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29, 1953

In the Privy Council.

No. 40 of 1952.

33597

ON APPEAL FROM THE FIJI COURT
OF APPEAL

UNIVERSITY OF LONDON
W.C.1.
10 FEB 1954
INSTITUTE OF LEGAL STUDIES

BETWEEN

GOBERDHANBHAI BHAILALBHAI PATEL (*Plaintiff*) *Appellant*

AND

GHELABHAI PREMABHAI (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

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In the Privy Council.

No. 74 of 1951.

ON APPEAL FROM THE FIJI COURT OF APPEAL

BETWEEN

GOBERDHANBHAI BHAILALBHAI PATEL (*Plaintiff*) *Appellant*

AND

GHELABHAI PREMABHAI (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

Writ of Summons.

In the
Supreme
Court.

SUPREME COURT OF FIJI.

Between

GOBERDHANBHAI BHAILALBHAI PATEL (Father's name
Bhailalbhahi Patel) of Ba Merchant *Plaintiff*

and

GHELABHAI PREMABHAI (Father's name Premabhahi) of Ba—
Merchant *Defendant.*

No. 1.
Writ of
Summons.
23rd
November,
1951.

10 GEORGE THE SIXTH by the Grace of God of Great Britain, Ireland
and the British Dominions beyond the Seas King, Defender of the Faith.

To : GHELABHAI PREMABHAI (Father's name Premabhahi) Merchant of
Ba.

WE COMMAND you that within 14 days after the service of this writ
on you inclusive of the day of such service you do cause an appearance to
be entered for you in an action at the suit of GOBERDHANBHAI BHAILALBHAI
PATEL (Father's name Bhailalbhahi Patel) of Ba, and take notice that in
default of your so doing the Plaintiff may proceed therein, and judgment
may be given in your absence.

In the
Supreme
Court.

WITNESS The Honourable JOHN HENRY VAUGHAN, M.C., Chief Justice
of our Supreme Court, at Suva, this 23rd day of November, 1951.

(L.S.)

No. 1.
Writ of
Summons,
23rd
November,
1951—
continued.

(Sgd.) A. D. PATEL,
Solicitor for the Plaintiff.

N.B. This Writ is to be served within twelve calendar months from
the date thereof, or, if renewed, within six calendar months from the date of
the last renewal, including the day of such date and not afterwards.

The Defendant may appear hereto by entering an appearance either
personally or by Solicitor at the Registrar's Office at Suva. 10

GENERAL ENDORSEMENT OF CLAIM.

THE PLAINTIFF'S CLAIM is against the Defendant for a partition of the
lands and buildings comprised in Certificate of Title Volume 51 Folio 5042
and known as NANUKUDRALA (part of) and in Certificate of Title 5915 and
known as NANUKUDRALA (part of) of which the said lands and buildings the
Plaintiff and the Defendant are proprietors as tenants in common.

No. 2.
Statement
of Claim,
8th
January,
1952.

No. 2.
Statement of Claim.

1.—The Plaintiff and the Defendant are registered Proprietors as
tenants in common of the lands comprised in Certificate of Title Volume 51 20
Folio 5042 and known as NANUKUDRALA (part of) and in Certificate of Title
5915 and known as NANUKUDRALA (part of) and the buildings and fixtures
situated on the said lands.

2.—The Plaintiff desires to have the said lands buildings and fixtures
partition between him and the Defendant and has approached the Defendant
to bring about the partition of the said properties but Defendant has so far
refused and neglected to carry out the same.

3.—The Plaintiff therefore claims :—

- (A) The partition of the said lands buildings and fixtures or in the
alternative—
- (B) The sale of the said lands buildings and fixtures by public
auction where both the Plaintiff and the Defendant should be free to bid
and the division of the proceeds between the Plaintiff and the Defendant.
- (c) Such further or other relief as to this Honourable Court shall
seem meet.

30

Dated at Nadi this 8th day of January, 1952.

(Sgd.) A. D. PATEL,
Solicitor for the Plaintiff.

Delivered this 11th day of January, 1952.

No. 3.
Defence.

In the
Supreme
Court.

No. 3.
Defence,
— January,
1952.

The Defendant says as follows :—

1.—He admits the allegations contained in the first paragraph of the statement of claim herein but further alleges that the lands buildings and fixtures therein mentioned are subject to the tenancy hereinafter described.

2.—As to the second paragraph of the said statement of claim he
10 admits :—

(A) That by a letter from the Plaintiff's Solicitor dated the 15th day of October 1951 the Plaintiff enquired whether he (the Defendant) was agreeable to a partition of the said lands buildings and fixtures.

(B) That subsequent correspondence regarding such suggested partition ensued between the Plaintiff's said Solicitor and his Solicitors concluding with a letter dated the 31st day of October 1951 wherein his Solicitors requested a rough sketch plan showing the manner in which the Plaintiff suggested the
20 said prospective partition should be effectuated.

Save as herein expressly admitted he denies each and every allegation contained in the second paragraph and he further alleges that no reply whatsoever has been made to the said letter dated the 31st day of October, 1951.

In the alternative the Defendant says :—

3.—He repeats paragraph 1 and 2 hereof.

4.—He will object in law that any such partition as aforesaid would contravene the provisions of "The Sub-division of Land Ordinance" (hereinafter called "the Ordinance") generally and in particular Sections 6,
30 11 and 18 thereof and further that the provisions of Section 6 of the ordinance have not been complied with.

In the alternative the Defendant says :—

5.—He repeats paragraph 1 and 2 hereof.

6.—The said lands buildings and fixtures are subject to a yearly tenancy in favour of the Defendant and one Champaklal Father's name Premabhai wherefore he will object in law that the Plaintiff is not entitled to seek partition or sale of the same.

In the alternative the Defendant says :—
40

7.—He repeats paragraph 1, 2, 4 and 6 hereof.

8.—He will object in law that the Plaintiff being disentitled to partition of the said lands buildings and fixtures is also disentitled to the alternative remedy of sale claimed in paragraph 3 (b) of the said statement of claim.
Delivered the day of January, 1952.

(Sgd.) RICE AND STUART,
Solicitors for the Defendant.

In the
Supreme
Court.

No. 4.

Judge's Note of Trial.

No. 4.
Judge's
Note of
Trial,
28th and
29th April,
1952.

Before His Lordship the CHIEF JUSTICE.

Mr. A. D. PATEL for the Plaintiff.

Mr. P. RICE for the Defendant.

Letters before action. Exhibit A. Read.

GOVERDHANBHAI BHAILALBHAI PATEL, Sworn.

Ex. B, C. Plaintiff. I own freehold property in C.T. No. 51/5042 and 5915 :
I produce the Titles : the Defendant and myself are tenants in common of
that property. There are buildings and other fixtures there. 1947 I went to 10
India—before that I was in occupation. Before leaving I let my share
under tenancy agreement to Ghelabhai and Champaklal for four years—I
produce the tenancy agreement. I returned 8th March, 1951, and sought
Ex. D. possession—I was refused possession. Since expiry of agreement I have not
been agreeable to their occupation : Champaklal & Co. are trading in the
premises as N. Goverdhanbhai & Company—they are occupying the whole
building. There are two buildings—main store in front then bulk store and
lavatory, etc., combined.

I required the premises to start my own business. I tried to negotiate
a friendly settlement without success : I asked Defendant to agree to a 20
partition of the property—he would not agree either to partition or sale.
The partition of the building would not be an easy matter : difficulties over
entrance—and one part would have two ways of access and the other part
none : one portion would be more value than the other.

The blocks of land are shown on the plans Ex. A and B. The front of
the store faces N.W. If partitioned E.—W. the part facing the road would
be of more value. If partitioned the other way—N.—S.—the western block
would be of more value than the eastern. Sale would be preferable to
partition : public auction with liberty to both parties to bid.

Ex. E. I produce deed of equitable mortgage made over the property by the 30
Defendant : the mortgage has been discharged.

XXD. RICE :

The two separate titles B and C relate to two separate blocks which
adjoin : one cannot be satisfactorily partitioned without the other.

Ex. D made when I went to India—prior to that I was a partner in the
firm N. Goverdhanbhai & Co., General Merchants and Traders—trading in
the building : I sold out my interest in the business to Defendant Ghelabhai
and Goverdhanbhai before I went to India. 24th July 1947 was date of the
deed I entered into then. Same day as tenancy agreement. This is the deed
Ex. F. in question : Clause 4 gives me an option to re-enter the business if I returned 40
to Fiji. On my return I wanted to exercise this option but failed, not because

I did not have the cash but because I did not agree to certain conditions the other party wished to impose: I was unable therefore to re-enter the business.

In the
Supreme
Court.

The other two purchased my interest in the business and they wanted my share of the land and buildings to enable them to carry on.

No. 4.
Judge's
Note of
Trial,
28th and
29th April
1952—
continued.

Ex. G. Ex. E Equitable Mortgage was to secure balance owing to me on sale of my business—the other two paid off the principal in full in due course—while I was away—this is the receipt (produced by Mr. Rice).

10 Store has two floors—living premises upstairs—dependants and families living there.

Ex. A. Letter dated 31st October: 2nd para.—asked for rough sketch plan showing proposed partition—no reply—(why?). Partition would have been difficult.

I have never made any application to sub-divide: no use doing so till we agreed.

(Sec. 2 of Sub-division of Lands Ordinance applies to the land in question—both counsel agree).

I have given no notice to quit nor supplied alternative accommodation.

EXD. PATEL:

20 The Defendant owns three other homes and stores in Ba: they are all let out to persons. He had ample means of accommodation of his own in Ba town. Recently he had premises which were only half occupied and he let it out. He has ample store accommodation also.

PLAINTIFF'S CASE:

RICE:

No evidence.

PATEL:

30 Tenants in common. One undivided half share. No agreement. Difficulties of partition. Court has power to order sale. Plaintiff has right in law to an order for partition or sale.

(Burden of proof is on party opposing the sale).

Vol. 10 Enc. Laws of England. 2nd Ed. p. 367.

Manaton v. Squire, 1677 E.R. 22 p. 925.

Parker v. Gerard, 1754 E.R. 27 p. 157.

Hals. Laws of Eng. 24, p. 380, para. 745, 746.

If Defendants have a statutory right by reason of the Fair Rents Act that does not prevent a sale. They can still raise the right against a purchaser.

Sale by public auction is most equitable.

40 Enc. Laws of England, p. 368, Form of Sale.

RICE:

Before 1868 Partition was a matter of right. Sale in lieu was not. Purpose of Act was to alter it.

In the
Supreme
Court.

No. 4.
Judge's
Note of
Trial,
28th and
29th April,
1952—
continued.

Cannot be a partition because it would be illegal by reason of Cap. 121.

S.2 applies (admitted by Patel).

S.11—both frontages only 13 perches.

S.18, S.6.

S.5 excludes common law—no partition in Fiji except by formalities prescribed.

Ariff v. Rai Jadunath Majundar Bahadur, 1931 T.L.T. p. 238.

Therefore partition cannot be ordered.

E. & E. Digest, 2 Cum. Sup. p. 73 footnote.

S.O. 9.30 a.m. 29th April.

10

29th April, 1952.

RICE :

Halsbury, 1 Ed. "Partition," Vol. 21 at p. 810 Partition Act repealed in 1925 therefore 1st Ed. applies.

If partition cannot be had at all then sale cannot be had either—sale being alternative to partition when partition inconvenient.

37 L.J. PC. 124—S. 3, 4 and 5 of the Act.

Halsbury p. 845, para. 1581.

Para. 6—Defence :—

Tenancy agreement expired in 1951 but under Fair Rents tenants 20 entitled to hold over until ejected under Fair Rents Ordinance. They were tenants from year to year.

Plaintiff therefore was a reversioner only and could not ask for partition : *Evans v. Bagshaw*. 5 Ch. A.C. 1870, p. 340.

Reply :

RICE :

Patel cannot reply. O.36 R. 36.

I allow Mr. Patel to reply on a point of law made by Mr. Rice. Mr. Rice objects.

Sub-division of Land Ordinance—order can be made subject to the 30 ordinance. Land already divided.

PATEL, in reply :

On the question of "Reversion"—Plaintiff has right. *Roughton v. Gibson*. L.J. 1877 Vol. 46, Ch. p. 366.

JUDGMENT RESERVED.

J. H. V.

No. 5.
Judgment.

In the
Supreme
Court.

No. 5.
Judgment,
29th May,
1952.

The Plaintiff and Defendant are the registered proprietors as tenants in common of two adjoining plots of land upon which stand buildings used for commercial and residential purposes. Prior to a date in 1947 the parties were occupying the land and buildings and were engaged in running a commercial enterprise therein as partners together with one Champaklal. The Plaintiff owned a half-share in the business and the Defendant and Champaklal owned the other half. In 1947 the Plaintiff decided to pay a
10 visit to India, and before leaving he entered into a written contract with his two partners in terms of which he disposed of his share in the business to his two partners, the Defendant and Champaklal, subject to a condition that on his return from India he should have the option to re-join them as a partner. At the same time he entered into a tenancy agreement with the Defendant and Champaklal under which he leased his undivided half-share in the property to them for a term of four years commencing from the 1st March, 1947. On his return to Fiji in March, 1951, the Plaintiff desired to exercise his option to re-enter the business, but he failed to come to any agreement with the Defendant and his partner because they wished to
20 impose conditions which he could not accept. He states that the Defendant and his partner are now in possession of the whole premises without his consent and against his will and that he has failed to come to any suitable or satisfactory arrangement with the Defendant and his partner. He applies for an order partitioning the property or, in the alternative, an order for sale. He admitted in evidence that owing to the form of the buildings and their position relative to the two properties and their accessibility, a fair partition would be extremely difficult either of each plot separately or of the two plots together. I accept his evidence on these points—indeed it is clear from the plans and the evidence as to the buildings
30 that partition is not a practical or economic proposition.

The application for the order is opposed by Mr. Rice on three grounds : Firstly, that owing to the provisions of the Sub-division of Lands Ordinance (Cap. 121) the Partition Act of 1868, 31 and 32 Vict. (Cap. 40, has no application in Fiji and the Court has no jurisdiction to order a partition. Secondly, that since the Court has no jurisdiction to order a partition the Court is equally debarred from ordering a sale which can only be ordered as an alternative to an order for partition. Thirdly, that the Plaintiff's interest in the property is an estate in reversion and an order of partition or sale can only be made at the instance of a person holding an estate in possession of the
40 property.

With regard to the first point, I can find nothing in the Sub-division of Lands Ordinance which expressly or by implication takes away the common law jurisdiction of this Court, exercised by virtue of Sections 36 and 37 of the Supreme Court Ordinance (Cap. 2) to order a partition when such order

In the
Supreme
Court.

No. 5.
Judgment,
29th May,
1952—
continued.

could lawfully be made. It may well be that the person obtaining such order would be bound to proceed in accordance with the provisions of the Sub-division of Lands Ordinance, and in the event it might be that owing to the application of those provisions to the particular circumstances the order could not be carried out. In that event I apprehend that the person obtaining the order would be entitled to apply for such alternative relief, if any, to which he might be entitled. Alternatively, I see no reason why the Court should not make an order directing partition and at the same time suspend the operation of the order until satisfied that the requirements of the Ordinance had been complied with. I find that this Court has not lost its common law jurisdiction to make an order directing the partition of property and therefore the case is one where, in the terms of the Partition Act, 1868, a decree for partition might have been made. It follows that the Court has power, in pursuance of the terms of the Partition Act of 1868, to make an order directing the sale and distribution of the proceeds. 10

This disposes of the first two grounds. On the third ground I understand Mr. Rice's submission to be that although the Defendant's tenancy in terms of his tenancy agreement with the Plaintiff expired in March, 1951, the Defendant, by virtue of the provisions of the Fair Rents Ordinance, No. 29 of 1947, is entitled to hold over, and until ejected in accordance with the provisions of that Ordinance he remains a tenant from year to year, and therefore the Plaintiff has no estate in possession but is a reversioner and cannot, in that capacity, bring an action for partition. I have always understood the law to be that the owner of a fee simple who leases his property for a term of years is in law regarded not as a reversioner but as enjoying, through his lessee, an estate regarded by the law as an estate in possession. However this may be it is quite certain that at the time he sued out his writ the Plaintiff was entitled in law to the immediate possession of the property (but of course not exclusive of the Defendant). The fact that the exercise of that right might be made difficult or impossible by the application of some provision in the Fair Rents Ordinance does not affect the nature of his title which I find is an estate in possession. This view of the law is borne out by the comment in Halsbury's 1st Edition of the Laws of England, para 1578, and the cases there cited, particularly the case of *Wilkinson v. Joberns*, Law Rep. 16 Eq. P. 14, the head note of which case reads :— 30

“ The fact that the owner of one moiety of an estate is yearly
“ tenant of the whole property, and occupies it for commercial
“ purposes, and also resides thereon, is no sufficient reason why a
“ sale of the property should not be decreed under Sect. 4 of the
“ Partition Act, 1868.” 40

I find that the Plaintiff is owner of one half undivided share of the two properties concerned, that he has an estate in possession, that no good reason has been shown against an order directing a sale in lieu of partition, and that by reason of the terms of Section 4 of the Partition Act, 1868, he is entitled to such an order. Indeed it is difficult to imagine a case where the nature of

the property and the interests of the parties make an order for sale rather than partition more desirable. There will be judgment for the Plaintiff with costs and I direct an order for the sale of the property and distribution of the proceeds.

(Sgd.) J. H. VAUGHAN,
Chief Justice.

Suva, Fiji. 29th May, 1952.

In the
Supreme
Court.

No. 5.
Judgment,
29th May,
1952—
continued.

No. 6.

Notice of Motion of Appeal.

In the
Court of
Appeal.

10 IN THE FIJI COURT OF APPEAL.

Civil Appeal No. 9 of 1952.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

No. 6.
Notice of
Motion of
Appeal,
7th June,
1952.

Between

GHELABHAI PREMABHAI Father's Name Premabhai of Ba
Merchant *Appellant*

and

GOVERDHANBHAI BHAILALBHAI PATEL Father's Name
Bhailalbhahi Patel of Ba Merchant *Respondent.*

20 TAKE NOTICE that the Court will be moved on such date at the expiration of fourteen days from the date of service upon you of this notice and at such time and place as the Registrar of this Honourable Court shall in pursuance of Rule 25 of "The Court of Appeal Rules 1949" notify by Mr. P. Rice of Counsel for the above-named Appellant Ghelabhai Premabhai that the judgment of the Supreme Court of Fiji delivered on the 29th day of May 1952 in an Action Number 74 of 1951 wherein the abovenamed Respondent Goverdhanbhai Bhailalbhahi Patel is Plaintiff and the above-named Appellant Ghelabhai Premabhai is Defendant be reversed or set aside or varied or modified or alternatively that a new trial of such action be granted and that the said Respondent do pay to the said Appellant his costs as taxed of and incidental to this appeal and to the said action UPON THE GROUNDS :

30 1. The said judgment of the learned Chief Justice of Fiji in the said action incorrectly propounded the first submission of the Appellant's Counsel to be that owing to the provisions of "The Subdivision of Land Ordinance" (Cap. 121 of the Laws of Fiji) (hereinafter called "the Ordinance") "The Partition Act 1868" (31 and 32 Vict. Cap. 40) (hereinafter called "the Act") has no application in Fiji.

40 2. The submission of the Appellant's said Counsel as made to the learned Chief Justice was that while the Act does apply in Fiji the provisions of the Ordinance must be read in conjunction with it and that so read the effect was that the said action was not one wherein a decree for partition might be made and this submission is again respectfully made to this Honourable Court.

In the
Court of
Appeal.

No. 6.
Notice of
Motion of
Appeal,
7th June,
1952—
continued.

3. The said judgment of the learned Chief Justice was wrong in law in holding that there was nothing in the Ordinance which expressly or by implication took away the common law jurisdiction of the Supreme Court of Fiji exercised by virtue of Sections 36 and 37 of "The Supreme Court Ordinance" (Cap. 2 of the Laws of Fiji) to order a partition and it is respectfully submitted the correct view in law is that such jurisdiction may be exercised only as to accord and not to conflict with the provisions of the Ordinance.

4. The said judgment was wrong in law in holding that the said Supreme Court had power to make an order directing the sale of the land referred to in such judgment and distribution of the proceeds of such sale. 10

5. The said judgment was wrong in law in holding that the said Respondent had an estate in possession in the said land.

6. Generally the said judgment was wrong in law.

7. As regards the final speeches of Counsel the learned Chief Justice despite protest by Counsel for the said Appellant wrongfully allowed to Counsel for the said Respondent the right of final reply although Counsel for the said Appellant did not call any evidence and announced his intention to refrain from so doing at the close of the case for the said Respondent.

Dated this 7th day of June, 1952.

RICE & STUART,
Solicitors for the Appellant.

20

To the above-named Respondent, Goverdhanbhai
Bhailalbhair Patel, and to The Registrar.

No. 7.
Judges'
Notes of
Hearing,
19th
August,
1952.

(a)
Carew, J.,
President.

No. 7.
Judges' Notes of Hearing.

IN THE FIJI COURT OF APPEAL.

Mr. Justice CAREW, President.
Mr. Justice RABY HEATT.
Mr. Justice RUSSELL.

(a) Mr. Justice Carew, President.

Tuesday, 19th August, 1952.
Civil Appeal No. 9 of 1952.

30

GHELABHAI PREMABHAI *ats* GOVERDHANBHAI BHAILALBHAI PATEL
Mr. P. RICE for the appellant.
Mr. A. D. PATEL for the respondent.

RICE :

- Drop Ground 5.
- Take 1 and 4 together.
- No dispute as to facts set out in para. 1 of C.J.'s judgment.
- Terms of offer—general. Record p. 30, Clause 4.
- Statement of Claim—Record p. 2. Para. 2, partition.
- Primary claim—sale was alternative claim.
- Record p. 35—letter re partition.
- 10 p. 36—letter, para. 3—partition.
- p. 37—letter, para. 3—partition—sale.
- p. 38—letter, para. 2—no reply. Writ issued.
- p. 3—Defence, para. 2 (b).
- No reason why negotiations were broken off.
- At trial respondent changed his front—wanted a sale. Partition not possible. Record pp. 4, 5—respondent's evidence—asked for sale.
- No reason for change of claim—cloak for a sale to which he is not entitled.
- Common law—one co-owner could obtain partition.
- Mayfair Property Co. v. Johnston* (1894) 1 Ch. 580.
- 20 At common law courts have not jurisdiction to order sale in lieu of partition—this is creature of statute.
- Partition Act 1868, 31 & 32 Vict., Ch. 40. Act repealed in England after 1874. First act still applies in Fiji.
- Halsbury to which I refer will be the original edition.
- Sale only ordered where Court had power to order partition.
- Halsbury p. 845, para. 1581—apply to Fiji.
- Sale cannot be ordered in Fiji where partition forbidden by own ordinance—Subdivision of Land Ordinance, Cap. 121, p. 1292, Vol. II, and amending Ordinance No. 14/1946.
- 30 Pleaded in Defence, record p. 3, section 3. Definition “sub-divide”—means partition.
- Ordinance 14/1946, sec. 2—consent of Board to partition. Sec. 3 application to the Board. Sec. 9, Cap. 121—power of Board in re-application—discretion vested in Board. Sec. 11, Cap. 121—prohibition limited area.
- Record p. 21—Exhibits B and C—Certificates of Title—area below minimum—13 perches—no partition of less than 24.
- Sec. 12 Cap. 121—even if one area Board has discretion. Sec. 17—refusal of Board—appeal to Governor in Council.
- 40 Courts have no jurisdiction to interfere.
- Sec. 18 Cap. 121—offence—breach of Ordinance. Sec. 19—Court's powers.
- Record p. 5. Land admitted to be land to which Ordinance applies—particularly section 5. Sec. 2—land which Ordinance applies.
- Respondent made no application to Board to sub-divide—admitted.
- C.J. said common law powers unaffected by this Ordinance to order partition.

In the Court of Appeal.

No. 7. Judges' Notes of Hearing, 19th August, 1952.

(a) Carew, J., President
—continued.

In the
Court of
Appeal.

No. 7.
Judges'
Notes of
Hearing,
19th
August,
1952.

(a)
Carew, J.,
President
—continued.

In effect common law overrides statutes—held otherwise in *Ariff v. Rai Jadunath Majundar Bahadur* (1931) 47 T. L. R., 238. P. 242, L. Russell.

Fiji Court of Appeal 2/1950 *Dhanraji v. Ramautar*.

Sec. 17, Cap. 121—Non-interference by Court.

Point of Ayr Collieries Ltd. v. Lloyd George (1943) 2 All E.R., 546.

Decision of Minister not questionable by courts.

Partition Act and our Ordinance must be read together, as to lands to which Ordinance applies. Where Ordinance does not apply to lands common law will apply. In case of conflict between common law and 10 statutes, statute law must prevail.

Board must first approve partition.

Compensation. Tenancy agreement—p. 21 Record.

Fair Rents Ordinance, 1947. Tenant cannot be ejected.

Compensation on basis of agreement offered and refused. Record p. 32—Letter. Letter p. 33—34—offer refused. P. 34—letter. P. 35—36—letter—no reply.

Ground 7: Not a ground for saying judgment was wrong—but ground for ordering new trial. Ground for depriving of costs. Unfair advantage.

PATEL :

20

Jurisdiction to order partition or a sale—common law applies to Fiji.

The Plaintiff a tenant in common entitling him to ask for partition—

Eve Laws of England, Vol. 10, 2nd Ed., p. 368. Difficulty in effecting partition—no bar.

English Reports 32, p. 308. *Turner v. Morgan*—difficulty does not oust jurisdiction.

Confusing partition and sub-division. Definition—sub-dividing for partition. Court could order partition if no sub-division necessary. Land already sub-divided—two titles. Partition can be made without involving 30 sub-division—even if result difficult and inconvenient. Sale can be ordered in lieu on account of inconvenience.

Partition Act 1868 especially for this—sec. 4—tenant in common was as of right entitled to ask Court for sale. Sale ordered unless good reason to contrary.

Can Court order partition and still comply with the Sub-division of Land Ordinance? It can and sub-divide in such a way as to meet with approval of Board or Governor in Council.

Ordinance does not oust Court to order partition. Ordinance only makes partition more difficult and inconvenient—another reason for 40 ordering sale.

Appellant wants tenancy—not entitled.

No reason why sale should not be ordered.

Ground 7: Even if wrong—judgment not affected—law correctly applied to facts.

Costs—brought about because appellant would not agree to partition or sale.

Order 36, rule 16. 1943 White Book, 644.
Discretion of Judge.

In the
Court of
Appeal.

RICE replies :

Ground 7 : Phipson, 8th Ed., p. 41.

First must get leave from Board to sub-divide before coming to the
Court.

C.A.V.

W.D.C.

No. 7.
Judges'
Notes of
Hearing,
19th
August,
1952.

Friday, 22nd August, 1952.

10 Mr. GAJADHAR (for Mr. RICE) for the appellant.
Mr. A. D. PATEL for the respondent.

(a)
Carew, J.,
President
—continued.

Judgment delivered.

Judgment to be entered for the defendant (appellant) in Supreme
Court Action No. 74 of 1951. Costs of appeal and of action in the Court
below to be paid by the respondent (plaintiff).

(Sgd.) W. D. CAREW,
Acting Chief Justice.
President.

(b) Mr. Justice Raby Heatt.

(b) Raby
Heatt, J.

20

Tuesday, 19th August, 1952.

Mr. P. RICE for the appellant.
Mr. A. D. PATEL for the respondent.

RICE :

Withdraws ground 5.

Will take 1 and 4 together.

No dispute of facts—as set out in first para. p. 7 Record.

Refers to option of plaintiff to re-enter business—see Clause 4, p. 30
Record (terms to be agreed).

Refers to para. 2 of Statement of Claim (p. 2 Record).

30 Refers to para. 3 of Statement of Claim (p. 2 Record).

Partition was major claim in Statement of Claim, and also in
correspondence—refers to p. 35 Record and (3) on p. 36—p. 37, p. 38—no
reply to this last letter—issued writ instead.

Refers to para. 2 (b) of Defence, p. 3.

All that was on “partition.”

At trial respondent changed face, said partition impracticable, and
sale only thing—see plaintiff's evidence at pp. 4 and 5.

Real reason for change of face—respondent did not want partition—
knew he was not entitled—merely used it as cloak to cover real desire for

In the
Court of
Appeal.

No. 7.
Judges'
Notes of
Hearing,
19th
August,
1952.

(b) Raby
Heatt, J.—
continued.

sale. At common law—one co-owner could always obtain partition.

Mayfair Property Co. v. Johnson (1894), 1 Ch., 580.

At common law—courts never had jurisdiction to order sale in lieu of partition—that jurisdiction came by English Partition Act 1868, 31 & 32 Vict., Ch. 40 (now repealed).

Said briefly—if there is jurisdiction to partition, then court could order sale.

Repeal does not affect Fiji. Laid down in cases that court could only order sale if it had power to order partition.

Original Halsbury p. 845, para. 1581. Submit when applying Partition Act to Fiji must add exception when partition forbidden by Fiji Sub-division of Land Ordinance, Cap. 121, as amended in 1946. 10

Refer to p. 3, para. 4—this part pleaded by defence that—see Defence. See para. 8 too.

Refers to definition of “sub-divide”—Cap. 121, sec. 3—includes “partition.”

Sec. 5 as replaced in 1946 Ordinance (No. 14)—consent of Board must first be obtained by person who seeks partition.

Sec. 6 as replaced—he *shall*.

Sec. 9 of Cap. 121 (Sub-sec. (1) and (2))—Board under no obligation to grant application. 20

Sec. 11—smallest area in sub-division specified. Refers to Certificates of Title—total area is 13 perches. Minimum under Sec. 11 is 24 perches.

Sec. 12—gives discretion.

Sec. 17—appeal from Board is to Governor in Council.

Sec. 18—criminal offence to contravene Cap. 121.

Sec. 19—shows care taken to show what cases courts have jurisdiction.

All through Ordinance refers to “land to which Ordinance applies” and those lands are defined in Sec. 2.

Agreed by both parties order appertains to this land—see p. 5 record— and Plaintiff made no application to subdivide. 30

C.J. held in fact that common law overrides statute—error—see *Ariff v. Rai Jadunath Majumdar Bahadur* (1931) 47 T.L.R., p. 238, at p. 242.

Dhanraji v. Ramautar—Fiji Court of Appeal Case No. 2/1950—held no principle of common law could override Ordinance.

Sec. 17, Cap. 121—contention is that court cannot interfere with Board's decision.

Point of Ayr Collieries, Ltd. v. Lloyd-George (1943).

2 All E.R., p. 546.

Must read common law, Partition Act and Cap. 121 together. 40

If Cap. 121 does not apply, common law and Partition Act apply.

If Cap. 121 does apply, then application to Board is condition precedent.

Submit no conflict between common law and statute—even if there were, statute would prevail.

Refer to tenancy agreement at p. 21—was for four years—Respondent could not eject tenants without leave of Court—Fair Rents Ordinance—compensation by way of rent has been offered to Respondent and refused—see pp. 32, 33–34, 34 and 35–36.

Ground 7 · Question of procedure—no ground for allowing appeal, but might be ground for ordering new trial. Respondent had no right of reply—he made no mention of Subdivision of Land Ordinance, Appellant did, and then Respondent claimed right of reply—at any rate he ought to lose his costs.

In the Court of Appeal.

No. 7.
Judges' Notes of Hearing, 19th August, 1952.

PATEL :

Submits Court had jurisdiction to partition or sale. Common law applies to Fiji.

10 Court has only to consider two points—(a) has Plaintiff title? Eve Laws of England Vol. X, 2nd Ed., p. 368—before Partition Act Court not concerned with inconvenience.

Turner v. Morgan Eng. Rep. 32, p. 308—inconvenience does not oust jurisdiction of Court.

Appellant erred in making partition and subdivide mean the same. If Court can subdivide without partitioning land, then Cap. 121 does not apply. Land already subdivided—two separate titles—buildings may be foolishly divided, but land is easy.

But absurdities in result give added reason to order sale.

Partition Act, 1868, specially for that purpose.

20 Refers to Sec. 4—tenant having half or one-third had right to ask court for sale.

Can court make order for subdivision which will comply with Subdivision of Land Ordinance? Difficult but possible.

Court should do so, seeing that Subdivision of Land Ordinance is complied with.

All Cap. 121 does is to make partition more difficult and more inconvenient—does not oust jurisdiction of court—another reason for sale in lieu.

30 Appellant wants to compel Respondent to grant Appellant a tenancy of his share of property.

Plaintiff entitled to apply for partition or sale in lieu and he has shown no reason why sale should not be ordered.

Refers to last para. of Judgment, p. 8 Record.

Ground 7 : Even if C.J. was wrong, does not affect judgment, and with the uncontroverted facts before the Court, the Court applied law correctly.

Costs—Defendant refused partition or sale—his fault. Refers to Order 36, Rule 16.

RICE replies :

Refers to Phipson on Evidence.

40 Plaintiff did not deal with law at all in his first speech.

Cap. 121 does not oust jurisdiction of Court, but it is *sine qua non* that you must go *first* to the Board.

No Court can make an order as suggested by Respondent because of criminal offence section of Cap. 121.

(b) Raby Heatt, J.—
continued.

(c) Mr. Justice Russell.

Tuesday, 19th August, 1952.

In the
Court of
Appeal.No. 7.
Judges'
Notes of
Hearing.
19th
August,
1952.(c) Russell,
J.

Mr. P. RICE for the Appellant.

Mr. A. D. PATEL for the Respondent.

RICE :

I abandon ground No. 5.

I will argue 1 and 4 together.

No dispute as to facts.

Terms as to rejoining firm by Plaintiff left vague. Page 30 Record,
Clause 4. 10

Respondent did not really want partition. He wanted sale.

At common law apart from statute or Ordinance one co-owner could
always obtain order for partition.

Mayfair Property Co. v. Johnston (1894) 1 Ch., 580.

At common law courts never had jurisdiction to order a sale.

This came by statute—Partition Act, 1868, which is now repealed.
31 & 32 Vict., Cap. 40.

Where jurisdiction to order partition court may order sale.

Partition Act still applies to Fiji. Hailsham Ed. applies to repealing
Act. A sale under the Act could only be ordered where jurisdiction to order 20
partition. Halsbury Vol. 21, original edition, p. 845.

Where the Partition Act is applied to Fiji a sale cannot be ordered where
Subdivision of Land Ordinance forbids.

Refers to "subdivide," Sec. 3, Cap. 121.

No land can be subdivided without prior approval. Ord. 14/1946.

Also application in writing must be submitted to Board.

Complete discretion in hands of Board to refuse application.

Sec. 11, Cap. 121—area and frontage. Land in this case did not come
up to minimum acreage under this section.

Sec. 12—again absolute discretion for Board to refuse. 30

Sec. 17—appeals from the Board are to Governor in Council.

Sec. 18—it is a criminal offence to contravene the provisions of the
Ordinance.

Sec. 19—Court has power to order demolition—this contrasts with
Sec. 17.

Land was admitted to be subject to Ordinance.

Respondent admitted he had made no application to subdivide.

C.J. held despite provisions of Ordinance common law power to order
partition.

This means common law overrides statute. 40

Ariff v. Rai Jadunath Majumdar Bahadur (1931) 47 T.L.R., p. 238, at
p. 242.

Dhanraji v. Ramautar, Fiji Court of Appeal 2/1950.

No principle of common law can affect the provisions of the Ordinance. Courts cannot interfere with Board's discretion or ruling of Governor in Council.

In the Court of Appeal.

Point of Ayr Collieries, Ltd. v. Lloyd-George (1943). 2 All E. R., p. 546.

No. 7.
Judges' Notes of Hearing.
19th August, 1952.

Before Court can order partition there must be evidence that approval of Board has been obtained. No power to order partition.

There was an agreement for tenancy made when Appellant in India.

Ground 7: No ground for saying judgment is wrong. May be ground for new trial. Was ground for refusing costs.

10 **PATEL :**

Court had jurisdiction to order partition and sale. Common law power to order partition.

(c) Russell. J.—
continued.

Had Plaintiff sufficient title ?

Plaintiff is tenant in common of this title.

Order for partition—was not incumbent upon Court to consider desirability.

Eve Laws of England, Vol. 10, 2nd Ed., p. 368.

Turner v. Morgan, Eng. Rep. 32, p. 308.

Court's jurisdiction not ousted by Subdivision of Land Ordinance.

20 Subdivision is not partition if Court can find ways and means of partition without subdivision.

Land is already subdivided and a partition can be effected without subdividing as in case of *Turner & Morgan*.

Difficulties in partition are an added reason for sale.

Court could order partition subject to Subdivision of Land Ord.

Appellant is only trying to compel Respondent to grant tenancy.

No valid reason shown by Appellant as to why sale should not be ordered.

30 *Ground 7*: If Judge wrong, this does not affect judgment, the facts were uncontraverted and Court was entitled to arrive at the decision it did and find the law as it did.

Order 36, rule 16. Was in Judge's discretion to allow right of reply.

RICE :

I asked for right of reply. It was refused.

RICE :

Phipson, 8th Ed., p. 41.

I am not saying Court's jurisdiction is taken away, but leave to subdivide must be obtained first.

40 Adjoined for judgment.

T. T. R.
19/8/52.

22nd August, 1952

Judgment read allowing appeal.

T. T. R.
22/8/52.

In the
Court of
Appeal.

No. 8.
Judgment.

Civil Appeal No. 9 of 1952.

No. 8.
Judgment,
22nd
August,
1952.

IN THE FIJI COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Between

GHELABHAI PREMABHAI, Father's name Premabhai of Ba,
Merchant *Appellant*

and

GOVERDHANBHAI BHAILALBHAI PATEL, Father's name 10
Bhailalbhahi Patel of Ba, Merchant *Respondent.*

This is an appeal against a decision of the learned Chief Justice, delivered on the 29th day of May, 1952, in a suit brought by the Respondent Goverdhanbhahi Bhailalbhahi Patel against the Appellant, Ghelabhai Premabhai. In that suit the Respondent claimed the partition of certain lands situate in the township of Ba, with the buildings and fixtures erected thereon, of which, it was admitted by both parties, the Appellant and the Respondent are the registered proprietors as tenants in common. In the alternative, the Respondent claimed an order for the sale of such property and the division between the parties of the proceeds of sale. The trial judge 20 gave judgment in favour of the Respondent, with costs, and directed an order for the sale of the property and distribution of the proceeds.

In his judgment the learned Chief Justice said that Mr. Rice, on behalf of the Appellant, had argued that owing to the provisions of the Subdivision of Land Ordinance, Cap. 121, the Partition Act of 1868 had no application to Fiji and that the Court had no jurisdiction to order partition, and that as a sale could only be ordered as an alternative to partition the Court had no power to order a sale.

The learned Chief Justice, in dealing with this submission, said—we quote from his judgment—

30
“ I can find nothing in the Subdivision of Land Ordinance
“ which expressly or by implication takes away the common law
“ jurisdiction of this Court, exercised by virtue of Sections 36 and
“ 37 of the Supreme Court Ordinance (Cap. 2) to order a partition
“ when such order could lawfully be made. It may well be that the
“ person obtaining such order would be bound to proceed in
“ accordance with the provisions of the Subdivision of Land
“ Ordinance, and in the event it might be that owing to the
“ application of those provisions to the particular circumstances
“ the order could not be carried out. In that event I apprehend 40
“ that the person obtaining the order would be entitled to apply
“ for such alternative relief, if any, to which he might be entitled.

“ Alternatively, I see no reason why the Court should not make an order directing partition and at the same time suspend the operation of the order until satisfied that the requirements of the Ordinance had been complied with. I find that this Court has not lost its common law jurisdiction to make an order directing the partition of property and therefore the case is one where, in the terms of the Partition Act, 1868, a decree for partition might have been made. It follows that the Court has power, in pursuance of the terms of the Partition Act of 1868, to make an order directing the sale and distribution of the proceeds.”

In the
Court of
Appeal.
—
No. 8.
Judgment,
22nd
August,
1952—
continued.

10

Mr. Rice stated to us that the learned Chief Justice incorrectly propounded his submission at the trial. He said that the submission which he then made, and to which he still adhered, was that while the Partition Act, 1868, applied to Fiji the provisions of the Subdivision of Land Ordinance Cap. 121, must be read in conjunction with it, and that, so read, the effect was that the action was not one wherein a decree for partition could be made.

It is clear that the Partition Act 1868 applies to Fiji and it is equally clear that in the absence of the Subdivision of Land Ordinance, Cap. 121, an order decreeing partition, or, if the circumstances so required, an order for sale, could lawfully be made.

We are of opinion that whilst the learned Chief Justice correctly expounds the law relating to his jurisdiction at common law and under the Partition Act, 1868, he has in fact failed to have regard to the provisions of the Subdivision of Land Ordinance Cap. 121. It is clear, under Section 11 of that Ordinance, that subdivision, which we hold for the purposes of this case to be the same as partition, cannot be granted by the Subdivision of Land Board in relation to the land the subject matter of this appeal, except in the circumstances specified in the proviso to that section. No evidence was produced to the trial judge, and no suggestion has been made to us, that that proviso is applicable to the present case. Thus it appears to us that in the circumstances of this case no order for partition could properly be made by the learned Chief Justice or this Court. It follows, therefore, by virtue of the fact that the Partition Act 1868 limits the power of the Court to order a sale to cases in which an order for partition could be made, that no order for sale should have been made in this case.

30

The appeal is therefore allowed, and judgment must be entered for the Defendant in the action. The Respondent will pay the costs of this appeal together with the costs in the Court below.

40

(Sgd.) W. D. CAREW,
Acting Chief Justice President.

(Sgd.) A. RABY HEATT,
Judge.

(Sgd.) T. T. RUSSELL,
Judge.

Suva, Fiji.
22nd August, 1952.

No. 9.

In the Court of Appeal.

Order Granting Provisional Leave to Appeal and Order for Security for Costs.

No. 9.
Order granting provisional leave to Appeal and Order for security for costs, 12th September, 1952.

Before the Honourable Mr. Justice CAREW in Chambers, Friday, the 12th day of September, 1952.

UPON HEARING the notice of motion herein and upon hearing Mr. A. D. Patel of Counsel for the Respondent and upon hearing Mr. K. C. Gajadhar of Counsel for the Appellant and upon reading the Affidavit of the said Respondent.

IT IS ORDERED that the Respondent be at liberty to appeal to Her Majesty in Council from the Judgment of this Honourable Court dated the 22nd day of August, 1952. 10

UPON CONDITION that the Respondent within three months from the date of this Order do furnish by way of a Bank Guarantee security in the sum of FIVE HUNDRED POUNDS (£500 0s. 0d.) sterling for the due prosecution of the appeal and the payment of all such costs as may become payable to the Appellant in the event of the Respondent not obtaining an order granting final leave to appeal or the appeal being dismissed for non-prosecution or in the event of Her Majesty in Council ordering the Respondent to pay to the Appellant's costs of the appeal and UPON CONDITION that the Respondent within three months from the date of this order shall also take all necessary steps for the purpose of procuring the preparation of the record and despatching the same to England. 20

AND IT IS FURTHER ORDERED that the Judgment in this action shall be suspended pending the Appeal.

By the Court,
(Sgd.) G. YATES,
Registrar.

L.S.



EXHIBITS.

B.—Certificate of Title.

Register Vol. 51.

Folio 5042.

Exhibits.

B.
Certificate
of Title,
No. 5042.

Area : Seven perches.
 District : Bulu.
 Island : Vitilevu.
 Known as : " Nanukudrala " (part of).

Proprietors {GOBERDHANBHAI BHAILALBHAI PATEL.
 {GELABHAI PREMABHAI.

10

(each as to one undivided half share).

C.—Certificate of Title.

No. 5915.

Area : Six perches.
 District : Bulu.
 Island : Vitilevu.
 Known as : " Nanukudrala " (part of).

Proprietors {GOBERDHANBHAI BHAILALBHAI PATEL.
 {GELABHAI PREMABHAI.

(each as to one undivided half share).

20

D.—Memorandum of Agreement.

MEMORANDUM OF AGREEMENT made this 24th day of June 1947 between GOVERDHANBHAI BHAILALBHAI PATEL Father's name Bhailalbhai Patel of Varoka in the district of Ba Merchant (who together with his executors administrators and assigns except where the context requires a different construction is hereinafter referred to as and included in the term " the Landlord ") of the one part and CHAMPAKLAL Father's name Prembhai and GHELABHAI Father's name Prembhai both of Varoka in the district of Ba Merchants (who together with their executors administrators and assigns except where the context requires a different construction is hereinafter referred to as and included in the term " the tenants ") of the other part.

30

D.
Memoran-
dum of
Agreement,
24th June,
1947.

Exhibits.

WHEREBY IT IS AGREED AS FOLLOWS :—

D.
Memoran-
dum of
Agreement,
24th June,
1947—
continued.

1.—The Landlord agrees to let to the tenants who agree to take a tenancy of all that the Landlords right title and interest in the undivided half share in those pieces or parcels of land known as C.T./5042 NANUKUDRALA (part of) 7 perches and C.T. 5915 NANUKUDRALA (part of) 6 perches situate in the township of Ba together with the store buildings out buildings and Bowser thereon (hereinafter referred to as “ the said premises ”) for a term of FOUR YEARS commencing from the first day of March 1947 at a rental of TWO HUNDRED AND THIRTY POUNDS (£230 0s. 0d.) payable by four equal quarterly payments first such payments to be made on the 31st May 1947 during the said term. 10

THE TENANTS AGREE WITH THE LANDLORD AS FOLLOWS :—

- 2.—(a) To pay the said rent in the manner and at the times hereinbefore provided.
- (b) To pay for all electric light and power and all water at any time consumed upon the said premises during the said term.
- (c) Not to assign sublet or in any way part with possession of the said premises without the consent in writing of the landlord first had and obtained provided that such consent shall not be arbitrarily or unreasonably withheld in the case of a reputable and substantial assignee or subtenant. 20
- (d) Not at any time to do or suffer any act or omission or carry on or permit any trade or occupation upon or about the said premises which may be a disturbance or annoyance to the occupiers or owners of adjoining premises or which may render any increased or extra premium payable for the insurance of the said premises against loss or damage by fire or which may make void or voidable any policy for insurance.
- (e) From time to time and at all times during the term hereby created to keep the said premises in at least the same order and condition as the same are in at the commencement of the said term (depreciation by fair wear and tear and damage by fire or other inevitable accident without neglect or wilful acts of the tenants alone excepted) and to deliver the same up to the landlord in at least the like condition (save as aforesaid) at the termination of the tenancy. 30
- (f) To comply with the requirements of the Ba Township Local Authority the Public Health Board or other proper Public Authority in connection with the said premises and the trades and businesses conducted therein and in the course of such compliance to make any structural alterations to the said premises required by the said Board or other proper authority. 40
- (g) Except as provided in the preceding sub clause “ f ” hereof not to make or permit to be made any alterations or additions to

the said premises nor cut main injure or remove any walls or timbers thereof without the written consent of the landlord first had and obtained.

- (h) The tenants will get the interior of the said premises painted at the expiry of three years of the term hereby created at their own expense.
- (i) To permit the Landlord's agents at all reasonable times to enter into and upon the said premises and view the condition thereof.

Exhibits.
—
D.
Memoran-
dum of
Agreement,
24th June,
1947—
continued.

10 THE LANDLORD AGREES WITH THE TENANTS as follows :—

3.—The Landlord will insure the buildings and structures on the said land against fire and hurricane in their full insurable value and the tenant will pay to the landlord the premiums of such insurances as and when they become due.

AND IT IS HEREBY AGREED AND DECLARED BY and between the parties hereto as follows :—

- 20 4.—(a) In case the said premises shall be destroyed or damaged by fire hurricane or other inevitable accident to such an extent as to render the premises untenable then the tenancy hereby created shall immediately cease and determine but without releasing the tenants from liabilities for rent accrued to the date of such determination or either party from any antecedent breach of any provision hereof.
- 30 (b) In case the said premises shall be partially destroyed by fire or other inevitable accident but not to such an extent as to render the premises untenable the rent payable hereunder shall abate in proportion to the damage done and in case the parties cannot agree the amount of such abatement shall be determined by arbitration and the landlord will forthwith take all reasonable steps to restore the said premises to their original conditions.
- (c) If and whenever the rent hereby reserved shall be in arrears and unpaid for the space of seven days after any of the days appointed for the payment thereof the landlord may forthwith recover the same by distress.
- 40 (d) If and whenever the rent is in arrears and unpaid for the space of seven days after the days hereinbefore appointed for the payment thereof whether the same shall have been legally or formally demanded or not or if and whenever the tenants shall make default in the performance or observance of any of the other provisions in this agreement then the Landlord may forthwith and without making any demand or giving any notice whatsoever re-enter upon and take possession of the demised

Exhibits.
 D.
 Memorandum of
 Agreement,
 24th June,
 1947—
continued.

premises and determine this agreement but without releasing the tenants from any liability for rent then due or either party from any antecedent breach of the provisions hereof.

AS WITNESS the hands of the parties.

THE SCHEDULE.

All that pieces or parcels of land comprised in C.T. 5042 known as NANUKUDRALA (part of) containing 7 perches and C.T. 5915 known as NANUKUDRALA (part of) containing 6 perches together with the store building and out buildings and Bowser (Benzine) thereon,

Signed by the said GOVERDHANBHAI BHAILAL- } (Sgd.) G. P. PATEL. 10
 BHAI PATEL as Landlord in the presence }
 of :— }
 (Sgd.) A. D. PATEL,
 Solicitor, Nadi.

Signed by the said CHAMPAKLAL and GHE- } (Sgd.) CHAMPAKLAL
 LABHAI as tenants of the presence of :— } GHELABHAI.
 (Sgd.) A. D. PATEL,
 Solicitor, Nadi.

E.
 Equitable
 Mortgage
 Agreement,
 24th July,
 1947.

E.—Equitable Mortgage Agreement.

AN AGREEMENT made this 24th day of July 1947. BETWEEN 20
 (CHAMPAKLAL Father's name Premabhai and GHELABHAI Father's name
 Premabhai both of Varoka in the district of Ba Merchants (hereinafter
 termed the BORROWERS) of the one part and GOVERDHANBHAI BHAILALBHAI
 PATEL Father's name Bhailalbhail Patel of Varoka aforesaid Merchant
 (hereinafter termed the LENDER) of the other part WHEREAS the Lender has
 agreed to sell to the Borrowers certain goods chattels and things mentioned
 in an agreement for Sale and Purchase made between the parties of even date
 AND WHEREAS it is one of the conditions of the said Sale and Purchase
 Agreement that the Borrowers shall keep FOUR THOUSAND POUNDS
 (£4,000 0s. 0d.) as a fixed deposit from the Vendor upon such terms condi- 30
 tions and securities as are hereinafter appearing.

NOW THEREFORE in pursuance of such agreement and for the
 consideration herein appearing the Borrowers contemporaneously with the
 execution of these presents agrees to deposit with the Lender the document
 or documents described in the first part of the schedule hereto with the
 intent that the said deposit shall operate as an equitable mortgage of or
 charge on the said document or documents and the right estate title and
 interest powers and remedies of the Borrowers arising thereunder (hereinafter
 called the property) as security for the due fulfilment of the provisions
 herein expressed or implied : 40

THE EXPRESSED PROVISIONS ABOVE REFERRED TO

Exhibits.

1.—The Borrowers shall pay to the Lender the said sum of £4,000 0s. 0d. and further advances (if any) on the first day of March 1951.

E.

Equitable
Mortgage
Agreement,
24th July,
1947—
continued.

2.—The Borrowers shall pay interest on the said sum of £4,000 0s. 0d. and advances (if any) at the rate of Ten Pounds per centum per annum as to the said sum of £4,000 0s. 0d. from the first day of March 1947 and as to such further advance or advances from the date or respective dates on which any indebtedness arises until repayment thereof, payable half yearly.

10 3.—The Borrowers when so required by the Lender will at any time and from time to time make do and execute such further or other acts deeds instruments and assurances for assuring or more perfectly assuring all or any of the Property unto the Lender by way of Mortgage and containing such covenants and provisions as the Lender may reasonably require and more especially a covenant enabling the Lender to proceed to the realization of this security or any part thereof within fourteen days after any default.

20 4.—The Borrowers hereby admit having represented to the Lender that the Borrowers now have good right to deal with the property in manner herein appearing and that all prior charges or encumbrances (if any) are disclosed in the second part of the said schedule of this agreement and that the Borrowers know that the Lender hath entered into this agreement on the faith of such representations.

30 5.—Nothing herein contained or implied is to extinguish the rights of the Lender against the Borrower as simple contract creditor and these presents are to be a running and continuing security notwithstanding any settlement of account or other matter or thing whatsoever until a final written discharge hereof shall have been given by the Lender to the Borrowers and where a further or other security or securities Bill of Exchange or Bills of Exchange have been taken by the Lender either before or after these presents neither these presents nor any such further or other security or securities Bill of Exchange or Bills of Exchange shall be deemed to be merged affected or controlled by these presents or by such further or other security or securities Bill of Exchange or Bills of Exchange unless such merging affection or control is set out in explicit terms under the hand of the Lender.

6.—In the event of any breach of any of the provisions of this agreement by the Borrowers all moneys interest and indebtedness hereby intended to be secured shall immediately become payable anything to the contrary notwithstanding.

40 7.—Any demand or notice served or given under the provisions of this agreement may be delivered personally to the person on or to whom the same is to be served or given or may be left at his or her above-mentioned or other last known address or may be posted in prepaid letter addressed to him or her at such address and in such event shall be deemed to have been received on the fifth day after the day of posting.

Exhibits.
 E.
 Equitable
 Mortgage
 Agreement,
 24th July,
 1947—
continued.

8.—All moneys required to be paid and all things required to be done to safeguard the interest of the Lender in or under this security shall be duly paid and performed by the Borrowers and in the event of the Borrowers making default hereunder it shall be lawful but not obligatory upon the Lender to pay and perform the same and all costs charges and expenses incurred by the Lender in or about the protection perfection or realization or the intended protection or realization of this security or any part thereof shall form part of the moneys or indebtedness of the Borrowers to the Lender hereby secured payable on demand and carrying interest at the rate of ten pounds per centum per annum from the date of payment. 10

9.—On the Borrowers making any default such as would render the moneys or indebtedness hereby secured payable and recoverable by these presents the Lender may in the first instance sue for and take judgment against the Borrowers as on a simple contract debt for all moneys interest and indebtedness secured or intended to be secured by these presents and may then levy execution against any property (including the property herein agreed to be mortgaged and charged) before resorting to and enforcing the provisions of these presents.

10.—Any moneys payable to the Borrowers under and by virtue of the documents described in the first part of the said schedule or any of them shall by virtue of this Clause 10 become payable to the Lender or his nominee and the receipt of the said Lender or his nominee shall constitute a complete exoneration and discharge for all moneys so paid. 20

11.—The expressions “ Borrower ” and “ Lender ” shall when the context so admits include the persons deriving title under the Borrower and Lender respectively and the said expressions where the Borrower and/or the Lender consist of more than one person shall include jointly and severally each and all of the persons constituting the Borrower and/or the Lender and the provisions of these presents shall be construed accordingly.

12.—The following clauses of the “ Provisions for Selection ” immediately hereinafter referred to by number shall be deemed to be incorporated in these presents and shall have the same effect and be construed as if it or they had been printed in full herein instead of being incorporated by reference to number only, namely— 30

13.—The Lender may at the Lender’s uncontrolled discretion make to the Borrowers such further advance or advances as the Borrowers may be prepared to accept and any such advance or advances shall be deemed to form part of the principal sum by these presents secured and payable accordingly together with interest at the rate and payable at the time or times aforesaid but such interest on any further advance or advances shall be computed only from the date of such advance or respective dates of such advances. 40

14.—The Lender may at the Lender’s uncontrolled discretion either in the Lender’s own name or in the name of the Borrowers apply for a new lease of all or any of the land described in the schedule hereto on such favourable

terms as the Lender may reasonably obtain. In these presents the words "new lease" shall mean and include an extension of lease a renewal of lease and a consolidation of leases comprising some or all of the land in the said schedule described whether or not there be in addition land included in the new lease which does not form part of the land described in the said schedule. The Borrowers shall make do and execute all things reasonably required by the Lender to enable any such new lease to be completed and registered and shall make do sign and execute all things reasonably required by the Lender to enable any amount owing under these presents to be

10 secured by registered mortgage collateral to and on the same terms and conditions as these presents charged on any new lease. All costs and expenses (including payments by way of premium to native owners) incurred in or about the obtaining of any new lease or the registration of a collateral mortgage as aforesaid shall constitute a further advance under these presents but payable on DEMAND. Any such new lease and any inchoate right or interest of the Borrowers to any such new lease howsoever arising shall until such collateral mortgage is duly registered against the same stand charged in equity with the payment of all moneys and interest and on the same terms and conditions (so far as they apply in equity) as is

20 provided by these presents. The Borrowers hereby irrevocably appoint the Lender the Borrowers' attorney for the Borrowers and in the Borrowers' name to make do and execute any document or thing required to be executed under this provision relating to new leases.

Exhibits.

 E.
 Equitable
 Mortgage
 Agreement,
 24th July,
 1947—
continued.

IN WITNESS whereof the parties have executed these presents after the same had been carefully read over and explained to them when they appeared fully to understand the same.

THE SCHEDULE HEREINBEFORE REFERRED TO
 (First Part-Description of Documents).

	<i>Date</i>	<i>Document</i>	<i>Number</i>	<i>Parties</i>	<i>Property dealt with</i>
30	5/11/41 ...	C.L. ...	26462 ...	Director of Lands	Lot 16 SECTION 1 Ba Township 20.1 p.
	13/3/36 ...	C.T. ...	5915 ...	—	NANUKUDRALA (part of) 6 perches Lot 1 on DP 610.
	15/3/27 ...	C.T. ...	5042 ...	—	NANUKUDRALA (part of) 7 perches.
	5/11/41 ...	C.L. ...	26461 ...	Director of Lands	Lot 9 Section 1 Ba Township 20 perches.

(Second Part—Prior Charges or Encumbrances).
 NIL.

40 Signed by the said Borrowers in the presence of :—

{ (Sgd.) }	CHAMPAKLAL
	PREMABHAI.
	GHELABHAI PREMABHAI.

(Sgd.) A. D. PATEL,
 Solicitor, Nadi.

Exhibits.

E.
Equitable
Mortgage
Agreement,
24th July,
1947—
continued.

PROVISIONS FOR SELECTION

(Referred to in Clause 12 of the foregoing Equitable Mortgage Agreement).

15.—The Lender is authorised and empowered by the Borrower and as the agent of the Borrower to and for this purpose (or all or any of these purposes) to instruct the Lender's solicitors, Messieurs A. D. Patel.

16.—The Lender shall be entitled during the currency of this security to keep insured in the name of the Lender as mortgagee of the Borrower in the full insurable value thereof against fire in some Insurance Company to be approved by the Lender and all costs premiums and charges incurred for or in respect of such insurance shall be deemed as coming within the provisions of Clause 8 of these presents. 10

17.—The moneys hereby secured are the same moneys as are secured by the document or documents immediately hereinafter described and any default hereunder or thereunder shall be deemed to be a default hereunder and the Lender may upon any default hereunder or thereunder exercise the Lender's rights powers and remedies both thereunder and hereunder either together or separately and in such order as the Lender may think fit.

18.—If the Borrower makes default in the observance or performance of Clause hereof he shall pay to the Lender as and for liquidated damages the sum of pounds. 20

F.—Deed of Assignment.

F.
Deed of
Assignment,
24th July,
1947.

THIS INDENTURE made the 24th day of July 1947 between GOVERDHANBHAI BHAILALBHAI PATEL Father's name Bhailalbai Patel of Varoka in the district of Ba Merchant (hereinafter called the Vendor) of the one part and CHAMPAKLAL Father's name Premabhai and GHELABHAI Father's name Premabhai both of Varoka in the district of Ba Merchants (hereinafter called the Purchasers) of the other part.

WHEREAS the Vendor is a partner having one half share and the Purchasers are partners having the other half share between them in the firm of N. GOVERDHANBHAI & COMPANY and WHEREAS the Vendor is desirous of going to India and to retire from the said partnership business during his absence in India AND WHEREAS it has been agreed between the Vendor and the Purchasers that in CONSIDERATION of the sum of £8,662 9s. 5d. (EIGHT THOUSAND SIX HUNDRED SIXTY TWO POUNDS NINE SHILLINGS AND FIVE PENCE) to be paid to the Vendor in the manner following that is to say the sum of £4,662 9s. 5d. on the execution of these presents and the balance of £4,000 0s. 0d. on the first day of March 1951 and interest on the said balance of £4,000 0s. 0d. at the rate of ten pounds per centum per annum payable half-yearly by the purchasers to the vendor and for better 40

securing the payment of the said balance of £4,000 0s. 0d. and interest thereon the Purchasers to give to the vendor an Equitable Mortgage over C.T. 5042 known as NANUKUDRALA (part of) containing 7 perches and C.T. 5915 known as NANUKUDRALA (part of) containing 6 perches and C.L. 26461 known as Lot 9 Section 1 Ba Township AND IN CONSIDERATION of the purchasers taking over full liability to duly pay and discharge all the debts and liabilities of the said firm of N. GOVERDHANBHAI & COMPANY outstanding on the first day of March 1947 as shown by the books of the business, he the vendor shall sell and the purchasers shall purchase all the
 10 vendor's share in the stock-in-trade, furniture and fittings book debts and other debts, described in the schedule " A " hereto, Overseas payments in advance described in the schedule " B " hereto, Lorries registered numbers 1421 and 954 and parts of the dismantled command Car and one typewriter.

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £8,662 9s. 5d. of which the sum of £4,662 9s. 5d. is now paid to the vendor by the purchasers (the receipt whereof is hereby acknowledged) and in consideration of the covenant by the purchasers to pay all debts and liabilities of the firm of N. GOVERDHANBHAI & COMPANY outstanding on the
 20 first day of March 1947 as shown by the books of the business the vendor doth hereby as beneficial owner ASSIGN UNTO the purchasers his the vendor's share in the stock-in-trade as it stood on the 28th day of February 1947 and which stock was taken by the parties hereto and valued at £10,587 1s. 2d. (TEN THOUSAND FIVE HUNDRED EIGHTY SEVEN POUNDS ONE SHILLING AND TWO PENCE) book debts and other debts described in the schedule " A " hereto, overseas payment in advance described in the Schedule " B " hereto, Lorries registered numbers 1421 and 954 and parts of one dismantled command car belonging to the said firm and one typewriter and also all the interest of his the vendor in all contracts and orders which the said firm has entered into for the purchase and importation of goods and the rights to
 30 apply for import and other licences from the Economic Warfare Office and quotes for the importation of goods and the right to import goods on licences already issued in the name of the firm but not heretofore used together with full power in the name of the firm to suffer demand recover enforce and receive payments of and give effectual receipts or discharges for any money damages costs charges and expenses which may become recoverable or payable in relation to or any of the said contracts or orders ; to have receive and enjoy the said premises UNTO AND by the purchasers their executors administrators or assigns absolutely.

THE PURCHASERS HEREBY COVENANT WITH THE VENDOR that :—

40 1.—The purchasers shall pay to the vendor the said balance of £4,000 0s. 0d. on the first day of March 1951 and shall pay interest on the said sum of £4,000 0s. 0d. at the rate of ten pounds per centum per annum from the first day of March 1947 payable every six months by the purchasers. The said sum of £4,000 0s. 0d. will be treated as a fixed deposit and the purchasers shall not compel the vendor to accept payment of the said sum of £4,000 0s. 0d. or any part thereof before the said first day of March 1951.

Exhibits.

—
 F.
 Deed of
 Assignment,
 24th July,
 1947—
continued.

Exhibits.
 F.
 Deed of
 Assignment,
 24th July,
 1947—
continued.

2.—The purchasers will deposit C.T. 5042, 5915 and C.L. 26461 and 26462 and shall give an Equitable Mortgage on the said Certificates of Title and Crown Leases as a security for the payment of the said sum of £4,000 0s. 0d. and interest.

3.—The purchasers shall not assign transfer mortgage or charge any of their assets (save and accept selling goods in their ordinary course of business) nor will they take any partner in the said firm without consent of the vendor in writing first had and obtained.

4.—The vendor shall have option to join the said firm as a partner with half share in the partnership business at any time after the first day of March 1951 but before the first day of March 1954. In the event of the Vendor exercising his option to join the firm no value will be charged or taken into account for the goodwill in the valuation of the said business. 10

5.—The purchasers shall endeavour to collect the debts mentioned in the schedule " C " hereto and shall pay the vendor half of the sum or sums so collected.

6.—The purchasers shall duly pay and discharge all the debts and liabilities of the said business outstanding on the first day of March 1947 as shown by the books of the business and described in the schedule " D " hereto and will keep the vendor his executors and administrators indemnified against the same and every part thereof respectively and from all actions proceedings costs charges demands and expenses in respect thereof. 20

7.—The purchasers shall forthwith register with the Registrar General the change of partners in the said firm as from the First day of March 1947 and shall inform all persons having dealings with the said firm of the said change.

8.—It is hereby expressly agreed and declared between the vendor and the purchasers that the vendor and the purchasers shall execute a tenancy agreement concurrently with these presents purporting to let the vendors undivided half share in the store and other buildings for a term of four years from the first day of March 1947 at a yearly rental of £230 0s. 0d. (Two HUNDRED AND THIRTY POUNDS) and all other terms as are appearing in the said agreement. 30

9.—All costs payable to Mr. A. D. Patel of Nadi Solicitor and Mr. Harishankar book-keeper of Ba in respect of work done in reference to going into accounts, taking stock, determination of the value of partnership business, negotiations between the parties for the sale and purchase of the vendor's share in the business and all other work concerning and incidental to these presents shall be paid by the vendor and the purchasers in equal shares. 40

SCHEDULE " A. "

BOOK DEBTS AND OTHER DEBTS

(Not printed. This Schedule consists of 106 items).

SCHEDULE " B. "

OVERSEAS PAYMENT IN ADVANCE.

(Not printed. This Schedule consists of 14 items).

SCHEDULE " C. "

BAD DEBTS.

(Not printed. This Schedule consists of 48 items).

SCHEDULE " D. "

SUNDRY CREDITORS.

(Not printed. This Schedule consists of 32 items).

Exhibits.

F.

Deed of
Assignment,
24th July,
1947—
continued.

10 IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed Sealed and Delivered by Goverdhanbhai } (Sgd.) G. B. PATEL
Bhailalbai Patel in the presence of :— } (Vendor).
(Sgd.) A. D. PATEL,
Solicitor, Nadi.

Signed Sealed and Delivered by Champaklal in } (Sgd.) CHAMPAKLAL
the presence of :— } PREMABHAI.
J. MEHTA.
(Purchaser).

20 (Sgd.) A. D. PATEL,
Solicitor, Nadi.

Signed Sealed and Delivered by Ghelabhai in the } (Sgd.) GHELABHAI
presence of :— } PREMABHAI
(Purchaser).
(Sgd.) A. D. PATEL,
Solicitor, Nadi.

G.—Receipt.

No. 12605.

A. D. Patel,
Barrister-at-Law,
Fiji, 2nd March, 1951.

G.
Receipt,
2nd March,
1951.

30

Received from Champaklal & Ghelabhai the sum of Four Thousand Three Hundred and Four Pounds Fourteen Shillings and Ten Pence being Trust account for G. B. Patel.

With thanks.

2d. Stamp
cancelled.

A. D. PATEL,
Per A. S. Pillay.

£4,304 14s. 10d.

Exhibits.

A.—Correspondence before action.

A.
Correspondence
before
Action.

(1) Letter, Rice & Stuart to A. D. Patel.

Rice & Stuart,
Barristers & Solicitors,
Commissioners for Oaths.

Box 14, BA, Fiji. 30th May, 1951.

(1) Letter,
Rice &
Stuart to
A. D. Patel,
30th May,
1951.

A. D. Patel, Esquire,
Solicitor,
Nadi, Fiji.

Dear Sir,

10

Under instructions given by Mr. Goverdhanbhai Bhailalbhair Patel, to a representative of our clients Ghelabhai and Champaklal, we enclose herewith our cheque for £57 10s. 0d. being amount payable to Goverdhanbhai Bhailalbhair Patel from our said clients, in respect of rent due as per tenancy agreement in writing dated the 24th day of July 1947 made between the said parties.

Kindly acknowledge receipt of the same in due course.

Yours faithfully,

(Sgd.) RICE & STUART.

(2) Cheque,
Rice &
Stuart to
A. D. Patel,
28th May,
1951.

(2) Cheque, Rice & Stuart to A. D. Patel.

20

No. 429019.

Stamp duty paid.

Bank of New South Wales,
Established 1817.

NOT NEGOTIABLE

Lautoka,
Fiji.

28th May, 1951.

Pay A. D. Patel or Bearer the sum of Fifty Seven Pounds and Ten Shillings £57 10s. 0d.

30

Rice & Stuart No. 2 Trust A/c.

(Sgd.) P. RICE.

(3) Letter, Rice & Stuart to A. D. Patel.

Rice & Stuart,
Barristers & Solicitors,
Commissioners for Oaths.

Box 14, Ba, Fiji.

31st May, 1951.

A. D. Patel, Esq.,
Solicitor,
Nadi.

Exhibits.

A.
Corres-
pondence
before
Action.

(3) Letter.
Rice &
Stuart to
A. D. Patel,
31st May,
1951.

10 Dear Sir,

Champaklal & anor. to G. B. Patel.

As you are aware we are acting for Champaklal and Ghelabhai in connection with their dealings with Goverdhanbhai Bhailalbbhai Patel.

We have had placed before us your Receipt dated 2nd March last in favour of our clients acknowledging the sum of £4,304 14s. 10d. in settlement of the amount due to your client by ours. Our clients state that your client holds a security for this sum, and we should be glad therefore if you would at once forward to us a discharge of this security together with the Certificate or Certificates of Title which it affects. In the event of your so doing we
20 undertake to pay you any proper discharge fees, and we should be glad to hear from you in the matter at your early convenience.

Yours faithfully,

(Sgd.) RICE & STUART.

(4) Letter, A. D. Patel to Rice & Stuart.

A. D. Patel, B.A.,
Barrister-at-Law,
Commissioner for Oaths.

Nadi. 11th June, 1951.

30 Messrs. Rice & Stuart,
Solicitors,
Ba.

(4) Letter,
A. D. Patel
to Rice &
Stuart,
11th June,
1951.

Dear Sirs,

I beg to acknowledge the receipt of your letter dated the 30th May 1951, enclosing a cheque of £57 10s. 0d.

Mr. Goverdhanbhai Bhailalbbhai Patel informs me that no such instructions as mentioned in your letter are given by him to your clients or their representatives.

The tenancy agreement dated the 24th day of July 1947 expired on the 28th day of February 1951. Since then there has been no tenancy between

Exhibits. your clients and mine, and your clients are in fact wrongfully staying over
 against the express request of my client to deliver up to him the possession
 of the premises let under the said agreement.
 A. Your clients are liable for double rent for the premises until they peace-
 Correspondence ably deliver up the possession to my client.
 before I have therefore to return your cheque No. 429019 herewith.
 Action.

(4) Letter,
 A. D. Patel
 to Rice &
 Stuart,
 11th June,
 1951.
 —continued.

Yours faithfully,

(Sgd.) A. D. PATEL.

(5) Letter,
 Rice &
 Stuart to
 A. D. Patel,
 25th June
 1951.

(5) Letter, Rice & Stuart to A. D. Patel.

10

Rice & Stuart,
 Barristers & Solicitors,
 Commissioners for Oaths.

Box 14, BA, Fiji. 25th June, 1951.

A. D. Patel, Esq.,
 Solicitor,
 Nadi.

Dear Sir,

re Ghelabhai & Champaklal & Goverdhanbhai Bhailalbhai Patel.

We have your letter of the 11th instant for which we thank you. Our 20
 clients insist that instructions were given as stated in our letter of the
 30th ult., but be this as it may, we take it from your latest letter that your
 client is not prepared to accept rent from our clients. Would you please
 confirm this.

Coming now to the third paragraph of your letter it is quite obvious
 that our clients are entitled to remain in possession of the premises in
 question on two separate grounds, namely :—(1) Our client Ghelabhai is a
 co-owner of such premises, and (2) the provisions of The Fair Rents
 Ordinance prevent your client from dispossessing ours.

For the foregoing reasons it is obvious that our clients are not liable for 30
 double rent. On the other hand they are ready and willing at all times to
 pay rent at the rate reserved in the Agreement of the 24th July, 1947. If
 and when your client will accept such rent please let us know and we shall
 see that it is promptly settled.

We would draw your attention to the fact that you have made no
 reply to our letter of the 31st ultimo regarding discharge of your client's
 security, and we shall be glad to hear from you in this matter at your
 earliest convenience.

Yours faithfully,

(Sgd.) RICE & STUART. 40

(6) Letter, A. D. Patel to Gelabhai Premabhai.

A. D. Patel, B.A.,
Barrister-at-Law,
Commissioner for Oaths.

Nadi, Fiji.

15th Oct., 1951.

Mr. Gelabhai Premabhai,
Storekeeper,
Ba.

Exhibits.

A.
Corres-
pondence
before
Action.

(6) Letter,
A. D. Patel,
to Gelabhai
Premabhai,
15th
October,
1951.

10 Dear Sir,

My client Mr. Gobardhan-Bhai Bhailal-Bhai Patel informs me that he and you are proprietors of lands comprised in Certificate of Title Volume 51 Folio 5042 and No. 5915 as tenants in common. You have refused possession to my client of the said lands and buildings thereon. My client, as you are well aware, has returned from India and has been waiting to start his own business for the last seven months.

My client desires to know whether you are agreeable to a partition of the said property by mutual agreement or not.

20 He has approached you several times in the past with the request to partition the property and he has been every time given an evasive reply. My client cannot afford to wait any longer and unless I receive a satisfactory reply from you within two days from the date hereof, proceedings will be taken without further notice.

Yours faithfully,

(Sgd.) A. D. PATEL.

(7) Letter, Rice & Stuart to A. D. Patel.

Rice & Stuart,
Barristers & Solicitors,
Commissioners for Oaths.

Box 14, Ba, Fiji.

19th October, 1951.

30

A. D. Patel, Esq.,
Solicitor,
Nadi.

(7) Letter,
Rice &
Stuart to
A. D. Patel,
19th
October,
1951.

Dear Sir,

re Gelabhai & Champaklal & Goverdhanbhai Bhailalbai Patel.

Your letter of the 15th instant addressed to our client Mr. Gelabhai Premabhai has been handed to us with instructions to reply.

Exhibits.
 A.
 Correspondence
 before
 Action.

(7) Letter,
 Rice &
 Stuart to
 A. D. Patel,
 19th
 October,
 1951—
continued.

We must say at the outset that having regard to the previous correspondence which has passed in this matter between you and our Firm we are very surprised to note that your latest letter has been addressed to one of our clients direct. Please address future correspondence in this matter to us and not to our clients.

We would further point out that we have received no reply either to our letter of the 31st May or to that of the 25th June last written to you in this matter, and would appreciate replies to the same at your earliest convenience.

Dealing now with the allegations in your latest letter of the 15th 10 instant we have to state as follows :—

(1) As regards possession of the lands and buildings to which you refer it is incorrect to state that Mr. Gelabhai Premabhai has refused possession to your client. Both you and he are well aware that the premises in question are the subject of a tenancy under which both of our clients namely Messrs. Gelabhai and Champaklal are the tenants. This matter has already been fully developed in our previous correspondence to you.

(2) We do not understand the significance of the last sentence of the first paragraph of your letter. Quite obviously your client is at liberty at any time to start any business he so desires so long as thereby he does not 20 infringe on any existing rights of our clients.

(3) Partition. Speaking for ourselves we are quite unable to see how partition of a building could be effectuated from the practical point of view. If, however, your client has any reasonable proposals to submit in this connection please let us know what they are and we shall at once submit them to our clients for consideration and let you have a prompt reply. We must emphasise the fact that even if the property were partitioned such partition would of course be subject to the rights of our clients under their existing tenancy. In the circumstances we would suggest that perhaps by far the best solution from your client's point of view would be to continue 30 in his present capacity as a landlord of the premises and accept his share of the rentals for the same.

(4) Our clients completely deny that they have ever given any evasive reply to your client. It is true that the parties have unsuccessfully negotiated direct with a view to settlement of their differences. To review the course of those negotiations would seem to us to be quite idle, but our clients do desire us to point out that such negotiations have broken down, not by reason of their unwillingness to continue, but by reason of unwillingness on the part of your client.

We shall be glad if you will please let us have an early reply to all the 40 matters raised in this letter.

Yours faithfully,

(Sgd.) RICE & STUART.

(8) Letter, A. D. Patel to Rice & Stuart.

Exhibits.

A. D. Patel, B.A.,
Barrister-at-Law,
Commissioner for Oaths.

Nadi, Fiji.

23rd October, 1951.

Messrs. Rice & Stuart,
Solicitors,
Ba.

A.
Corres-
pondence
before
Action.

(8) Letter,
A. D. Patel
to Rice &
Stuart,
23rd
October,
1951.

10 Dear Sir,

re G. B. Patel and Gelabhai Premabhai.

I beg to acknowledge receipt of your letter of the 19th inst.

I was aware that you were acting for the firm of N. Gobardhanbhai & Co., but I was never informed that you were also acting for Gelabhai Premabhai in his individual capacity. I had therefore to address the letter of the 15th inst. directly to him.

20 The buildings situated on the lands are of iron and timber construction and they can be easily divided by putting a partition through them. If however Gelabhai is unwilling to partition the same or considers the partition impracticable, the property can be put to a public auction sale, where both parties, namely your client and mine should be free to bid and purchase the whole property.

As to the alleged tenancy of the undivided share of my client which is claimed by the firm of N. Gobardhanbhai & Co., it is a separate matter between different parties and my client will take whatever steps he considers necessary to eject them.

30 My client requires possession of the property for his own use and occupation, and if your client Gelabhai is willing to let his portion of the property to my client on the same terms and conditions on which they want to take his share, my client will be pleased to take a tenancy thereof.

If your client does not definitely agree to the partitioning or sale by public auction of the property, as hereinbefore mentioned by 27th inst., proceedings will be taken without further notice.

Yours faithfully,

(Sgd.) A. D. PATEL.

Exhibits.

(9) Letter, Rice & Stuart to A. D. Patel.

A.
Corres-
pondence
before
Action.

Rice & Stuart,
Barristers and Solicitors,
Commissioner for Oaths.

Box 14, Ba, Fiji.

31st October, 1951.

(9) Letter,
Rice &
Stuart to
A. D. Patel,
31st
October,
1951.

A. D. Patel, Esq.,
Solicitor,
Nadi.

Dear Sir,

10

re G. B. Patel and Gelabhai Premabhai.

We have your letter of the 23rd inst. which has remained unanswered for a few days owing to the writer's absence in Suva.

As regards your suggested partition, would you kindly submit to us a rough sketch plan showing the manner in which your client suggests the prospective partition should be effectuated, bearing in mind that partition is to be of *land*, not of a building regarded as a chattel. We do not at this stage make any admission as to our client's views on this prospective partition, but you may rest assured that any suggestion so made will receive earnest consideration.

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Gelabhai is not prepared to consent to the property being sold by public auction, because (*inter alia*) this might jeopardise his position as one of the present tenants of the property. Your statement that the tenancy is a matter between different parties is obviously incorrect because Gelabhai is one of the tenants.

In conclusion we would once again ask for a reply to our letters of the 31st May and the 25th June last in this matter.

Yours faithfully,

(Sgd.) RICE & STUART.

In the Privy Council.

No. 40 of 1952.

ON APPEAL FROM THE FIJI COURT OF APPEAL.

BETWEEN

GOBERDHANBHAI BHAILALBHAI
PATEL ... (*Plaintiff*) *Appellant*

AND

GHELABHAI PREMABHAI
(*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

HY. S. L. POLAK & CO.,
20-21 Took's Court,
Cursitor Street,
London, E.C.4,
Solicitors for the Appellant.

BARROW, ROGERS & NEVILL,
Whitehall House,
41 Whitehall,
London, S.W.1,
Solicitors for the Respondent.