

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 129 of 2023

IN THE MATTER of an application for
Partition of Land pursuant to section
119 of the *Property Law Act 1978*

AND

IN THE MATTER of an application for
sale by Order of Court pursuant to
Order 31 of the *High Court Rules 1988*.

BETWEEN: **HASMUKH SUNDARJEE** of 77 Terry Street, Blakehurst, New
South Wales, 2221, Australia, Company Director.

PLAINTIFF

AND: **MURJEE SUNDARJEE** and **PRAVIN SUNDARJEE** both of Suite
1001, 88 Alfred Street, Milsons Point NSW 2006, Australia, both
Company Directors.

DEFENDANTS

Coram: **Banuve, J**

Counsels: **R. Patel Lawyers for the Plaintiff**
Sherani, Solicitors for the Defendants

Date of Hearing: **2 August 2024**
25 March 2025

RULING

A. INTRODUCTION

1. The Plaintiff and the Defendants are the registered proprietors of;
 - a. CT No.6011 being Lot 1 on DP No. 704 having an area of more or less 4.5 perches; and
 - b. CT No. 11088 being Lot 1 on DP No.2733 having an area of more or less 13.8 perches.
2. The properties are owned personally by the parties as follows:
 - a. Hasmukh Sundarjee as to two undivided fifth share;
 - b. Murjee Sundarjee as to two undivided fifth share; and
 - c. Pravin Sundarjee as to one undivided fifth share.
3. On 24 April 2023 the Plaintiff filed an Originating Summons and an Affidavit of Lemeki Sevutia annexing Affidavit in Support of the Plaintiff pending the receipt of the Plaintiff's original signed Affidavit in Support being received from Australia. On 26 April 2023, the Plaintiff's original Affidavit was filed.
4. An Affidavit in Opposition was filed on 18 June 2024.
5. An Affidavit in Reply was filed on 10 July 2024.
6. The following relief were sought in the Originating Summons;
 - a. An Order that the property in CT 6011 and CT 11088 be sold pursuant to section 119 of the *Property Law Act* 1978 and Order 31 of the *High Court Rules* 1988.
 - b. An Order that an Independent Valuer be appointed by the High Court to carry out valuation of the properties the cost of which is to be borne by the parties in proportion to their ownership of the said properties.

- c. An Order that both parties be given the first option to purchase each other's share in the said properties at a price to be determined by the current valuation.
 - d. An Order that if the parties are not willing to purchase the others' shares in the said properties, then the Plaintiff be allowed to call for tenders for the sale of the said properties.
 - e. An Order that all costs and expenses of the sale including all professional charges and Capital Gains Tax out of the sale proceeds and the balance share proceeds be distributed and paid out proportionately to the Defendants and the Plaintiff.
 - f. An Order that the Chief Registrar of the High Court be authorized to execute any Transfer or other relevant conveyancing documents if the Defendants refuse to execute the same.
7. The Originating Summons is made pursuant to section 119 of the *Property Law Act 1978* and Order 31 of the *High Court Rules 1988*.

B. THE LAW

8. Section 119 of the *Property Law Act 1978* states;

In action for partition court may direct land to be sold

"119.-(1) Where in an action for partition the party or parties interested, individually or collectively, to an extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.

(2) The court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstance, a sale of the land would be for the benefit of the parties interested.

- (3) *The court may also, if it thinks fit, on the request of any party interested direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.*
- (4) *On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.*
- (5) *Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendants in the action to object for want of parties, and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the parties interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations:*

Provided that all persons who, if this Act had not been enacted, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within the time limited by rules of court, apply to the court to add to the decree or order.

- (6) *On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters."*

9. Order 31 of the *High Court Rules* 1988, states;

Power to order sale of land (O.31, r.1)

- " 1. *Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part or in receipt of the rents and profits thereof, may be compelled to deliver up such*

possession or receipt to the purchaser or to such other person as the court may direct. In this Order "land" shall include any interest in, or right over, land.

Manner of carrying out sale (O.31, r.2)

2. (1) *Where an order is made, in court or in chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he or she thinks fit, or may direct that the land be sold in such manner as the Court may direct for the best price that can be obtained, and all proper parties shall join the sale and conveyance as the Court shall direct.*

(2) *The Court may give such directions as it thinks fit for the purpose of effecting a sale, including, without prejudice to the generality of the foregoing words, directions-*

(a) appointing the party or person who is to have the conduct of the sale;

(b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;

(c) fixing a reserve or minimum price;

(d) requiring payment of the purchase money into Court or to trustees or other persons;

(e) for setting the particulars and conditions of sale;

(f) for obtaining evidence of the value of the property;

(g) fixing the security (if any) to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him or her.

Certifying result of sale (O.31, r.3)

3. (1) *If either the Court has directed payment of the purchase money into Court or the Court so directs, the result of a sale by order of the Court must be certified-*

(a) in the case of a sale by public auction, by the auctioneer who conducted the sale and

(b) in any other case, by the solicitor of the party or person having the conduct of the sale;

and the Court may require the certificate be verified by the affidavit of the auctioneer or solicitor, as the case may be.

(2) *The solicitor or the party or person having the conduct of the sale must file the certificate and any affidavit in the Registry.*

10. The parties have both filed written submissions which the Court finds useful in reaching its determination.

Plaintiff's Case

11. The Plaintiff states that certain differences have arisen between him, and the Defendants, and that it has now become untenable for them to continue as business partners or hold the Fiji properties, **CT 6011, DP 704** and **CT 11088, DP 2733**, together (*hereinafter* 'local properties').
12. The Plaintiff states¹ that he has, through his solicitors written to the Defendants on 9 March 2023 and 20 March 2023, expressing his intention to sell his shares in the local properties to them, or alternatively, he could purchase the Defendants shares, in them.
13. The Defendants have not responded.
14. The Plaintiff states at paragraph 13,² that the local properties are rented out to tenants and that he has sought copies of the Lease Agreements (and rental income), but only received a response, recently from the Defendants , after considerable delay. This shows the level of oppression that the Defendants were able to exercise against the Plaintiff. The fact that the Defendants between them control 60% of the ownership of the 2 properties does not give them the right to act oppressively against the Plaintiff.³
15. The Plaintiff, asserts one of the logical steps to take when the relationship between property owners breakdown is to sell the property so that each party can be free to deal with their sale proceeds as they see fit.⁴
16. The Plaintiff offer to the Defendant was most reasonable. Either he buys them out or they buy him out.⁵

¹ Paragraphs 6 and 7 of the Plaintiff's Affidavit in Support of the Originating Summons filed on 26 April 2023

² Ibid

³ Paragraph 25 of the Plaintiff's Written Submissions filed on 16 August 2024

⁴ Ibid, paragraph 26

⁵ Paragraph 27

17. A sale or inter-party transfer will be beneficial to both sides. It will eliminate an issue that is causing animosity between the parties, and it will allow either one party, or all of them, to be paid if the property were to be sold independently.⁶

Defendant's Case

18. The Defendants oppose the orders for sale sought by the Plaintiff pursuant to Order 31 of the *High Court Rules 1988*, and section 119 of the *Property Law Act 1978*, as sought in the Originating Summons filed on 24 April 2023, generally, on the basis of non-compliance by the Plaintiff with the pre-requisites of these provisions, being;
 - a. The Plaintiff has not met the threshold of circumstances under Order 31 to justify the grant of sale of the said properties. Merely stating that the relationship is beyond repair, without stating the cause or matter to which that relationship refers to, and how it affects the land does not justify the grant of an order for sale.
 - b. The Plaintiff has not adduced any evidence to show why partition cannot be undertaken, or why it is not possible.
 - c. No party has a right to insist on the sale, the Court must consider the evidence and decide that it is more advantageous that it be sold.
 - d. The Plaintiff has introduced a new and different allegation in the Affidavit in Reply filed on 10 July 2023, that the Defendants are utilizing rental income from the subject properties which he is being deprived of, references which must be disregarded as it is prejudicial to the Defendants, with their lack of opportunity to reply to the allegation, in Court.
 - e. The Plaintiff's reliance in his Affidavit in Reply on the case of *Sundarjee Bros (Aust) Pty Ltd v Sanjay Sundarjee* [2024] NSWSC 237, as proof that the relationship between the parties have irretrievably broken down, is without merit, as the Plaintiff has not stated why he is of the view, that the

⁶ *Ibid*, paragraph 28

case is proof that the relationship between the parties, has broken down beyond repair.

C. ANALYSIS

19. The Court notes that it is, the Defendants in its Affidavit in Opposition filed on 24 June 2024, who adduce evidence of the proceedings in Australia, the purpose of which was rather, to affirm that the sale of shares in a company or *company property*⁷ must be resolved within the Company's Articles of Association or by board resolution and not one party going to seek court orders. Consequently, the initiation of proceedings by way of Originating Summons, by the Plaintiff, has been described as being *frivolous, unjustified and without merit*,⁸ by the Defendants.
20. The primary objection of the Defendants that the initiation of proceedings by the Plaintiff in this Court, as being frivolous, unjustified and without merit, cannot be a valid response in current proceedings, as plainly, the subject properties are not company property to be dealt with, as authorized under a Company's Articles, rather, the title to the properties are registered in the personal names of the parties.
21. The Court has found rather that the facts as summarized in the ruling of the Supreme Court in *Sundarjee Bros (Aust) Pty Ltd v Sanjay Sundarjee* [2024] NSWSC 237 as useful, in affirming, rather, the level of acrimony that the parties have descended to, in the operation of the Australian company, which lead to the initiation of proceedings on 19 August 2022, against the Plaintiff, and other employees, for the breach of contractual and fiduciary obligations stemming from the Plaintiff's resignation as an employee of the company and his action to divert suppliers and customers from the company. The Plaintiff pleaded guilty to contempt of court, and on 12 March 2024, the Plaintiff was ordered to pay a fine of AUD\$50,000.⁹ A copy of the Supreme Court judgment was annexed to the Affidavit in Opposition.

⁷ Paragraph 7 of the Defendants Affidavit in Opposition filed on 24 June 2024.

⁸ Ibid, paragraph 7

⁹ See Annexure B to the Affidavit in Opposition filed on 24 June 2023

22. The resignation of the Plaintiff from Sundarjee Bros (Aust) Pty Ltd, a family owned company and the initiation of suit by the company against the Plaintiff is clear demonstration of a significant breakdown in relations, between the parties, as members/directors of the company.
23. The Court notes that the primary relief sought by the Plaintiff are for the sale of the local properties, which have been properly sought by way of Originating Summons, pursuant to section 119 of the *Property Law Act 1978* and Order 31 of the *High Court Rules 1988*. The transfer memorials in the Fiji Certificates of Title¹⁰ confirm, respectively;
- (i) *CT 6011, Lot 1, DP 704, area of 4.5 perches, situate in Suva, Viti Levu*
Murjee Sundarjee - 2 Undivided Fifth Share
Hasmukh Sundarjee - 2 Undivided Fifth Share
Pravin Sundarjee - 1 Undivided Fifth Share
- (ii) *CT 11088, Lot 1, DP 2733, area of 13.8 perches, situate, in Suva, Viti Levu.*
Murjee Sundarjee - 2 Undivided Fifth Share
Hasmukh Sundarjee - 2 Undivided Fifth Share
Pravin Sundarjee - 1 undivided Fifth Share
24. The real issue, for the Court's determination, is whether, on the facts, and circumstances of this case, the application ought to be granted to the Plaintiff, or not, under section 119(2) or (3) of the *Property Law Act 1978*?
25. The primary objection of the Defendants to the request by the Plaintiff for the sale of company property, is that the request, based on the breakdown of relations, is frivolous, unjustified and without merit, in *that the decision to sell shares must in the first instance be resolved internally pursuant to the company's Articles of Association*. As indicated previously, the Court has found that this is not a valid objection to the Summons, as plainly the ownership of the local

¹⁰ Annexures A and B of the Plaintiff's Affidavit in Support filed on 28 April 2023.

properties are registered in the personal names of the parties, and are not company property.

26. The Court finds however that this basic misconception is at the root of the Defendants opposition to the Orders that the Plaintiff seeks.
27. As stated, the Court has found that, in fact, the evidence adduced by the Defendants on the initiation of suit and the findings, made against the Plaintiff (as Fourth Defendant) in *Sundarjee Bros (Aust) Pty Ltd v Sanjay Sundarjee* [2024] NSWSC 237, if anything, affirms the position that there was a significant breakdown in the business and personal relations of the parties in their Australian operations.
28. The Defendants, nevertheless, maintain the position, that the status of relations between the parties cannot justify an order of sale being granted, as sought by the Plaintiff
29. The Court deems it necessary to address in detail the main objections articulated by the Defendants against the order for sale sought by the Plaintiff;
 - (i) **Whether the Plaintiff’s Application establish or constitute a “cause or matter relating to any land”**

The Defendants contend that the Court can only direct a sale of land, or any right or interest in such land, in terms of Order 31, in a *cause or matter relating to any land*, where it appears necessary or expedient to order such a sale, and cite dicta from *Chandra v Chandra* [2019] FJHC 1135; HBC 238.2017 (26 November 2019), to support their contention that a ‘bare’ request for the sale of land, *without an underlying cause or matter relating to land*, to premise it on, cannot justify the Court exercising jurisdiction and ordering a sale, under Order 31.

The Defendants cite the case of *Chandra*, as support for this position. The *ratio* of the case, however does not support this position. The relevant passage from the judgment of Mansoor, J in *Chandra*, which

has not been cited in full by the Defendants, affirms the contrary position;

“It is the opinion of this Court that this cause is related to land, and the Court is vested with the jurisdiction to make appropriate orders in terms of Order 31 of the High Court Rules. The Court takes cognizance of the absence of any relief seeking a partition of the property. This was raised by counsel for the Defendant during oral submissions. The Plaintiff has not explained why it did not seek this course. However, it is the view of this Court that the power to order the sale of any land is unaffected by the absence of relief seeking partition of the land. Order 31 vests the Court with sufficient authority and flexibility to make such orders as are necessary to mete out justice if a co-owner of land is unable to benefit from such land. A contrary reading of the provision is likely to negate the purpose for which it has been enacted by the legislature”

The finding of the Court in *Chandra* that the Summons for the sale of land constituted *a cause relating to land*, is not an isolated one, but have also been affirmed in other cases.¹¹

- (ii) **The Defendants object to the Plaintiff raising a new issue of rental income in its Affidavit in Reply, and assert that if the Plaintiff wished to rely on the issue of rental income being paid into the Defendants Trust Account, then he ought to have raised this issue in the Affidavit in Support, and not the in its Affidavit in Reply.**

The Court notes that the Plaintiff initially raised this issue in paragraph 13 of the *Affidavit of Hasmukh Sundarjee in Support of Originating Summons* filed on 24 April 2023,¹¹ *that the said properties are presently rented out to tenants and I, together with my said Solicitors, have requested the Defendants and our common Solicitors in Fiji, Sherani*

¹¹ *Vimal Construction and Joinery Works Ltd v Vinod Patel & Company Ltd* [2008] FJCA 98; ABU0093.2006s (15 April 2008); *Hem Raj v Ravinesh Dinesh Prasad*-Civil Action No HBC 269 OF 2015 (16 July 2019); *Bibi v Raza* [1993] FJHC 13

& Co to provide me with copies of the Lease Agreements to which I and/or my said Solicitors have not received any reply”.

The Court finds that the issue of the Lease Agreements governing the tenancies of the local properties, was first brought up in the Plaintiff’s Affidavit in Support, and could not therefore be described as a wholly new issue,¹² and the Court will allow reference to it, on that basis.

The rental information sought was ultimately, provided by the Defendants, after letters of request were sent to them on 30 May 2024 and 24 June 2024, respectively.¹³

The objective behind the Plaintiff’s grievance can be gleaned from these passages in paragraph 3 (b)- (e) of his Affidavit in Reply¹⁴;

- “b. I say that the rental payments by the Tenants of the said Properties were paid into the said Bank Account which Account has now been frozen due to the Defendants failure to provide necessary information to the Bank to activate the said Account despite various requests and reminders from the said Bank.*
- “c. I only recently came to know that the Tenants are now paying their rent into the Trust Account of Sherani & Co, who are the Defendants solicitors. This was done without my knowledge and/or consent. The Defendants should have advised me and/or sought my consent/approval as 40% owner of the said properties before making such decisions .*
- “d. I now do not have access to the Accounts of payment of the rents from the said properties or the expenses being paid out from such rental income.*
- “e. The Defendants have totally ignored my previous request for information regarding the Tenancy, rental income and expenses*

¹² Paragraphs 38-41 of the Plaintiff’s Written submissions

¹³ Paragraph 3 of the Plaintiff’s Affidavit in Reply filed on 10 July 2024

¹⁴ Ibid

paid out of the rental income.

The Defendants rely on the ruling of this Court in *Kuar v Singh* [2016] FJHC 920; HBC 388.2015 (7 October 2016), to assert the position, at common law, that an applicant's case was to be made in the founding affidavit, and not in the reply. The Court notes however, the qualification in the general rule also cited in *Kuar* that; "...*the Court had a discretion to permit new material in the reply affidavit where special circumstances existed such as where the applicant could not have known of such issues at the time of deposing of the founding affidavit*"

The information which the Plaintiff sought on the rental income being collected from the local properties, which he jointly owns with the Defendants, was not available to him when the Affidavit in Support was filed on 24 July 2023, and on that alternative basis, that information could be deemed as 'new evidence' also.

The Court does not find the objection raised by the Defendants on the issue of rental income as sustainable. It was raised initially in the Affidavit in Support filed on 24 July 2023. In the alternative, it could also be classified properly as new evidence.

30. On the balance of probabilities, the Court finds that the significant breakdown in relations between the Plaintiff, on one hand, and the Defendants on the other, that have beset their Australian operations, has also affected the management of joint proprietorial interests in Fiji, where the Defendants, together, hold 60% ownership rights, and the Plaintiff holding 40% ownership rights, in the same properties. The Plaintiff asserts that the Defendants working together have deprived the Plaintiff of information on tenancy over the properties and the benefit to be derived from rental proceeds which he may be entitled to, as the holder of 40% of ownership rights. The Court finds on the balance of probabilities, that there is merit in the Plaintiff's contention. The significant breakdown in relations between the parties in the Australian operations, despite their close family ties, has also tainted their relationship in Fiji, in the management of the joint property rights they have over CT 6011 and 11088. It stretches the bounds of credibility, for the Defendants to contend

otherwise, given the parties are the same. As the Plaintiff states in submissions¹⁵ ;

“...that the properties are rented out to tenants and that he through his Solicitors requested for copies of Lease Agreements and has not received these. This shows the level of oppression that the Defendants were able to exercise against the Plaintiff. The fact that the Defendants between them control 60% of the ownership of the 2 properties does not give them the right to act oppressively against the Plaintiff...”

31. The Court does not find the other objections raised by the Defendants as cogent. The assertion that the issue of partition has not been properly ruled out for example, would appear to be negated *also* by the very wording of section 119(1) of the *Property Law Act 1978*, itself, which disentitles the Plaintiff, as the interested party, from seeking partition as his individual share in the properties does not amount to *a moiety*, when evaluated against the shares held by the Defendants in the local properties.

D. FINDING

32. The Court finds on the balance of probabilities that the Plaintiff has made out a case to warrant the grant of orders sought in the Originating Summons filed on 24 April 2023 on the basis outlined.
 - (i) The Plaintiff has met the threshold for Order 31 of the *High Court Rules 1988*. The Court’s power to direct a sale of a land or any right or interest in such land in terms of Order 31 arises in a cause or matter, relating to any land, where it appears necessary or expedient to order such sale. In *Chandra*, as in this instance, the dispute relates to land (CT 6011 and 11088), and so are the relief sought by the Plaintiff.
 - (ii) The discordant, acrimonious relations between the parties that arose in the management of Sundarjee Bros (Aust) Pty Ltd, has also affected the relationship of the parties, as joint owners of 2 local properties in Fiji, to the extent that the Defendants have deprived the Plaintiff of any role

¹⁵ Paragraph 25 of the Plaintiff’s Written Submissions filed on 16 August 2024

in the management of tenancies on the properties and/or deriving a share of the benefit which he is entitled to.

- (iii) A sale of the local properties given the circumstance described in paragraphs 31(i) and (ii) would be for the benefit of all parties. It would remove an issue currently causing animosity between the parties and will allow either one party or all of them to be paid if the properties were sold.
- (iv) The Court adopts the finding of the Court in *Chandra v Chandra* –Civil Action HBC 238 of 2017, that the power to order the sale of any land is unaffected by the absence of relief seeking a partition of the land. Order 31 vests the Court with sufficient authority and flexibility to make such orders as are necessary to mete out justice, if a co-owner of land is unable to benefit from such land. A contrary reading of the provision is likely to negate the purpose for which it has been enacted by the legislature.

ORDERS

1. **The Orders sought in the Originating Summons [Expedited Form] filed on 24 April 2023 are granted as follows**
 - a. **An Order that the property in CT 6011 and CT 11088 be sold pursuant to section 119 of the *Property Law Act 1978* and Order 31 of the *High Court Rules 1988*.**
 - b. **An Order that an Independent Valuer be appointed by the High Court to carry out valuation of the properties, the cost of which is to be borne by the parties in proportion to their ownership of the said properties.**
 - c. **An Order that both parties be given the first option to purchase each other's shares in the said properties at a price to be determined by the current valuation.**

- d. An Order that if the parties are not willing to purchase the others' shares in the said properties, then the Plaintiff be allowed to call for tenders for the sale of the said properties.
 - e. An Order that all the costs and expenses of the sale including all professional charges and Capital Gains Tax be paid out of the sale proceeds and the balance of the sale proceeds be distributed and paid out proportionately to the Defendants and the Plaintiff.
 - f. An Order that the Chief Registrar of the High Court be authorized to execute any transfer or other relevant conveyancing documents if the Defendants refuse to execute the same.
2. Costs summarily assessed at \$2000.00 to be paid by the Defendants to the Plaintiff within 21 days of this judgment.



Savenaca Banuve
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Savenaca Banuve
Judge of the High Court

At Suva
25 March 2025