*Privy Council Appeal No. 9 of 1976*

**1. Ram Narayan s/o Shankar**
**2. Vijay Kumar s/o Ram Narayan** – – – – *Appellants*

*v.*

**Rishad Hussain Shah s/o Tasaduq Hussain Shah** – – *Respondent*

FROM

**THE FIJI COURT OF APPEAL**

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH JUNE 1979

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*Present at the Hearing:*

LORD DIPLOCK
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD RUSSELL OF KILLOWEN]

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This appeal relates to an alleged contract under which the present appellants (father and son) agreed to sell two farms in Fiji, mainly sugar cane farms, of which they were lessees, to the present respondent. The story starts in 1968 with a document (Exhibit P.1) signed by the present appellants in the following terms:

> "RECEIVED from RISHAD HUSSAIN SHAH f/n Tasaduq Hussain Shah of Maro, Nadroga, the sum of ONE THOUSAND POUNDS (£1,000:0:0) being deposit in respect of two farms at Maro Nadroga, Nos. being 5128 and 11242 together with all improvements situate thereon. The balance being £4000:0:0.
> Dated at Nadroga this 31st day of January, 1968
>
> (Sgd.) RAM NARAYAN
> (Ram Narayan f/n Shankar)
> (Sgd.) VIJAY KUMAR
> (Vijay Kumar f/n Ram Narain)"

It is true in a sense to say that it starts with that document, though in reality it turns out that there was an oral agreement. The plaintiff (respondent to this appeal) wished to acquire the farms. The present appellants ultimately resisted completion of the alleged contract. At some date in 1970 they made it clear that they would not take any steps to convey their leasehold interests to the respondent plaintiff. The respondent plaintiff in September 1973 sued for specific performance and damages. The trial judge in June 1975 ordered specific performance plus damages of $2,635. The Court of Appeal set aside that order for specific performance on the ground of laches and remitted the matter for assessment of damages for total breach of contract in favour of the

plaintiff, the respondent to this appeal. The defendants (present appellants) appealed to their Lordships with leave of the Court of Appeal. The plaintiff also obtained leave to cross-appeal against the reversal by the Court of Appeal of the order for specific performance, but his participation in matters before their Lordships' Board proceeded no further than entry of appearance and lodging a petition of cross-appeal. He was not represented at the hearing of the appeal. The cross-appeal must therefore be dismissed with costs.

On the appeal the defendants took two points, both on the local equivalent of section 4 of the Statute of Frauds, namely section 59(*d*) of the Indemnity, Guarantee and Bailment Ordinace (Cap. 208), which had been relied upon in the defence. The first point was that it emerged from the plaintiff's own evidence that the bargain struck between the parties was for the sale at the one price of not only the two leasehold farms but in addition some chattels—two bullocks, two ploughshares, and (according to the plaintiff but not the defendants) a tractor, said by the plaintiff to have been together worth in 1968 some £225. The plaintiff said the Exhibit P.1 referred to " improvements " and that this embraced the chattels mentioned. Their Lordships observe that it was not suggested by the Court of Appeal that such chattels could come within the word " improvements " in Fiji, and see no reason to suppose that they do. The situation accordingly is that there was one indivisible contract with one price for the land and the chattels: the Note or Memorandum of Agreement relied upon (Exhibit P.1) omitted that term of the bargain that was struck which related to the chattels: it was therefore an insufficient Memorandum of the agreement and the defence based upon section 59(*d*) must succeed. It may be—their Lordships go no further—that the plaintiff could have waived the term in his favour as to those chattels: but he did not: on the contrary, as already indicated, he contended for their inclusion as part of the defendants' obligations.

No mention is made of this " chattels " point in the judgment in the first instance. In the Court of Appeal Marsack J.A. dealt with the point as follows:

> " In any event, as I see it, the law specifies that what must be committed to writing is the sale of land. The sale of chattels could be proved independently. There is nothing in section 59 in my view, stating or even implying that the memorandum required would be insufficient if collateral parts of the bargain between the parties, having no reference to sale and purchase of the land, should have been omitted from what is set down in writing ".

In their Lordships' opinion this approach was erroneous because it overlooks the fact that there was asserted by the plaintiff one indivisible contract for one indivisible price: that part of it which related to the chattels cannot be described as " collateral ". Gould V.P. on this point said:

> " But it is argued that the amount includes an agreement to assign . . . certain chattels and improvements and the net amount referable to the sale of the actual land is not specified. I do not think this matters. Such of the ' improvements ' as are chattels are of no great value and in the case of a sale of chattels (as distinct from land) courts are prepared to decide what is a reasonable price—see *Hall v. Busst* (1960) 104 C.L.R. 206. From that point of view the amount allocated to the land would be ascertainable ".

In their Lordships' opinion neither the case cited nor principle afford support for the proposition that a price in no way expressed to be divisible can be thus divided for the purposes of section 59(*d*). Spring J.A. contented himself with agreeing with both judgments.

For the appellants a second point was taken: that the language of the receipt Exhibit P.1 was not sufficiently indicative of the existence of a *contract* to constitute a Note or Memorandum of an Agreement. Their Lordships, inasmuch as the appellants succeed on the first point, do not consider it necessary to express an opinion on the validity of the second.

One matter remains. Since 31 January 1968 the appellants have had in their hands £1,000 ($2,000) deposited by the plaintiff. At some unidentified date in 1970—which for lack of other material their Lordships will assume to be 1 July 1970—they refused to proceed with the sale of the farms. They did not offer to refund the £1,000, their explanation in evidence for this being " because there was no arrangement for this to be done ". Their Lordships in all the circumstances consider that it is proper now to order repayment by the appellants to the respondent of the deposit of £1,000 together with interest at the rate of 8% per annum from 1 July 1970, there being set off against that liability the liability of the respondent to the appellants for the taxed costs next mentioned. Subject to that their Lordships are of opinion that the orders of the Court of Appeal and of the trial judge should be set aside with costs, the appeal allowed with costs and the cross-appeal dismissed with costs. They will humbly advise Her Majesty accordingly.

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**In the Privy Council**

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**1. RAM NARAYAN s/o SHANKAR**
**2. VIJAY KUMAR s/o**
**RAM NARAYAN**

*v.*

**RISHAD HUSSAIN SHAH s/o**
**TASADUQ HUSSAIN SHAH**

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