

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 200 of 2013

BETWEEN

BHIKABHAI BHINDI of 9062 141a Street Surrey, British Columbia,
Canada, Retired.

PLAINTIFF

AND

DESMUHHBHAI BHINDI of 55 Toorak Road, Toorak,
Suva, Businessman.

DEFENDANT

Counsel : Mr. Parshotam S. with Mr. Singh R. for the Plaintiff.
Mr. Singh A. with Ms. Ali R. for the Defendant.

Dates of Hearing : 04th, 5th, & 8th June, 2019

Date of Judgment : 30th August, 2019

JUDGMENT

- [1] The property comprised in Certificates of Title No. 5946 and 6067, located at 53 – 55 Toorak Road, Suva, owned by the plaintiff, the defendant and their father who is now deceased, is the subject matter of these proceedings.
- [2] The father of the plaintiff and the defendant died on 22nd March, 1994 leaving a last will and one Chandulal Naranji Bhindi was appointed as the sole executor and the trustee of his estate and upon the death of their father his 1/3rd share devolved on the plaintiff, the defendant and their brother who also lives in Canada and who is not a party to these proceedings.
- [3] The plaintiff filed this writ of summons seeking the following reliefs:
- A. An order that a receiver of the said property be appointed until judgment in this action.
 - B. An account for what is due to the plaintiff from the defendant in respect of money received by the defendant for or on account of the plaintiff from 23 March 1994.
 - C. An order for the defendant to pay rent at the market rate for the use of and occupation by him of the premises now used and occupied by him and his family in the said property, such rent to be determined by the Commerce Commission of Fiji and effective from 23 March 1994.
 - D. An order for payment by the defendant to the plaintiff of any sum found due upon taking such account.
 - E. All further proper accounts, inquiries and directions.
- [4] The plaintiff with leave of the court amended the statement claim by adding the following causes of action:
- 12. The defendant has since on or about 23 March 1994 acted as Trustee for the plaintiff in the administration of the said property as pleaded in paragraph 7 herein and owed a duty of care to the plaintiff to ensure that the said property was adequately maintained and insured so that income from the

said property would be earned at market rate. The defendant failed in his duties as follows;

- (a) Failed to adequately repair and maintain the said property and keep it in a well maintained condition.
- (b) Failed to insure the said property and to keep it insured.
- (c) Failed to obtain proper market rental for the said property.
- (d) Failed to engage appropriate persons to maintain and market the said property to obtain the best market rental.
- (e) Failed to prevent the said property from deteriorating in condition and appearance.
- (f) Failed to handover administration of the said property to a suitable qualified third party.

[5] It is averred in the amended statement of claim that as a result of the above failures the plaintiff suffered damages and he claims general damages.

[6] The position of the defendant is that his parents lived in the house and they were looked after by him and during that period with the approval of the parents he administered the commercial property. The defendant avers further that he had to attend to and expend his own personal savings to maintain these properties and administer without any management fees or remuneration for the responsibilities he discharged.

[7] The defendant while denying the above allegations averred that the plaintiff's following inappropriate actions contributed in part to the dilapidated state of the business:

- (a) Failure to inject or provide financial assistance-contributions or working capital to prop up the business;
- (b) Failure in providing managerial support to build up strategic business plan;
- (c) Despite coming over to Fiji and visiting the defendant on numerous occasion the plaintiff failed to organise any business meetings to discuss business operations to raise all matters that he now claims in his Amended Statement of Claim;

- (d) Failure in convening partnership business meetings despite the defendant's numerous requests through plaintiff's solicitors and personally.

[8] At the pre-trial conference the parties admitted the following facts:

1. The plaintiff is registered as owner of an undivided third share in the lands comprised in Certificate of Title Nos. 5946 and 6067, located at 53-55 Toorak Road, Suva ("the said land").
2. The defendant is registered as owner of a further undivided third share in the said land.
3. The other undivided third share is registered in the name of Sundarji ("the father"), who is the father of the plaintiff and the defendant.
4. The father died on 22 March 1994 and one Chandlal Naranji Bhindi was constituted the sole executor and trustee of his estate.
5. The said lands have constructed on them certain residential, commercial and warehousing premises ("the said property").
6. Since the death of the father, the said property has been variously rented out with one-three bedroom unit being occupied exclusively by the defendant and his family.
7. Further, since the date of death of the father and with the agreement of the plaintiff, the said property has been wholly administered by the defendant. The administration included:
 - a. Letting out this property.
 - b. Collecting all rents in respect of the said letting out.
 - c. Attending to any repair and maintenance works that may be required to be effected on the said property from time to time.
 - d. Making payment of any statutory outgoings e.g. rates in connection with said property.

[9] It is a fact admitted by the parties that there was an oral administration agreement between the plaintiff and the defendant. It may not be all that relevant to the issues to be determined in this matter but it is important to mention that the property which is the subject matter of this action is not only owned by the plaintiff and the defendant.

The other joint owner who is the father of the plaintiff and the defendant gave the rest and residue of his estate after paying the debts, testamentary expenses and funeral expenses to the plaintiff, the defendant and the other son Sanjaybhai. Hence, there is another person who has an interest in this property. There is nothing on record to say that the father's estate has been administered. Therefore, without the consent and approval of the administrator or if the estate has already been administered, the other son of the testator there cannot be a valid administration agreement in respect of this property which will also affect his rights in the property. Evidence does not disclose the existence of a partnership agreement among the joint owners of the property in question. The learned counsel for the plaintiff submitted that pursuant to section 25(e) of the Partnership Act 1910 no partner is entitled remuneration for acting in the partnership.

- [10] Section 3(a) of the Partnership Act 1910 there cannot be a partnership agreement created by operation of law among the joint owners or joint tenants.

Section 3(a) of the Partnership Act 1910 provides:

In determining whether a partnership does or does not exist regard shall be had to the following rules:-

- (a) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned whether the tenants or owners do or do not share any profits made by the use thereof;

- [11] For the reasons set out in paragraph 10 it cannot be said that there was a partnership among the joint owners of this property created by law.

- [12] It is also the position of the plaintiff that the defendant has breached his fiduciary duty as a constructive trustee. There is no evidence for the court to assume the existence of a constructive trust. The learned counsel cited the following paragraph Underhill's Law Relating to Trusts and Trustees where constructive trust has been defined;

- (3) Constructive trusts which are not resulting arise:

- (a) When some person holding a fiduciary position has made a profit out of the trust property;

(b) In all other cases where there is no express trust, but the legal and equitable rights in property are nevertheless co-extensive and united in the same individual.

- [13] The plaintiff's claim against the defendant, as per the amended statement of claim, is not based on a trust or a partnership agreement. In the amended statement of claim the plaintiff's claim is based on the ground that there was an administration agreement between the parties. For the first time the issues of partnership and constructive trust were raised in the written submissions of the learned counsel for the plaintiff without giving an opportunity for the defendant to reply. Therefore, the court cannot base its judgment on these issues. Even if the court accepts the position of the plaintiff that the defendant had a fiduciary duty as a constructive trustee, it cannot be said the defendant breached his duty for the reasons that, as shown in the evidence adduced at the trial which I will discuss below, the defendant has paid the plaintiff his share of the profits.
- [14] The evidence of the plaintiff is that when he left for Canada their father was still alive and when he came for the father's funeral the defendant informed him that all the accounts were with his accountant. There have been many letters transacted between the plaintiff and the defendant. The plaintiff has been asking for accounts the evidence of the defendant is that he sent accounts. Referring to the letter dated 31st March, 2011 the defendant said that it was the first time he sent accounts to the plaintiff. The evidence of the plaintiff in this regard briefly is that he was not given any accounts nor did he receive any response to the queries and the defendant did not answer to the telephone calls. On the contrary the defendant's evidence is that he tried to contact the plaintiff but there was no response however, whenever the plaintiff came to Fiji they discussed matters pertaining to the administration of the properties.
- [15] I will first consider the issue whether the plaintiff is entitled to recover general damages from the defendant as claimed in the amended statement of claim. The plaintiff alleges in the amended statement claim that the defendant has failed to administer the estate properly. The question is whether the plaintiff has a legal or moral right make these allegations against the defendant who has volunteered to manage this property not only for his benefit but also for the benefit of the plaintiff and the other brother who live in Canada, without any assistance, financial or otherwise, from them. The defendant has been managing this property since the demise of their

father in 1994. The plaintiff has not shown any interest in this property till 2011. Although he said in evidence that the defendant did not respond to his telephone calls there is no evidence to show that he in fact called the defendant. He could have written a letter or sent an e-mail which could have been used as evidence. The first letter, after seven years, was the letter (P5) sent by the plaintiff's solicitors on 16th January, 2011. This is a letter relied on by the plaintiff in proving his case. The second letter sent by the solicitors of the plaintiff is dated 10th March, 2011(P6). In reply to "P6" the defendant wrote the letter dated 31st March, 2011 (P7) and with that letter the defendant has sent the annual financial statements from 1998 to 2006 to the plaintiff and it has been stated that annual financial statements for the years 2007 to 2010 were being prepared. In the same letter the defendant has stated that they should have a round table family discussion as this is very much a family matter but there had been no response from the plaintiff.

- [16] There is no agreement between the parties as to who should provide funds for the maintenance work. In my view since this is a property commonly owned by the plaintiff, the defendant and their brother, they should have contributed to the maintenance of the property equally if they expected any return from the property.
- [17] It is the evidence of the defendant that the condition of the 2nd floor of the building was not good and whatever available was rented out. From 1989 to 1999 the ground floor had been rented out for \$5,500.00 per month. Since they failed to pay the rent distress for rent order was served on them and the things were auctioned to recover the arrears of rent. Thereafter it had been closed for three years and in 2000 during the coupe the building had been damaged and it could not have been given on rent without repairing. During this period although they were informed about the damage the plaintiff and the other brother has not provided any assistance. The defendant has repaired the property with the income from upstairs hotel and rented the bottom floor to "Subrail Furnitures" for \$3,600.00 per month. It is his evidence that "Subrail Furnitures" after about 6-7 months paid two months' rent and vacated the premises and then he rented it out to Carpenters in 2003 after informing the plaintiff.
- [18] This evidence has not been successfully challenged by the plaintiff. The evidence of the defendant shows that with many difficulties he had managed the property and paid some money to the plaintiff. It is admitted that the defendant once paid the plaintiff

Canadian \$ 5000.00. The defendant further testified that he obtained the approval from the Reserve Bank of Fiji (annexure 12 – D9) to send Canadian \$19500.00 but the plaintiff has refused it and informed the defendant that he needs \$25,000.00 when he come to Fiji and when he came the defendant had offered \$25,000.00 but the plaintiff refused accept it.

[19] In the circumstances the allegations that the defendant has failed to adequately repair the property and to keep it well maintained has no basis.

[20] There had been no agreement or understanding between the plaintiff and the defendant that the defendant must insure the building, to appoint appropriate person to manage the property or to handover the administration to a suitable person. I must say that in this matter the plaintiff, the defendant or their bother do not have power to do anything with this property without the consent of the others. Any decision regarding the administration of this property should be taken together. The plaintiff has no right or power to dictate terms on the defendant or other brother and say this is what you should do. The defendant managed this property as a joint owner and not as an employee of the plaintiff. If the plaintiff or the other brother were not happy with the services rendered by the defendant they could have taken it over or appointed an outsider to manage the property without waiting for such a long time. The defendant in his evidence said that he has no objection in appointing another person to manage the property. Therefore, there cannot be any difficulty in appointing a person to administer this property.

[21] For these reasons the plaintiff is not entitled to claim any damages from the defendant as claimed in paragraph 12 of the amended statement claim.

[22] The plaintiff also claims rent from the defendant for occupying the residential premises. It is a fact admitted by both parties that the residential premises is the family house of the plaintiff, the defendant and their brother who is not a party to these proceedings. Prior to migrating to Canada the plaintiff also lived in this house with their parents and after the demise of the father, the mother lived with the defendant in this house. Further, whenever, the plaintiff visited Fiji he used to stay in the same house. This property too was owned in common by the plaintiff, the defendant and their father since 1975. There is no evidence that any one of them paid rent for occupying the house. There had been no agreement to pay rent. The other brother

who is also a joint owner has never claimed rent from the defendant. There is no evidence that there was an agreement to pay the rent by the occupier of the family house. If the plaintiff is liable to pay rent for the family house their father, their mother, the plaintiff and the brother are also liable to pay rent for the respective periods of their stay in this house. I do not think there is any legal basis for the plaintiff to claim rent for these premises from the defendant.

[23] The plaintiff claims any sum due to him upon taking the account. As I understand what the plaintiff claims is his share of the rent from the commercial property. In my view this claim falls into the category of special damages which the plaintiff must plead and prove. The only income derived from the property is rent income. The plaintiff in proving his claim relied on two reports. The Forensic Accounting Report (P13) prepared by one Devan Raniga, the Principal Consultant of Insurance Risk Consulting Pty Ltd based in Australia and a valuation report prepared by Rolle Associates, Valuers and Property Consultants. Mr. Devan Raniga testified at the trial and was taken through the report where he explained how he arrived at the figures contained in the report and the material relied on by him in preparing the report. In cross-examination the learned counsel for the defendant asked the witness about his relationship to the plaintiff. The witness said he is related to the plaintiff but he did not discuss this matter with the plaintiff and the instruction were given by Ravi Bhindi, a son of the plaintiff. This witness has relied on the other report referred to above in preparing his report.

[24] The Rental Valuation Report gives the average rentals of the apartments and the ground floor area of the building. In conclusion the author of the report says that the loss caused to the plaintiff is \$1,386,235.00 (including interest but before tax).

[25] Under the sub-heading, Other Information the report says –

Under usual circumstances, we would have expected most, if not all, the following documents and information for the majority of, if not the entire period from. 19984 to 2018 to be provided to us:

- a) Financial statements (including detailed profit and loss statements), stating the name, address and contact details of the

accountant or firm that prepared them. Ideally, these would be audited financial statements;

- b) Income Tax and/or VAT returns and Notice of Assessment or any other records from the Fijian Tax Department to show income declared and/or taxes assessed and paid (if any), whether by the estate, or by DB in his individual capacity declaring/showing his one third share of income from the property/estate;
- c) Bank statements showing receipts and payments on behalf of the property/estate, and/or, DB's personal bank statements if any expenses or revenue was routed through his personal bank accounts;
- d) Copies of invoices for material items of expenditure, particularly capital expenditure;
- e) Any records, such as ledgers or copies of receipts issued, for rent received in cash;
- f) Details of tenants, including the duration of their tenancies, the rent previously paid or payable in future, and any other relevant details, plus copies of lease agreement and related documents;
- g) If the property is insured, details of the insurance policy and any details provided by DB to the insurer and/or broker, including any information relevant to rent received or receivable.

We have not been provided the information listed above.

[26] What the plaintiff has to prove in this matter is the actual amount of money the defendant received by way of rent. The assessment made by an expert without having all the required documents has no evidentiary value in this matter.

[27] In the valuation report prepared by Rolle Associates which was relied on by Insurance Risk Consultant in preparing his report, the following observations have been made:

The rental for the studio unit is subject to successful completion of the renovation works.

These works need to be completed before the units are leased out.

The rooftop cannot be leased out for any use as a lot of work will need to be done including construction of ablution units, water, electrical and waste water reticulation.

In the same report the following observation have also been made;

Please note that we have been advised that the property was vacant during the period 1999 – 2001 due to the property going on mortgagee sale and the coup of 2000.

We also make a similar noting on the studio unit which have been vacant for the last 3-4 years.

- [28] The assessment of rent found in the above reports is challenged by the defendant. The defendant called one Mr. Krishna Chand, a Lawyer and an Accountant to testify. He tendered in evidence a report prepared by him (D11). In his evidence the witness said the methodology used in the Rental Valuation Report is inappropriate. In his report the witness has made *inter alia* the following observations:

Among other internal and external factors affecting the computation of the assumed income by the experts (above) it is equally important to understand the location of the commercial building that is the subject of this matter. It is to be noted that the partnership's commercial building is located in commercial zone "B" (Annexure 5) that is located uphill and outside the parameter of Central Business District (CBD) which is in zone "A". This area, commercial zone "B", is not commercially or economically as vibrant as those in the CDB zone "A" and not frequented much by individual consumers as one would expect. Due to this reason I have personally observed much business turnover within short periods of time in this commercial zone "B" location. For example, in the last decade or so RB Patel supermarket ceased and relocated in CDB, Immigration Department relocated, various small and medium enterprises (SMEs) closed down, some of the renowned businesses sold and few businesses changed ownership.

Now, referring to the evaluation methodology implemented for the computation of assumed income and loss buy these experts the following have been observed:

1. The base year selected by these experts as starting point for the computation of assumed income was 2018;
2. As to the basis of computing the assumed income derivable from rooftop space, first floor suits, ground floor retail spaces and basement car parking for the 2018 based year, these experts extrapolated and used the current market rental rates that is held in their portfolios;
3. In order to determine the assumed income for each of the relevant years (1994 to 2018) the experts have computed them by gradually decreasing the base year assumed income with an inflation rate (for example, an average inflation rate of 3.25% straight line basis) as claimed by Insurance Risk Consulting (Pty) Limited. I assume this methodology. I assume this methodology was also followed by the other expert, Rolle Associates;
4. Once the assumed income was determined for the periods 1994 to 2018, the experts then computed assumed expenses by gradually decreasing the base year assumed expense with an inflation rate (for example, by considering an average assumed expense rate of 37.9% for the 2018 base year the expert then gradually adjusted the base year assumed expenses with inflation rate to compute assumed expenses for the years 1994 to 2018) as claimed by Insurance Risk Consulting (Pty) Limited.
5. After computing assumed income and offsetting that with assumed expenses the net assumed income/loss was adjusted with an average annual interest rate (for example, adjustment of net assumed income/loss with 6.12% annual interest rate and deemed as assumed net income foregone for the period 1994 to 2018;
6. The overall assumed net income/loss adjusted with interest rate was considered as assumed revenue derived from rooftop space, first floor suits, ground floor retail spaces and basement car parking for the main partnership for the period 1994 to 2018; and

7. Finally, the plaintiff declares his claim of assumed income foregone to be one third (1/3) of this adjusted overall assumed net income/loss for the periods 1994 to 2018.

Theoretically, by computing assumed income by implication of just one factor (inflation rate) and deeming it to be derived from incapable or non-income generating asset is not only ridiculous but defies any right thinking persons' fundamental logic. Such fictitious claims of income foregone based and on abstract assumptions with disregard to other significant internal and external factors that affect income generating capability of real assets is absurd. Significant factors, such as age of the building, dilapidated condition of the income generating asset, numerous political upheavals, spiraling economic conditions, inability for financing for repair and maintenance, high cost of borrowing, risk of mortgagee sale, location out of CBD boundary, rent freezes, fly-by-night tenants, absconding tenants, etc. have not been considered in the experts' computation of assumed income claimed to be foregone. These are pertinent matters that affect revenue generating ability of any business assets.

- [29] What the plaintiff claims in this case is his share of the income from these properties. The only evidence available to the court to ascertain the exact income derived from these properties from 1994 to 2018 are the two reports relied on by the plaintiff. On a careful consideration of these two reports and the report of Krishna Chand it is clear that the experts employed by the plaintiff have based their reports on certain assumptions. In these reports there is no indication how many studio apartments were given on rent during the period from 1994 to 2018 and the actual rent collected by the defendant. What the plaintiff, the other brother who is not a party to these proceedings and the defendant are entitled to, is one third each of the net income from these properties. It is also pertinent to note that income alone is not sufficient for the court to ascertain the entitlement of the partners. It needs the expenses incurred by the defendant for the maintenance of the commercial building. It is an undisputed fact that the plaintiff or the other brother did not spend any money for the maintenance of the building. The defendant in his evidence said after distress for rent order the building was closed for three years and during the coup the building was damaged and could not be given on rent without repairing and the other owners did not provide assistance

to repair it. It is also the evidence of the defendant that whenever the plaintiff visited Fiji he informed him about it but he said he did not have money.

- [30] For the court to calculate the net income derived from the commercial building all these accounts should be before it. A mere assessment of the income based on assumptions is not sufficient for the court to arrive at the correct amount to which each of the joint owners is entitled.
- [31] As I stated earlier in this judgment the defendant's evidence that he paid \$5000.00 and that he obtained the approval from the Reserve Bank to send \$19,500.00 to the plaintiff but he said he would collect it when he comes to Fiji and the fact that when the plaintiff gave him \$25,000.00 the plaintiff refused to accept it has not been denied by the plaintiff.
- [32] Although it is admitted that there is an administration agreement between the partners the court is unaware of the terms and conditions of such agreement. Therefore, the allegations found in paragraph 12 of the amended statement of claim which I have referred to above have no basis.
- [33] On the other hand the allegations of the defendant that (a) Failure to inject or provide financial assistance-contributions or working capital to prop up the business; (b) Failure in providing managerial support to build up strategic business plan; (c) Despite coming over to Fiji and visiting the defendant on numerous occasion the plaintiff failed to organise any business meetings to discuss business operations to raise all matters that he now claims in his Amended Statement of Claim; and (d) Failure in convening partnership business meetings despite the defendant's numerous requests through plaintiff's solicitors and personally, are well founded. The plaintiff since 1994 has not taken any step towards the up keep of this building nor has he made any contribution towards to maintenance of this building.
- [34] The plaintiff is certainly entitled to his share of the income from this property after deducting the cost of maintenance. The defendant has never denied the plaintiff's entitlement to his share of the profit. The accounts tendered in evidence by the defendant show how much each of them is entitled to. Some accounts show a credit balance and others show a debit balance. The plaintiff has not been able to challenge these accounts except for the personal expenses incurred by the defendant. There has

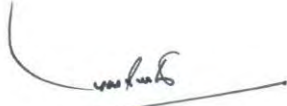
been no understanding or agreement that the defendant must look after and manage this property at his own expense. In my view the cause for this dispute is that there has been no proper system of administration of the property agreed upon by the joint owners and the plaintiff has not taken any interest in discussing the matters relating to the management of the property with the defendant.

[35] For the reasons given above I am of the view that the plaintiff did not have a cause of action to sue the defendant for the reliefs prayed for.

ORDERS

1. The action of the plaintiff is dismissed.
2. The plaintiff is ordered to pay the defendant \$10,000.00 as Costs (summarily assessed) of the action.




Lyone Seneviratne

JUDGE

30th August, 2019