IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Civil Jurisdiction

Action No. 296 of 1972

000001

Between

JAGAT RAM s/o Ram Prasad Maharaj — Plaintiff

- and -

CHATTAR SINGH s/o Sardar Singh — Defendant

Dr. M.S. Sahu Khan, Counsel for the Plaintiff
Mr. S. Prasad, Counsel for the Defendant

JUDGMENT

The plaintiff Jagat Ram and the defendant Chattar Singh are half brothers, born of the same mother but having different fathers. It appears that there were two farms in the name of Chattar Singh. No evidence was led as to how he got them, and the two brothers appear to have been farming together. In 1968 they agreed that Jagat Ram was to have Farm 326 which is situated at Varoko, Ba in return for his paying £1,300 or $2,600, and the two brothers went to a solicitor called Regan in Nausori and there entered into an agreement for sale. That agreement recites that the parties had been living together as a joint family and had agreed to vest their joint assets. I conclude from that although there is no evidence upon the subject that the arrangement as to division of their joint assets meant that plaintiff took Farm 326 and paid $2,600 by equalisation of division, for there is a clause in the agreement that Farm 504 was to be the sole property of the defendant. It is also recited that the agreement is subject to the consent of South Pacific Sugar Mills Limited who it is agreed were the lessors of the farm. The sum of $2,600 was to be paid by four payments of $600 by sugar cane proceeds in 1968, $600 by sugar cane proceeds in 1969, $600 by sugar cane proceeds in 1970 and $800 together with interest at 10% on $2,600 "or so much thereof as is owing from the execution of this agreement by cane proceeds in 1971." It is common ground that no application was ever made to obtain consent from South Pacific Sugar Mills Limited. The agreement also provided for the defendant to receive all cane moneys and to retain what was owing to him and refund the balance to the plaintiff. It is perhaps desirable that the three final clauses of the agreement should be set out in full, the plaintiff

being the transferee and the defendant the transferor

"13. If the transferee shall make default in payment of any moneys when due or in the performance or observance of any other stipulation or agreement on the part of the transferee herein contained and if such default shall continue of the space of 90 (Ninety) days that and in any such case the transferor without prejudice to the other remedies of the transferor may rescind this memorandum of agreement and resume possession of the said land or any part thereof any sum hereunder paid to remain forfeited to the transferor.

14. The transferor and transferee to accept this agreement as binding and conclusive of all right's whatsoever that one may have as against the other.

15. Upon payment by the transferee in accordance with the terms of this agreement of all moneys due from the transferee hereunder the transferor and all other necessary parties (if any) will execute a proper transfer of the assurance of the said land to the transferee or the approved nominee of the transferee free from encumbrances, such transfer or assurance and easement to be prepared by and at the expense of the transferee including the transferor's Solicitor's perusal fee and to be tendered to the transferor for execution."

Matters seem to have drifted along without very much incident until 1972. The defendant had gone to live in Rakiraki to work Farm 504, but on 18th May 1972 he caused a solicitor in Ba, Mr. G.P. Shankar to write to his brother directing his attention to the default clause under the agreement and stating that the plaintiff had made default and that the default had continued for 90 days and the agreement was rescinded and all moneys paid forfeited. It was not stated what default had been made. The plaintiff replied on 9th August through his own solicitor alleging that the defendant had been asked to advise the balance owing but had not done so, and consequently the forfeiture notice was invalid. On 7th October defendant got a Suva solicitor to wite to his brother in much the same terms, as Mr. Shankar had written but rather more vaguely, but on 29th September 1972 plaintiff had issued his writ. Perhaps before I go further I should mention that plaintiff had written to his brother on 12th June stating that the purchase moneys had been fully paid and asking for an account. Plaintiff says that when that letter was written he had not received the letter of 18th May 1972, and since defendant made no attempt to gainsay that story, although he had ample time to do so, I accept the plaintiff's evidence on the point.

The writ of summons, after referring to the agreement, alleged that the plaintiff had been cultivating the farm No. 326 since January 1968 and the defendant collecting the cane moneys. Then it says that the plaintiff is willing to pay defendant anything that is still due and alleges that demand has been made for proper accounts of moneys received, but that defendant has failed to comply. So he asks for proper accounts, for an order for specific performance, for an injunction, for damages, for other relief and for costs. The defence which is dated 17th September 1975 three years after the writ was issued says that proper accounts have been furnished, but does not say when or what they were, and also avers that because plaintiff failed to pay the purchase price defendant rescinded the agreement, but again does not condescend to particulars. Then he says alternatively that no consent has been obtained from South Pacific Sugar Mills Limited and the agreement is unenforceable. Plaintiff filed a reply dated 5th May 1976 and denies that an account was given and states that requests for an account were made, but gives no particulars as to when the requests were made. When the action came to be set down the Court ordered an account, and the defendant then furnished an account computing interest from the date of the agreement and calculated with rests on the occasion of each cane payment. That account was calculated only up to 31st December 1971, but the defendant's solicitor has given an undertaking to the Court to furnish an account from 1st January 1972 to date. The account which was furnished and filed in Court on 8th December 1977, shews that at 31st December 1971 a sum of $483.54 was still owing by plaintiff, but Dr. Sahu Khan challenges the method of computing interest.

When the action came to trial, the plaintiff produced copies of records from the Fiji Sugar Corporation Limited, and of cane payments which were not objected to. I am afraid they are mostly illegible and convey nothing to me, and I refuse to wade through figures that should have been agreed by both parties and submitted to the Court in a proper and legible form. The plaintiff deposed that after he was asked to pay by the letter of 18th May 1972 he went to Shankar's office and asked for an account and he took with him a man who was prepared to lend him money to pay off the defendant, if it could be found how much was owing, and the proposed lender came to corroborate that statement. That evidence was indeed not refuted.

On the second day defendant gave evidence but in the middle of his cross-examination he collapsed and the case was not resumed for almost a month.

There was really no question of fact between the parties. What has to be decided is the meaning of the disputed parts of the agreement they made. I think that the first point to be decided is what the payment clause means. I have earlier given its terms broadly. It reads:

> "2. The said $2,600" (I have converted pounds into dollars) "to be paid by the transferee as follows:
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> $600 (six hundred dollars) by sugar cane proceeds in 1968
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> $600 (six hundred dollars) by sugar cane proceeds in 1969
>
> $600 (six hundred dollars) by sugar cane proceeds in 1970
>
> $800 (eight hundred dollars) together with interest by sugar cane proceeds in 1971."

Dr. Sahu Khan submitted that what appears to be a calendar year really meant the cane crushing season, and that the expression 'year' was intended to comprehend all cane payments from 1968 cane and so on. Mr. Prasad on the other hand contends for the calendar year 1968 and so on. I think there would be a great deal of force in Dr. Sahu Khan's submission were it not for clause 6 of the agreement which reads:

> " 6. If the transferee do not comply with the requirements of the notice given under clause 5 hereof then the transferor his servants or agents to have full authority to enter in the premises and effect repairs. The cost of such repairs to be added to the sum of $2,600 and which sum to be paid by the transferor on or before the 31st December, 1971."

It seems to me that the above clause clearly shews the intention of the parties that the sum secured by the agreement was intended by the parties to be fully paid by 31st December 1971 and not when the final cane proceeds for 1971 were received which would be towards the end of 1972.

The second point is the calculation of interest. Both the plaintiff and the defendant have produced accounts. In my view neither is correct because neither gives the plaintiff credit for amounts which were deducted from the plaintiff's cane moneys by the miller before moneys were paid to the defendant. I think that tax is properly payable by the defendant, for the cane is in his name and receivable by him, although grown by the plaintiff. Furthermore the plaintiff did not receive the cane moneys, although he is entitled to the benefit of them. So far as I can ascertain the total tax deductions were $243.45 and the deductions were made between 1968 and 1978. Rent is rather different. Dr. Sahu Khan submitted that defendant had agreed to pay the rent. But that is a half-truth. What defendant said

was that he had paid the rent on Farm 326 and he submitted receipts. But what he meant was that he had paid rent ever since the millers had ceased to deduct it. The millers deducted rent for 1968, 1969, 1970, 1971, 1972 and 1973 at $50 a year totaling $262.50. The agreement is silent about rent and since this was a sale and purchase agreement, the rent would normally be paid by the purchaser. In my view the plaintiff is entitled to no allowance for rent deducted, although if he fails in this action and recovers his money he will be entitled to be credited the amounts deducted by the millers for rent on the defendant's land. It does not compound interest, but it does charge interest first from every receipt of cane moneys. The payment clause which I have set out directs that interest shall be added to the last payment. There is, of course, a further matter to be considered in the account namely the insurance premium. These have been paid by the defendant, but according to the agreement they are payable by the plaintiff, and although breach of the agreement in respect of non payment by the plaintiff of these insurance premiums has not been mentioned, when a proper account is had between the parties these insurance premiums must be debited to the plaintiff.

Dr. Sahu Khan takes a further point. He argues that even though money may be owing by the plaintiff the defendant cannot rescind the agreement without furnishing an account. I accept the fact that defendant was asked to furnish an account before he purported to rescind the agreement, and that he failed to do so. I do not think that it was reasonable to expect the plaintiff to be able to make up an account. The defendant was collecting the cane moneys, and although the plaintiff may have seen the cane accounts, they were the defendant's cane accounts and in the defendant's name. This is not the case of a fixed sum mortgage wherein the mortgagor can calculate the amount owing as easily as the mortgagee. However the cases cited by Dr. Sahu Khan do not in my view get him very far. I think that the position is that, these two parties being vendor and purchaser, the defendant vendor is as between himself and the plaintiff purchaser, constructively a trustee for the purchaser, since this is a contract of which specific performance might be ordered, and as a trustee he has to account. The Court has always required trustees to account. see Springett v Dashwood (1860) 66 E.R. 218. It is true that the vendor has a paramount right to protect his interest as vendor, but in my view when he is asked for an account, he cannot rescind without giving an account, particularly when as in the present case he was seised, through his solicitor Mr. G.P. Shankar, of the knowledge that the purchaser was prepared

to borrow money to complete the purchase.

Dr. Sahu Khan's final point is about consent. It is common ground that no consent was obtained although the agreement provides that the agreement is subject to the consent of South Pacific Sugar Mills Limited who, it is agreed on both sides were the lessors of the land of which Farm 326 comprises part. For myself I am not certain that the Colonial Sugar Refining Company Limited were not the owners of this land, but I am content to accept the position agreed upon by the parties. Mr. Surendra Prasad contended that the obligation to obtain consent lay upon the plaintiff but he cited no authority and he seemed to me to assume that the agreement itself placed this obligation upon the plaintiff. That is not so. The agreement merely states that the agreement is subject to the consent of South Pacific Sugar Mills Limited, and there is nothing that I can find, nor did Mr. Prasad point me to anything which gives any indication of where the responsibility for obtaining consent lay. Of course the real responsibility rested upon the solicitor who prepared the agreement who was acting for both parties, and was, I fancy, related to them. It might reasonably have been expected that having taken their money, he might have properly completed the work. He did not.

I think that the way to look at this matter is to bear in mind that here was a farm in the defendant's name. He wanted to transfer it to the plaintiff. The lessors were certainly not likely to agree to transfer it unless the defendant applied, and in this state of affairs it seems to me that the obligation to obtain the consent rested on the defendant. Moreover it is the defendant who now seeks to take advantage of the fact that no consent has been obtained. It is to be borne in mind that in this case the failure to obtain consent does not result in illegality, although it may perhaps be said that the contract is unlawful as distinct from being illegal. Several cases were referred to by Dr. Sahu Khan. That most nearly in point is Lloyd v Crispe (1813) 128 E.R. 685 to which the headnote reads: "If the vendor of a lease in which there is a covenant not to assign, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment: per Mansfield C.J." I followed that in Gulzara Singh v Balram Singh No. 89 of 1968 and La toka Action 5 of 1975 in a judgment delivered on 30th April 1976. This was originally a Suva action. Once it is clear that the obligation rested upon the defendant to obtain the consent of South Pacific Sugar Mills Limited, if he refuse or omit to apply for consent he cannot be heard to say that the contract is void and he is absolved from performance. He would be taking advantage of a state of affairs which he has himself produced. The law does not allow that. So much

appears from New Zealand Shipping Company v Societe des Citeliers et Chantiers de France (1919) A.C. 1 Broner v James Clark (Brush Materials) (1952) 2 A.E.R. 497 and just lately in the Fiji Court of Appeal Macgregor Investments v Sheraton Hotels (1977) Civil Appeal 62 of 1976.

In the result then, it seems probable that some amount will be found to be owing by the plaintiff to the defendant as at 31st December 1971, but the amount will not be known until the defendant furnishes an account. Cane moneys will be credited against purchase price and against balances of purchase price and interest will be calculated separately upon balances from time to time due, but no interest will be chargeable until 31st December 1971. To that extent I think that the account prepared by Dr. Sahu Khan indicates the proper method of calculation. The plaintiff will be given credit for tax deducted by the millers from his cane pays, but he will be debited with rent. Rent has already been debited against him and deducted by the millers up to the time they gave up business in Fiji. but plaintiff must also pay rent which has already been paid by the defendant, and that will appear as a debit in the account. Plaintiff will also be debited with insurance premiums payable by him under the agreement and paid by the defendant on his behalf. I have considered whether the plaintiff should also pay interest on insurance premium and rents, but the defendant has collected, if one may rely upon the Fiji Sugar Corporation figures, something over $6,000 from the plaintiff's cane, and he has had the use of this money for some five years, so that in fact all payments which he has made for rent and insurance premiums have been made out of the plaintiff's money. The account should be made up to the date of the trial, and will doubtless have to be continued after that, to take account of cane moneys received by the defendant in 1978. The defendant has not furnished any figures for cane moneys received by him after December 1971, but the cane accounts furnished by the Fiji Sugar Corporation indicate that moneys to the extent of over $3,000 have been paid to the defendant since the end of 1971, and it seems probable that the account as made up to the dateof trial and thereafter will show a balance in favour of the plaintiff.

The next question to be considered is whether the plaintiff is entitled to an order for specific performance. Counsel for the defendant concedes that specific performance is a matter for the exercise of the Court's discretion, but he urges that a decree should not be made in this case on the ground of hardship. I am not quite sure what counsel meant by hardship here, for he led no evidence on that score, and the only hardship which emerges from the evidence is that the defendant has transferred his farm at Rakiraki to his two sons, and presumably wants to farm this particular land himself. I would observe that he would scarcely

find this possible since he has lost a leg, and any attempt at farm work would, I should think, be grievously hampered. Moreover he told the Court nothing of the circumstances which prompted the transfer of the Rakiraki farm to his sons, or the date when that occurred, and I cannot see that he has established such hardship and should disentitle the plaintiff to specific performance. I would add that if indeed the defendant is suffering hardship, it is hardship which has been brought upon him by his own act and which therefore equity will not relieve. In any event, hardship is usually judged as of the time of entry into the contract and there was nothing of that kind in March 1968. I think that in considering whether the plaintiff is entitled to an order for specific performance I must look at the whole course of proceedings. When the contract was made both parties got what they wanted from it, namely the defendant got Farm 504 and the promise of money, and the plaintiff got Farm 326. The price became due at the end of 1971. The plaintiff made endeavours to find out how much was owing by asking for an account, and he got someone who was prepared to advance the money to pay off the defendant. Instead of giving plaintiff an account, defendant made ready to rescind the contract. As soon as he was given notice of that attempt at rescission plaintiff sued. He asked for an account by his writ. Still no attempt was made to give him an account. Although the defendant entered an appearance in October 1972, he did not file a defence until September 1975. In the meantime the plaintiff had set the action down in September 1973, but for some reason unexplained it did not actually come to trial. The defence which was filed in September 1975 admitted that the defendant was collecting the cane moneys from the farm, alleged - and I hold falsely - that proper accounts had been furnished, and claimed that the agreement had been rescinded, and it also relied on the fact that the consent of South Pacific Sugar Mills had not been obtained - a matter which I have held to be one to which the defendant himself should have attended. But nothing was said at any stage of the defendant's pleadings that he was prepared to make the plaintiff any allowance for his work on the farm over seven years, and the defendant's case has been conducted on the basis that there was a rescission, which meant that he relied on his agreement under which all moneys paid were to be forfeited to the defendant. It was only at the end of his case, in what appeared to be a last minute bid to stave off the likelihood of an order for specific performance, that defendant offered to refund to the plaintiff all moneys received by the defendant.

There are, however, two matters which should be looked at before an order for specific performance is made. The first is the subject of delay. As I have said plaintiff issued his writ quickly enough, but no attempt was made to explain the delay which then ensued, or why plaintiff

did not capitalise on the fact that his brother had filed no defence, or why he did not get an order for an account. The defendant did not cross-examine upon this aspect of the case, and perhaps I should not penalise the plaintiff for what may be the fault of his solicitors. I considered this aspect of delay in Gulab Ben v Amratlal Jamnadas Action 297 of 1969 and ventured to mention there the case of Moore v Blake (1816) 3 E.R. 1148 in which specific performance was decreed in 1816 in an action begun in 1801. I think that this is a case where the plaintiff has been in substantial possession of the benefits under the contract and is claiming the completion of the legal estate. see Mills v Haywood (1877) 6 Ch D 196: Williams v Greatrex (1956) 3 A.E.R. 705. A more serious matter would appear to be plaintiff's omission to comply with his agreement to complete in December 1971. However,in view of my decision that defendant must account before plaintiff can settle, and the fact that defendant did nothing after the action was begun until almost three years had elapsed while continuing to reap the fruits of plaintiff's labours by allowing him to work the farm while he, defendant, collected the cane moneys I absolve plaintiff from blame in this respect. I have not so far noticed Mr. Prasad's submission that in this agreement time was of the essence. I do not think it was. Fry on Specific Performance 6th ed. at page 503 has this comment "In order to render time essential, it must be clearly and expressly stipulated, and must also have been really contemplated and intended by the parties that it shall be so: it is not enough that a time is merely mentioned during which or before which something shall be done. The learned author says later at page 504 "Lapse of time in payment of the purchase money may generally be recompenced by interest and costs." Here there was no stipulation that time was to be of the essence. Short payment in 1968, 1969, and 1970 had been permitted to pass without comment. If the defendant had called upon the plaintiff to settle and he had not done so, he could have made time of the essence by a notice to that effect, but nothing of that sort happened. I reject Mr. Prasad's submission.

In my view this is a proper case for an order for specific performance. Evidence has been given that South Pacific Sugar Mills Limited would probably have given consent to a transfer in terms of the agreement, and I have no doubt that when it is represented to the Director of Lands that the purchase price has been fully paid, the necessary consent will be forthcoming. If that does not happen the plaintiff will be entitled to damages. I have been told that this farm is now worth $15-16,000. If I take the lower figure the plaintiff will be entitled, and here I am trying to follow Megarry J. in Wroth v Tyler (1973) 1 A.E.R. 897, 923-4, to the difference between $2,600 and $15,000,

which will be $12,400, in addition to which of course he will receive a refund of all cane moneys received by the defendant under the agreement.

To summarise, then, there will be an order for an account made up as I have indicated earlier and for payment to the plaintiff of all moneys found to be due to him on the taking of such account. There will also be an order for specific performance of the agreement dated the fourteenth day of March 1968 subject to the consent of the Director of Lands, for the defendant to transfer the Farm No. 326 to the plaintiff. Alternatively the defendant will pay $12,400 by way of damages and will also pay to the plaintiff all moneys received by the defendant under the agreement, and if there is any dispute as to the account or the amount of moneys to be repaid to the plaintiff recourse will again have to be had to the Court. The plaintiff will be entitled to the costs of the action to be agreed or taxed.

LAUTOKA,
21st July, 1978

(sgd.) K.A. Stuart
JUDGE