Notice of and proceedings at meetings generally

- a. *The Secretary shall give at least seven days notice in writing to each member by advertisement in at least one news paper and any media, which notice shall state the place, date, time and the nature of the proposed business to be transacted at the meeting.*
- b. *That all quorum at all General meeting shall not be less than 50% of all members eligible to vote at an Annual General Meeting.*
- c. *If within half an hour after the appointed time for the commencement of the Special General Meeting a quorum is not present, the meeting:*
 1. *If convened upon the requisition on Members, shall be dissolved.*
 2. *If the Special Annual General Meeting is called by the Management Committee and the quorum is not present then the meeting shall be adjourned to another date.*

³ Clause 8 provides inter alia as follows:

8. Special General Meeting

- a. *Special General Meeting may be called by the Management Committee or by the Secretary on a special requisition in writing by no less than 50% of the members of the Mandali.*

7. As stated, underlying this case is an ongoing animosity between two factions of TBMM. Their animosity pertains to various leadership, management and governance issues. The parties are, the TBMM's trustees on the one hand, and the TBMM's Management Committee ("**MC**") on the other.
8. To reiterate, TBMM, as stated in its Declaration of Trust, "**is an association with membership open to persons as provided in its constitution**"⁴ . It is set up specifically for educational purposes. As stated, it has a constitution, which TBMM adopted earlier in 2008. What TBMM was pre-2008, I do not know. I gather that the organisation has been in existence in one form or another for decades well before its 2008 constitution.
9. I note that, some two years after TBMM adopted its constitution, on 15 March 2010, some of its members became trustees pursuant to a Deed of/Declaration of Trust. The background as to why that happened is not in any affidavit filed. It was not raised hitherto by the learned Judge who dealt with this case before. The trustees who signed the Deed of/Declaration of Trust were Elle Narshea, Prem Singh, Rakesh Parmod Kumar, Jagdish Singh and Arvind Kumar. The said Rakesh Parmod Kumar also counter signed the document in his capacity as secretary, "**for and on behalf of the office bearers and the committee members**".
10. In any event, it would appear that TBMM became a trust on 15 March 2010.
11. Notably, from all the arguments and submissions of counsel, the parties all accept that TBMM's constitution continues in force alongside its Trust. Is TBMM therefore a hybrid trust and association/society?

CHARITABLE TRUST OR FRIENDLY SOCIETY OR RELIGIOUS ORGANISATION?

12. I have speculated above that TBMM looks to be a hybrid Trust and society. It appears that it might even be registered under the Religious Bodies Registration Act (Cap 68). In Fiji, the Charitable Trusts Act provides for the incorporation of charitable trusts

⁴ As stated in the Declaration of Trust dated 15 March 2010.

under section 3 of the Act. The Friendly Societies Act (Cap 253) provides for the registration only of Friendly societies. Both Acts contain their own separate provisions as to how an organisation might be registered and/or incorporated under their respective schemes, what their objects and purposes should be, how the officers/trustee are appointed and removed, how property is acquired and held, how disputes between members might be resolved within the context of the rules of the organisation, how the organisation may be dissolved or wound up, and the government of their affairs generally. One notable difference is that under the Friendly Societies Act, under section 11, an expelled member may complain to a Magistrate. Under the Charitable Trusts Act, it is the High Court which has jurisdiction to determine or hear all matters⁵.

13. In some jurisdictions, a Trust is, generally, distinguishable from a society or association in many respects. For example, while a society may have a charitable purpose, a trust must have a charitable purpose. And whereas the decision making in a society is left to members at general meetings in accordance with the rules, decision making in respect of a charitable trust is left to the trustees. Also, whereas the membership of a society is determined by its rules, a charitable trust has no membership but is merely run by the trustees to benefit the beneficiaries. Furthermore, whereas the committee of a society is accountable to the members, the trustees of a charitable trust are accountable to the beneficiaries and must comply with the trust deed as well as the legislation dealing with trustees (usually the Trustees Act). There is also a host of corporate governance features which distinguish one from the other.
14. It is not clear to me whether or not TBMM is registered at all, and if so registered, whether it is registered under the Charitable Trusts Act (Cap 67), the Friendly

⁵ Section 20

Judge of the Supreme Court to have jurisdiction

20. A judge of the Supreme Court shall have jurisdiction and authority to hear and determine all matters relating to such scheme, and all proceedings therein shall be had in a summary manner, and the judge may decide what persons shall be heard before him in support of or in opposition to the scheme.

Societies Act (Cap 253) or, the Religious Bodies Registration Act (Cap 68). The plaintiffs say though that the TBMM's constitution is "registered with the Registrar of Deeds for registration of Declaration of Trust"⁶. Section 3 of the Registration Act states the object of registration under that Act is, merely "**for publication, for preservation and for execution**"⁷. Under the Charitable Trusts Act though, "registration" means "incorporation" as per Part II of the Act⁸. I note that the Friendly Societies Act, while it makes provision for the registration of societies, does not say that registration equals incorporation.

15. I need to know exactly what the true nature of TBMM is before I can further consider any issue in this case.

THE STRIFE - HOW IT BEGAN

16. The strife between the trustees (plaintiffs) and the MC (defendants) first spewed out on 01 March 2011 when the former, in their capacity as trustees, took the drastic decision to dissolve the MC (defendants), purportedly, because of the corrupt practices of the MC members⁹. Retaliation by the MC and its supporters surfaced when a Notice of SGM was published in the Fiji Times issue of 03 August 2011. The Agenda on the said Notice listed, *inter alia*, the "Appointment of Trustees" amongst

⁶ This probably means that the instruments in question are registered with the Registrar of Deeds pursuant to the Registration Act (Cap 24).

⁷ Section 3 states: "*Deeds may be registered for publication, for preservation and for execution, or for one or more or all of these objects*".

⁸ The relevant provisions of Part II are as follows:

PART II-INCORPORATION OF TRUST BOARDS

Incorporation of trust boards

3. It shall be lawful for the trustees or trustee for the time being of any charity for religious, educational, literary, scientific, or charitable purposes, to apply to the Registrar for a certificate of registration of the trustees of any such charity as a corporate body; and if the Registrar having regard to the extent, nature and objects, and other circumstances of the charity, shall consider such incorporation expedient, he may grant such certificate accordingly, subject to such conditions or directions as he shall think fit to insert in such certificate relating to the qualification and number of trustees, their tenure or avoidance of office, the mode of appointing new trustees, and the custody and use of the common seal; and thereupon the said society or trustees shall become a body corporate under the name set forth in the certificate.

Application for incorporation

4. Every application to the Registrar for a certificate under the provisions of this Act shall be in writing, signed by the person or persons making the same, and shall contain the several particulars specified in the First Schedule, or such of them as shall be applicable to the case. The Registrar may require such declaration or other evidence in verification of the statements and particulars in the application, and such other particulars, information, and evidence, if any, as he may think necessary or proper.

Nomination of trustees and filling up vacancies

5. Before a certificate of incorporation is granted, trustees of the charity shall be effectually appointed to the satisfaction of the Registrar; and, where a certificate of incorporation has been granted, vacancies in the number of the trustees of such charity shall from time to time be filled up so far as shall be required by the constitution or settlement of the charity, or by any such conditions or directions as aforesaid, by such legal means as would have been available for the appointment of new trustees of the charity if no certificate of incorporation had been granted, or otherwise as shall be required by such conditions or directions as aforesaid; and the appointment of every new trustee shall be certified by or by the direction of the trustees to the Registrar within one month of such appointment.

Certificate of incorporation

6.-(1) A certificate in the form in the Second Schedule purporting to be signed by the Registrar shall be conclusive evidence in all courts that the trustees therein named (hereinafter called the board of trustees) has been duly incorporated, and of the date of such incorporation. The Registrar shall not issue a certificate when the name of the proposed board of trustees, in his opinion, resembles too closely the name of any existing board of trustees.

(2) The original certificate of incorporation shall be kept exhibited in a conspicuous position at the registered office of the board of trustees.

Registered office

7. Every board of trustees incorporated under the provisions of this Act shall have a registered office and shall notify the Registrar of the address thereof. It may from time to time change its registered office by filing in the office of the Registrar a notice under its seal intimating the change and the new address. Any notice or legal process shall be deemed to be served upon the board if left at its registered office.

⁹ e.g. nepotism, non-payment of school fees. The main allegations were against one Janend Singh who was the Treasurer.

the items to be put to the vote at the SGM. As it turned out, the “SGM” was duly held on 04 August 2011 at which a resolution was passed to remove the trustees¹⁰.

MUD-SLINGING

17. That resolution only incited more mudslinging between the parties as they hurl slander after slander at each other. The plaintiffs/trustees insist it is within their powers¹¹ to dissolve the MC for cause so long as a new MC is appointed within one month thereafter¹². They also say their dismissal was unlawful in that TBMM’s Declaration of Trust prescribes only two ways by which a trustee may be dismissed lawfully¹³.
18. The defendants say the plaintiffs had given themselves that power after tampering with the constitution¹⁴ and this is the cause of all the discord within TBMM¹⁵. They further allege¹⁶ that the plaintiff’s appointment as trustees was unlawful *vis a vis* the TBMM Constitution which forbids a trustee from holding dual positions. This requirement was put in place to avoid a conflict of interest but was overlooked. Prem Singh for example, was Manager of the Mandali when he was appointed trustee. Elle Narshea was President of the Mandali, whilst Prakash Kumar was Secretary. As such, they all had a conflict of interest.
19. Both camps allege various improprieties against each other. The trustees say certain MC members misused school monies and that the MC had lacked accountability to the trustees in the way the MC conducted its business¹⁷. The defendants would hurl similar allegations at the plaintiffs. For example, Prem Singh (allegedly) is alleged to have gotten his son exempted from having to pay school fees at THS and even got his

¹⁰ A letter dated 04 August 2011 from Nacolawa & Company purportedly on the instructions of the Management Board (probably Management Committee) to the trustees informed them that the said resolution was based on the illegality in the trustees’ decision to dissolve the old MC. The letter also stated that the resolution was made because of the trustees’ (alleged) tampering with the TBMM constitution in order to increase their powers. The letter also alleged that the Trustees had tampered with certain pages of the Constitution to give them more power. The letter then states: “*This notice of dismissing the previous school Management Board and tampering of the constitution will be taken up in the SGM of 14 August 2011 specifically convened for your removal*”.

¹¹ under the TBMM Constitution.

¹² Clause 8.3.b.g.3. The Trustees would argue that, because the former Treasurer was not handing over the accounts, which hindered the preparation of audit reports, it was impossible to appoint a new Board within the one month stipulated. Hence, the matter was postponed to the 17 April 2011 AGM meeting.

¹³ These are, firstly, if the trustees are of unsound mind and, secondly, if they are declared bankrupt. They argue that section 4 of the Trustees Act (Cap 65) also applies re, appointment and discharge of trustees.

¹⁴ (pages 10 and 11) to the constitution.

¹⁵ The true constitution, they maintain, does not give the trustees any power at all to dissolve the MC, let alone to appoint a new one. These are done only by AGM which is held in March every year.

¹⁶ as asserted in the affidavit of Ganga Reddy sworn on 12 September 2011.

¹⁷ On 14 May 2011, the Trustees had written to the Board highlighting its concern at the Management Board’s practice of having closed door meetings without informing the Trustees of these meetings.

wife employed at THS Canteen for \$125-00 per week and even got paid for services he provided “voluntarily”. It is alleged that Singh even removed building materials from the school for his own personal use.

20. There was even an issue raised about the appropriateness or otherwise of the school observing a certain religious function¹⁸ - which goes to show the extent of the parties’ nitpicking at each other.

WILL AN EGM HELD NOW RESOLVE THE IMPASSE?

21. I do not know whether or not an EGM will resolve the impasse. It could be the first step though towards resolving the impasse. The problems of the TBMM may well have to do with the way the organisation is set up. But then again, I am not in a position to make a proper diagnostic analysis of its problems unless all the relevant documentation setting out the history of the organisation is as well as its corporate structure, is placed before me.

22. Once I get all this documentation, then I can begin to map out a course which will hopefully benefit all concerned, with assistance of counsel.

DIRECTIONS

- (i) case adjourned to **07 October at 9.30 a.m.** for hearing on the corporate status of the TBMM.
- (ii) the parties are at liberty to file any affidavit and also submissions which may throw light on the corporate status of the TBMM.
- (iii) once the current corporate status of the TBMM is established, further directions will then be given as to the proper course to resolve the impasse between the parties.

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Anare Tuilevuka
JUDGE
26 September 2013.

¹⁸ Prem Singh, one of the plaintiffs/trustees, had written to the Principal querying the same.