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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 11 of 1980

Between:

RAM REDDY & NARAYAN REDDY
both sons of Ratna Reddy

Appellants

and

SAMLAL & SONS LIMITED

Respondent

B.C. Patel for the Appellants.

K.C. Ramrakha and H.C. Sharma for the Respondent.

Date of Hearing: 11th March 1981.

Delivery of Judgment:

JUDGMENT OF GOULD V.P.

This is an appeal from a judgment of the Supreme Court of Fiji at Lautoka dated the 23rd October, 1979. It dismissed a claim of the appellants (except as to \$210) and a counterclaim by the respondent company which had not been proceeded with - we are not concerned with the counterclaim.

In 1970 the appellants and the company entered into an agreement which was, in effect, for the sale and purchase of a bus operating business owned by the company. The appellants were given possession of a number of buses which they operated, under the name of the respondent company, in whose name the road service licences remained for some eighteen months. The appellants agreed to pay \$138,000 for the business, and did pay a deposit of \$20,000 plus fourteen monthly instalments of \$200 (\$2,800). The company agreed to transfer the vehicles and seek the transfer of the service licences

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once the contract price had been paid in full. During the period of their operation the appellants purchased three more buses in their own name.

This agreement now serves as little more than background, for the appellants were unable to fulfil its terms and the parties entered into a new agreement on the 29th October, 1971. In the action under appeal the appellants claimed a declaration that the company was in breach of its obligations under this agreement, a refund of \$22,800 called "option money" and general damages for breach of contract. In the Supreme Court these claims failed and in this Court have been limited and narrowed by counsel to the sum of \$20,000.

The relevant content of the agreement of the 29th October, 1971, hereinafter referred to as "the second agreement", may be summarized. Clause 1 stated that the first agreement was thereby cancelled and was to be of no effect whatever. By Clause 2 the appellants were to indemnify the company against claims arising out of the appellants' conduct of the business. The appellants were to pay all debts and hand over all property of the company acquired while they operated the business. There was provision for the transfer from the appellants to the company, at specified prices, of the three buses which the former had acquired - vehicles Y478, Y479 and AB455. In Clause 11 it was agreed that buses registered nos. P11 and 8552 did not have certificates of fitness and their tyres needed replacement. Clause 12 is in the following terms:-

"12. THE vendor and the Purchasers agree that in consideration of the sum of \$20,000.00 and any other payments made by the Purchasers to the Vendors and hereinbefore mentioned the Vendors hereby give an option to the purchasers, to be exercised in writing within a period of 2 years from the date hereof, to purchase the road service licence RSL 12/20/10 (excluding the route to Bavu village) together with passenger

vehicles registered number M384, K601, L707, P10, P11, F421, E697, A808, 8552 for the sum of \$138,000.00. Provided if the purchasers also purchase RSL 12/20/3 from the vendors at a price to be agreed upon then the vendors shall transfer the route to Bavu village to the Purchasers. "

It is to be observed that the two buses P11 and 8552 were within the ambit of Clause 12, but no provision was inserted that they were to be made serviceable and provided with certificates of fitness.

The company then ran the business in its own name. The appellants purported to exercise their option by letter dated the 5th October, 1973, which was within the period allowed by Clause 12. The letter reads:-

" Lautoka 5th October, 1973.

Samlal & Sons Limited,
NADI.

Dear Sirs,

Re: Option to purchase dated
29th October, 1971 -
RAM REDDY and NARAYAN REDDY

We act for Messrs. Ram Reddy and Narayan Reddy. We are instructed to inform you that our clients intend to exercise the above-mentioned option. Would you please accept this letter as notification of the exercising of the said option.

Could you please inform us as to the exact amount that our clients must now pay. We understand that in addition to the first \$20,000.00, you have also received other payments from our clients on the understanding that these payments will be on the exercising of the option be accepted as part payment.

Yours faithfully,
STUART, REDDY & CO.

R.W. PREBBLE "

I would say here that in his judgment the learned Judge said that on the evidence he was not able to find that the plaintiffs (appellants) effectively exercised their option. That would be based on the evidence as to events which followed the letter of the 5th October, 1973. He followed that opinion with the statement that it was immaterial because "they certainly withdrew it when it was clear that the defendant was not prepared to read certain additions or qualifications into the agreement".

For myself I have no doubt that the letter of the 5th October constituted a valid exercise of the option as Mr. Patel contends. The point was not seriously contested by Mr. Ramrakha. He did say at one stage that the option had not been exercised but conceded, probably in view of the correspondence, that it really came to a question of repudiation and the reasonableness of the actions of the parties.

The first paragraph of the letter of the 5th October, is in definite terms. The second is an enquiry as to understanding of the terms of payment. A letter of the 22nd October, 1973, from the company states that they are prepared "to honour the agreement". A later letter, dated the 30th October, also from the company requires the sale and purchase to be finalised by a certain date. This envisages a binding contract for sale and without the exercise of the option there was none. The correspondence continued on the basis that there was a binding contract, and at no stage did the appellants make the question of the payment of \$20,000 a condition of their exercise of the option: they were ready to pay it if it was properly payable under the terms of the contract but did maintain their view that it was properly to be regarded as a payment on account, once the option had been exercised.

The negotiations continued and led up to a visit by Mr. Prebble, a member of the appellants' solicitors firm, and the second appellant, on the 7th December, 1973, to the office of Messrs. Patel & Sharma, Solicitors for the respondents, in an effort to effect settlement. The attempt proved abortive. On my view that there was a concluded contract for sale and purchase extant between the parties (though there were differences between them as to the proper interpretation of its terms). In order to establish a right to damages, the appellants had to show an attitude or conduct on the part of the company amounting to repudiation of that contract.

Although the learned Judge took a somewhat different view of the legal position his assessment of the evidence remains relevant as the principle involved is similar. He said:-

" Although the plaintiffs purported to exercise their option it is clear that they were only purporting to exercise it in respect of the agreement as they wanted it to be read together with certain implied qualifications or additions. They certainly didn't want to exercise their option in respect of and agreement which was to be construed strictly according to its terms. That is not surprising, but the blame for that must rest with themselves for entering into such a badly drafted agreement in the first place, or with whoever drafted the agreement. Whether or not the plaintiffs exercised their option validly in the first place effectively or not is immaterial, because they certainly withdrew it when it was clear that the defendant was not prepared to read certain additions or qualifications into the agreement.

In the event they are not entitled to have the consideration for the option (i.e. \$20,000) returned to them as claimed. With regard to the \$2,800 also claimed by the plaintiffs, that never formed part of the option agreement, and in so far as it formed part of the first agreement it was not returnable. "

This indicates a view, adverse to the appellants, that they were never prepared to settle upon the terms by which the parties were bound, but only if their own version were accepted and some additions made. If that is the case, the appellants could not succeed, irrespective of whether the option had been validly exercised or not: There is the further question whether, because of the failure to settle on the 7th December, matters had reached a point at which the appellants were entitled to say, without more, that an intention to repudiate had been made manifest. It is necessary therefore to examine the evidence bearing in mind that the learned Judge had the advantage of having seen and heard the witnesses.

The correspondence is important. The letter of the 5th October, 1973, is set out above. From the reply of the company, dated 22nd October, 1973, it will suffice to quote the last paragraph:-

" However we are not pursuing the point about past consideration at all. We are prepared to honour the agreement. The payment in respect of the option is not part of the purchase price and therefore would you please ask your clients to pay us the sum of \$138,000.00 in full. "

That is a clear statement of the respondent's interpretation of the contract as to the \$20,000. The next letter from Messrs. Stuart, Reddy and Co. is dated the 26th October, 1973 and the text is:-

" We are in receipt of your letter dated 22nd October acknowledging the receipt of our letter dated 5th October 1973 exercising the option. Your remarks about the total purchase price we are referring to our client.

Could you please confirm that you are in a position to honour the agreement in full particular the following passenger vehicles properly registered as passenger vehicles Registered No. M384, K601

L707, P10, P11, F421, E697, A808 and 8552.

Could you also confirm that the said buses have certificates of fitness from the Department of Transport and Civil Aviation to carry fare paying passengers.

Could you also advise us as to a suitable date for settlement of this transaction. "

This touches upon a controversial matter, for two of the buses mentioned, P11 and 8552, are noted in Clause 11 of the agreement of the 29th October, 1971, as having no certificates of fitness (and tyres needing replacement) when they were delivered to the respondents by the appellants. Next the company wrote in somewhat brusque terms setting the 7th November, 1973 as the final date for completion. This date was not adhered to and the letter need not be set out, but there was another letter of the same date from the company to Messrs. Stuart, Reddy & Co., as follows:-

" We thank you for your letter dated 26th October, 1973. Certificates of fitness would be provided for vehicles M384, E697, P10 and A808. If any of the above vehicles do not have the certificate of fitness we undertake to provide it for your clients.

As for vehicles K601, L707 and F421 we would provide replacement vehicles with certificate of fitness.

As for vehicles P11 and 8552 we would invite your attention to clause 11 of the agreement. We did not undertake to provide certificate of fitness for these vehicles. Your clients used these buses and left them with us in their present condition. When they had the buses before they were using these buses and because of their use the buses could not now be operated as passenger vehicles and it was because of the way the buses had been used by your clients. We had to buy two additional buses. If they want these buses to be in fit condition to carry passengers would you please invite their

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attention to clause 2 of the option agreement.

We would prefer the whole transaction to be complete before 7th November, 1973. We would prefer settlement at the office of our solicitor Mr. H.C. Sharma, M.P. "

The significance of that letter is that it shows acceptance of an obligation under the contract to provide certificates of fitness for all buses except P11 and 8552, mentioned above. The way in which they proposed to carry out the obligation in the case of K601, L707 and F421 was to provide "replacement" buses with certificates. In evidence the second appellant said that on the 7th December, 1973, he insisted on getting the same buses back, but would have accepted replacements if they could have been shown to him: the company did not have replacements available at that time.

The correspondence then continued between solicitors. Messrs. Stuart, Reddy & Co. wrote the following, dated the 8th November, 1973, to Mr. H.C. Sharma:-

" This is to confirm our telephone conversation on the 7th November, 1973.

- (1) That the day of settlement be delayed two weeks from the 7th November, 1973.
- (2) That our respective clients meet and discuss without prejudice that condition of the buses and the offer of alternative replacement vehicles to those mentioned in the contract.
- (3) That if our clients reach a satisfactory agreement that we then discuss how the transfer shall be affected.
- (4) That your clients agree that the total price owing is \$108,000.00 minus payments already received from our clients. "

This letter, particularly paragraph 4, brought a sharp reply from Messrs. Patel & Sharma, dated the 22nd November, 1973,

as follows:-

" Your letter dated the 8th November 1973 addressed to our Mr. H.C. Sharma was mislaid in this office and although your Mr. Prebble promised to send a copy of it, he apparently overlooked to do so.

We have now found the letter and reply to it as follows:-

- (a) That the telephone conversation between your Mr. Prebble and our Mr. Sharma was without prejudice.
- (b) That at no time it was agreed that the total price owing by your clients was \$108,000.00 less payments received by our clients from them. "

Apparently some "without prejudice" negotiations broke down at this stage. All that I need extract from another letter of the 22nd November, 1973, from Messrs. Patel & Sharma to Messrs. Stuart, Reddy & Co. is a statement that their clients had always been prepared to settle in terms of the agreement dated the 29th October, 1971. Similarly on the 26th November, 1973, there is a letter from Messrs. Stuart Reddy & Co. asserting that their clients had the money to settle and were ready and willing to do so.

By this time the parties were descending to accusations and threats. By letter of the 30th November, 1973, Messrs. Patel & Sharma gave Messrs. Stuart, Reddy & Co. until 4 p.m. that day to "come and settle this matter at our office and our client will transfer the business to them upon payment of \$138,000". They also demanded payment of their costs. There was no mention of the form in which the business would be transferred. There was a conciliatory tone in the next letter from Stuart, Reddy and Co., dated the 3rd December, 1973, though it opens another difficult point. I will quote portions of it:-

" We suggest that the settlement take place in our office on Wednesday the 5th December at 2.30 p.m.

Could your client please bring with him the executed memorandum of transfer for the buses mentioned in the agreement. We presume that your client has already made an application to the Licensing Control Board to have the licences and routes transferred to our client. Could your client also please bring evidence of these applications. We will require you to hold the purchase price in your trust account until your client has obtained the necessary consents for the transfers of the bus routes if these have not already been obtained. "

" We thank you for finally informing us of the sum which your client requires to settle. We first requested this on the 5th October 1973. We feel that your client has misunderstood Clause 12 of the agreement as the \$20,000.00 option paid to your client forms part of the purchase price. However, our client still wish to settle. We suggest that our client pay \$118,000.00 to be paid to your trust account pending the granting of consent to the transfers of road licenses and the remaining \$20,000.00 be paid into your trust account. That we seek jointly a declaration from the Court as to the true amount owing and should your client's interpretation be correct than the said \$20,000.00 will form part of the purchase price. Should our clients interpretation be correct we would require an undertaking from you that the money be returned. We suggest that we also seek a declaration as to whether the other sums paid by our client to your client form part of the purchase price and that your client give an undertaking to return to us such sum should the Court decide in our client's favour.

We feel that the above suggestions are a sensible way of implementing this contract. As you state in your letter of 30th November 1973 that your "client is ready and willing to settle the whole matter" we feel that this transfer can now go through quite easily. "

Applications for the transfer of a Road Service Licence are made under sections 64, 65 and 71 of the Traffic

Ordinance (Cap.152). We were not referred to the "prescribed form" but obviously an application for a transfer would have to have the concurrence of both transferor and transferee. Under section 71(3) the Board may refuse the transfer, grant it unconditionally or conditionally but shall not grant a transfer unless satisfied that the proposed transferee is financially able to carry on the service. It is clear that the obtaining of the transfer of the licence, when it is proposed to transfer a "business" such as this, is a matter essential to the validity of the whole transaction. Although not specifically referred to in the second agreement it must be implied that both parties will use their best endeavours to apply for and obtain approval of the transfer. There is no evidence that the appellants had been called upon to participate in any application and in the circumstances the presumption referred to in the first passage in the letter last quoted, can hardly have been put forward with any real confidence. At the same time the suggestion (or "requirement") that the price be held in the solicitor's trust account until the consents were obtained appears reasonable.

On the following day, the 4th December, 1973, Messrs. Patel & Sharma wrote to Messrs. Stuart, Reddy & Co. a letter which, after certain incivilities, contained:-

" However our client is willing to settle provided :-

1. Your client pays \$138,000.00 by either a Bank cheque or solicitors Trust account cheque into our trust account on or before 7th December, 1973 and settlement is made not later than 7th December, 1973.
2. Our client transfers the buses and your client applies for and obtains all necessary approval from all the authorities concerned. Note there is no undertaking that our client obtains any approval from anywhere.
3. That the question of indemnity be resolved at a later date.

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4. That if settlement does not take place on or before the 7th December, 1973, our client would no longer be bound by the terms and conditions of the agreement. "

Paragraph 3 above, is not material for present purposes. There is a hint, no more, in paragraph 1, that the bank cheque proceeds will be retained in the company's solicitors trust account for some unspecified period and purpose; otherwise why mention the trust account. The last line of paragraph 1 together with paragraph 4 could be read as an intention to repudiate if the date is not adhered to. Paragraph 2, in all the circumstances, so far as the approval is concerned, cannot have been expected to be taken literally.

This point is taken in the letter of the 6th December, 1973, from Messrs. Stuart, Reddy & Co. to Messrs. Patel & Sharma, the last letter written prior to the attempt at settlement made on the 7th. It reads:-

" We are in receipt of your letter dated 4th December 1973. With respect you do not appear to have understood some of the points we made in our letter. Passenger Road Licenses are personal to the holder. Only the holder can transfer a license and he can only do this by making an application to the Transport Authority and obtaining its consent. There was no need for this to be stated on the agreement as it is common knowledge. We assume your client has in fact made such application and as you state you are ready to settle, we will require to see all the necessary consents to the transfer without such consents the transfer would be illegal. We will also require to see the properly drawn up and executed transfers for the buses before passing over any money. However, we agree that there is little point in continuing to exchange letters in this way.

This is to confirm our telephone conversation of 6th December 1973. Our client will be in your office at 11.45 a.m. 7th December 1973 with a Bank cheque for \$138,000.00 which we will require you do hold on

trust account pending the successful transfer of the buses and routes and the settling of the question of the real meaning of clause 12 of the agreement.

Please have the above mentioned documents available. "

As to the transfer of the licence, the writer must have known his stipulation could not be complied with - under section 65(1) of the Traffic Act the application for transfer had to be advertised by the Transport Control Board and it can be assumed that this had not occurred. The request to sight the transfers of the buses was reasonable in principle, but in fact no agreement had been reached as to what buses should be transferred. An inference from the letter is that the writer had made a specific appointment with some member of the firm of Messrs. Patel & Sharma for 11.45 a.m. the next day. There was agreement that the bank cheque would be for \$138,000; it can hardly be read into the letter that it was claimed that the requirement concerning holding the cheque in the trust account had been agreed at the telephone conversation referred to, but, as I have mentioned above, there was some hint of intent of this kind in the letter of the 4th December, 1973.

As at the 7th December, 1973, the position as far as it can be ascertained from the correspondence, was that both parties had agreed that they were bound by the contract, for sale and purchase, but differences remained as to its terms and as to the method by which those differences were to be resolved. The position was:-

(a) As to price. The question whether the \$20,000 should be regarded as having been paid on account of the \$138,000 was not agreed. The method of determining this question suggested by the appellants, by obtaining a declaration of the court, had not been accepted by the company though it could be said in a

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way to have been left in the air.

(b) The company had rejected liability to provide certificates of fitness for buses P11 and 8552. The appellants had made no response to this.

(c) The company had accepted obligation to supply certificates of fitness for the other buses; but in the case of three of them, for reasons unstated, it was proposed to discharge this by supplying replacement buses. This proposition had not been agreed to in writing by the appellants at this stage.

(d) The company had rejected any liability to apply for appropriate licensing authority consent to the transfer, though the request for the payment of the \$138,000 to their trust account may indicate a modification of this attitude.

(e) The appellants had asked for production of the executed transfers of the buses "mentioned in the agreement" and stipulated for the retention of the purchase price pending the obtaining of the consent.

On the 7th December, 1973, Mr. R.W. Prebble (employed by Messrs. Stuart Reddy & Co.) went with appellant Narayan Reddy to the office of Messrs. Patel & Sharma "to effect settlement". There is only the evidence of these two persons as to what transpired, as the respondent company called nobody on that topic. They took a bank cheque for \$138,000 and I would add at this point that bank evidence confirmed that such a cheque was issued to them. They saw the chief clerk Mr. S.W. Naidu who said he was not expecting them. Neither Mr. Patel nor Mr. Sharma was there, but Mr. H. Bhagat, a member of the respondent company, and Mr. R.D. Mishra, who had drawn up the two agreements, but was not on that date a member of Messrs. Patel and Sharma, were also present. Mr. Patel came in later.

The details of this remarkable meeting as far as material are:

1. Prebble handed Naidu the cheque. It was inspected and passed back.
2. Prebble said he was prepared to hand it over for settlement on the lines mentioned in the letters, but Naidu said it needed a joint application for transfer and that had not been done. A glimpse perhaps of the obvious.
3. The conversation then appeared to be carried on with "the Samlal man" - presumably Bhagat. Prebble said his client would sign a joint application if the buses were transferred to them. Bhagat said he would not make transfers unless the \$138,000 was paid. He said he was in a position to make transfers, but it would take time.
4. Bhagat said he had no registration papers.
5. Prebble asked Naidu if his firm was prepared to undertake that his client owns "the buses", and received a negative answer.
6. After some argument Bhagat said 2 buses had certificates of fitness, 4 buses had not but could get them with repairs, 3 buses were write offs.
7. Asked by Prebble whether the buses were his and in the condition indicated, Bhagat said he would not sign anything until the money was handed over; Prebble said in that case he could not advise his client to hand over anything.

At this point Mr. Patel came in but disclaimed any knowledge of the matter - On explanation he asked what was wanted.

8. Prebble said, proof of ownership, proof that the vehicles were fit for transfer (he had of course just been told that the

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majority were not) and an undertaking that application would be made for approval of transfer.

9. At this stage Bhagat said he would give "these undertakings" but it would be at least six months before the buses were roadworthy enough to enable an application to be made to the Transport Control Board for the transfer.

10. Prebble said this was unsatisfactory and asked Mr. Patel if he was authorised to speak for the respondent company. Mr. Patel replied that he had very limited instructions and knew very little of the matter.

11. Prebble asked for repayment of the \$20,000 paid for the option but Bhagat denied that any option money had ever been paid.

12. It is well to add certain passages from the evidence of the appellant Narayan Reddy. He said that he wanted certificates of fitness for all buses mentioned in the agreement, and "I wanted buses to have certificates of fitness. No one would pay \$138,000 for buses that weren't fit". On the question of replacement he said he would have accepted them if good buses, but Bhagat did not have replacements at that time.

Prebble and Narayan Reddy withdrew from the meeting and there the matter appears to have died until, on the 14th May, 1975, Messrs. Stuart, Reddy & Co. wrote to Messrs. Patel & Sharma, referring to the abortive settlement attempt, and threatening legal proceedings.

It has now become common ground that the matter must be judged on the reasonableness of the actions of the parties. To this I would add that the appellants as plaintiffs would have to show such unreasonableness on the part of the respondent company as to manifest an intention not to be bound by the contract. The 7th December, 1973, had been agreed as

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a date for settlement but time had not been specifically made of the essence. Earlier dates had been specified (with threats of action) and abandoned. The respondent company used just the same phraseology with regard to the 7th November in their letter of the 30th October, as did their solicitors in their letter of the 4th December, with regard to the 7th December. Reading the correspondence as⁹whole it appears proper to construe these as empty threats. Messrs. Stuart, Reddy & Co. at no time purported to call for completion by a certain date, making time the essence, though they did threaten "proceedings" in their letter of the 26th November in default of readiness and willingness to complete.

Mr. Patel, for the respondent company, submitted that there was no evidence to suggest that the appellants would not have accepted replacements - the respondent was at fault in not coming up with any details. The respondent should have tendered buses in running order. Mr. Patel was prepared to except the two which had been delivered without certificates of fitness - P11 and 8552. As to the others he relied on The Moorcock (1889) 14 P.64 as to implied terms. The correspondence, he submitted clearly showed the appellants were trying to find a reasonable and acceptable method of settlement. The unreasonable attitude of the respondents was illustrated by the second proviso in their letter of the 4th December - title could not be given without consent. Further, the appellants never proffered an undertaking to return the money if the consent was not forthcoming.

Mr. Ramrakha submitted that when in evidence Narayan Reddy said he wanted certificates of fitness for all the buses mentioned in the agreement and said that on the 7th December he insisted on getting the same buses back, he was in effect repudiating the agreement. He was not entitled to certificates for at least two of the buses. He also contended that when on the 7th December Prebble was told by the chief

clerk that he was not expecting him (though it appears Messrs. Bhagat and Mishra were there) he should have offered to come back later, as he had been dealing with Sharma. It was submitted that the request for the return of the "option money" showed that the settlement had not been approached with any idea of success but as an expedient to get this money back - a mere show of compliance with the contract. Mr. Ramrakha's final point, and I deem it a strong one, is that for eighteen months after the 7th December, there was silence. The appellants did not write on the next day, or the next week, claiming that the respondent company was in breach of the contract, or had repudiated the contract.

I would agree with Mr. Patel that the respondent company had during the correspondence taken an unreasonable attitude in some aspects of the matter. Also Mr. Bhagat appears to have been intransigent in the early stages of the meeting on the 7th. Before the end of that meeting, however, he had made substantial concessions. He had particularised the condition of the buses and said he was prepared to give the undertakings asked for. As usual the meaning is not clear but Prebble had just asked for proof of ownership, proof that the vehicles were fit for transfer and an undertaking that application would be made for consent to transfer. It is not in dispute that the consent would have to relate to particular buses, which explains Bhagat's reference to six months' delay to make the buses roadworthy. He had referred to the condition of nine buses, which is the total number mentioned in the second agreement; in his volte face concerning the undertakings there was no specific reference to P11 and 8552. It is the greatest pity that the parties did not then and there set down to draw up the undertaking which was the only possible base for a settlement, to see how far they were agreed and exactly what concessions were being made. Indeed the reference to six months appeared to put Prebble off (it may

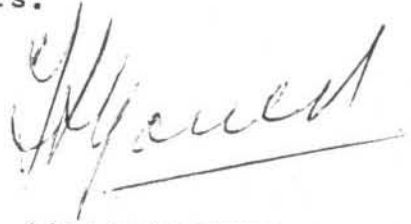
of course have been intended to have just that effect but we cannot know that) and he withdrew.

We have the position then that the appellants' representatives went to the meeting, certainly armed with a bank cheque, which would normally indicate good faith, but knowing that there was an outstanding question about at least two buses, without stipulating that replacement buses for others which werenot roadworthy be available for inspection, knowing that no application for licence transfer had been made, and without final agreement on the question of the \$20,000, and knowing that as a result of all these things settlement hinged upon the respondent's being able and willing to give a satisfactory undertaking. Yet at the first indication of willingness on the part of the respondent company to give some form of undertaking, the representatives refrained from pursuing the matter and withdrew. They did not enquire the next day or at any time how far the respondent company was prepared to go, did not formulate their minimum requirements and call for compliance within a certain time, but, so far as the evidence goes, did nothing for some eighteen months. This is not the reaction of parties to a contract who felt that their own house was in order and that the other side was repudiating their legitimate claims.

I am not prepared to agree with Mr. Ramrakha that the effort to settle was a mere front but prefer the learned Judge's view that the appellants had to rely on a very badly drafted contract and were doing what they could to get more out of it than they were legitimately entitled to. This may have affected the attitude of the respondent company which was at times unreasonable but not I think, in the final analysis, to an extent to show an intention not to be bound.

The appeal cannot succeed and I do not therefore need

to deal with what sum, if any, the appellants would have been entitled to as damages had their claim been meritorious. All members of the Court being of the same opinion it is ordered that the appeal be dismissed with costs.



.....
Vice President

SUVA.

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

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Between:

RAM REDDY & NARAYAN REDDY
sons of Ratna Reddy

Appellants

and

SAMLAL & SONS LIMITED

Respondent

B.C. Patel for the Appellants
K.C. Ramrakha and H.C. Sharma
for the Respondent

Date of Hearing: 11th March, 1981
Delivery of Judgment:

JUDGMENT OF HENRY J.A.

The facts in this appeal have been fully set out and analysed in the judgment of Gould V.P. which I have had the advantage of reading. It is unnecessary for me to add to the narrative. The steps taken by the parties have been accompanied by correspondence, the essential portions of which have been quoted.

The appeal turns on the application of the particular facts of this case to general principles of contract. Appellants were the holders of an option to purchase a bus operating business owned by respondent. They purported to exercise the option. Respondent made a claim as set out in the judgment of Gould V.P. This claim was dismissed in the Supreme Court on the ground that the option had not been validly exercised.

In this Court it became clear that the parties had for a long time acted and negotiated on the basis that a contract had ensued from the purported exercise of the option. Mr. Ramrakha, counsel for respondent, in effect, conceded that he could not seriously contend otherwise and that the real question was whether respondent was in default of its obligations under the contract.

No terms were fixed for either the time or method of settlement. The transfer of the assets was not a simple transaction and required the co-operation of both parties for it to be carried out. The payment of the purchase price and the transfer of the assets were concurrent conditions, and, since it was an open contract, it had to be performed within a reasonable time in all the circumstances known to and contemplated by the parties. At no stage was time made of the essence of the contract.

The attempts to settle have been set out at length by Gould V.P. I respectfully agree that appellants genuinely attempted to settle and that any suggestion that conditions were being imposed for any ulterior purpose is unfounded. However, on a careful consideration of the whole of the circumstances I am satisfied that respondent was reasonable in its approach to the question of settlement of what was not a straightforward exchange of money for assets. In my opinion appellants have not proved that respondent was in breach of any obligation under the contract which would entitle appellants to rescind it. Accordingly the action brought must fail on that ground.

I would dismiss the appeal with costs.



.....
Judge of Appeal

544 44

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 11 of 1980

Between:

RAM REDDY & NARAYAN REDDY
sons of Ratna Reddy

Appellants

and

SAMLAL & SONS LIMITED

Respondent

B.C. Patel for the Appellants

K.C. Ramrakha and H.C. Sharma for the Respondent

Date of Hearing: 11th March, 1981

Delivery of Judgment:

JUDGMENT OF MARSACK J.A.

I have had the advantage of reading the carefully detailed judgment of the Learned Vice President and agree generally with his conclusions. He has fully and accurately set out the facts and I do not need to repeat them.

As I see it the case must be determined by the answer to the two questions:

- (1) Was the option to purchase the business and the vehicles validly exercised by the letter of 5th October, 1973?;
- (2) If so, was the contract, brought into operation upon the exercise of

5/24/5

the option, subsequently nullified
by the conduct of the parties?

As to (1): I must respectfully dissent from
the conclusion of the learned trial Judge, and I am in
full agreement with the Learned Vice President that
the option was correctly exercised.

As to (2): it is clear from the evidence
that a period of vacillation followed in the
negotiations between the parties as to the proper
interpretation of the terms of the contract. In my
view the evidence establishes that the parties were
never ad idem in this aspect of the matter; and the
complete inaction on the part of the appellants for
eighteen months after those negotiations ceased
clearly demonstrates that by their conduct the
appellants had forfeited all right to maintain that
the contract was still in force.

For these reasons I fully concur with the
judgment of the Learned Vice President that the appeal
cannot succeed.

Hadleyarsack
.....
Judge of Appeal