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VANCOUVER REGISTRY

1996 CanLII 2411 (BC S.C.)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
KALVINDER JIT SINGH ATWAL	
Plaintiff	
AND:	**REASONS FOR JUDGMENT**
JARNAIL SINGH SARAN and PARMINDER KAUR SARAN	**OF THE HONOURABLE**
Defendants	**MR. JUSTICE E.R.A. EDWARDS**
AND:	
PARMINDER KAUR SARAN	
Third Party	

Counsel for the Plaintiff:	Michael S. Frost
Counsel for the Defendant Jarnail Singh Saran:	J.A.W. Schuman
Counsel for the Defendant and Third Party Parminder Kaur Saran:	Angela E. Thiele
Dates and Place of Hearing:	April 9, 10 and 11, 1996 Vancouver, B.C.

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1 The plaintiff "Atwal" alleges he advanced $155,001.33 to the defendants between April 18, 1992, and November 28, 1992, in five instalments of $55,000; $45,000; $21,666.67; $16,666.66; $11,668.00 and $5,000, on the understanding the first defendant Jarnail Saran, a successful realtor and friend of Atwal, would invest the money in real estate which would be flipped for profit they would share. Atwal claims the balance of some $43,000 he says was never returned to him after he and Mr. Saran had a falling out.

2 Atwal had previously been involved with his brother in real estate speculation through a company, PKS Investments Ltd. The "P" in the company name stood for Parminder, the given name of the second defendant and third party who was then the wife of Mr. Saran. Atwal testified that although the ostensible "third partner" in the company, Mrs. Saran played no part in it. Atwal testified he dealt with Mr. Saran respecting PKS business. Mr. Saran testified he knew no details of his wife's business dealings in PKS.

3 Mr. Saran testified he had no personal knowledge of the sums being advanced, although Atwal testified Mr. Saran had received the cheques from him or been present on each occasion when he had given cheques to Mrs. Saran. The cheque for $11,668 was payable to and endorsed by Mr. Saran, who testified he had probably endorsed it

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for deposit by Mrs. Saran into their joint account but could not specifically recall having done so. According to Mr. Saran, Mrs. Saran did all of the family and business banking and record keeping.

4 In December, 1992, the parties were together in India on a holiday. During the visit, Mr. Saran said he found Atwal and Mrs. Saran in a compromising situation. This Atwal denied, admitting only to being in the same room with Mrs. Saran while she was feeding her baby girl Jessica, who was born 26 January 1991.

5 Whatever happened, suspecting the worst, Mr. Saran indicated he no longer considered Atwal a friend, told him to stay away from Mrs. Saran and returned to Canada before Atwal. Mr. Saran said Mrs. Saran promised to have no further contact with Atwal.

6 It turned out Mr. Saran′s suspicions were warranted. A DNA test ordered by the Court in the context of subsequent matrimonial proceedings between the defendants, disclosed Atwal was Jessica′s father. Atwal admitted at the trial he and Mrs. Saran had been intimate "a couple of times", but claimed the relationship had ended by April, 1992.

7 At the opening of the trial, Mrs. Saran through counsel, although a defendant, admitted she owed Atwal the money he claims.

This is consistent with her evidence given at a discovery on 5 December, 1995. I was told she has taken the position in her matrimonial action with Mr. Saran that it is a family debt she and Mr. Saran jointly owe Atwal.

8 The day after Atwal returned from India, 23 January 1993, he says he had a conversation with Mr. Saran, who said he wanted to sever their arrangement and repay the money Atwal had advanced. A $55,522.98 bank draft payable to Atwal dated 21 January 1993 was signed by Mrs. Saran. Mr. Saran denied he was aware the payment had been made until told by Mrs. Saran sometime before 4 February 1993. Mr. Saran testified Mrs. Saran paid it from a special account she had for dealings with Atwal, but never explained to him what it was for.

9 On 4 February 1993, Atwal and Mr. Saran met and Mr. Saran gave Atwal a cheque for $42,000, dated the previous day, promising, according to Atwal, a second cheque the next day in the amount of $12,500. This Atwal received as well and the two cheques were deposited 4 February 1993 into an account in the name of Atwal's mother.

10 Here the stories of Atwal and Mr. Saran diverge significantly. Atwal says that at the 4 February 1993 meeting Mr. Saran, after consulting with Mrs. Saran in Atwal 's presence, indicated that

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they, the defendants, owed Atwal a further $54,500. According to Atwal he said they were in error and only owed him a further $43,000. This Atwal said Mr. Saran agreed to repay him within a week or two. Atwal says that Mr. Saran also agreed to pay him his share of the profits from the anticipated sale of a property which had been purchased for $520,000, $50,000 of which had come from money advanced by Atwal, he alleged. This forms no part of Atwal's present claim, which is for $42,978.35, that is the $155,001.33 allegedly advanced minus the payments to Atwal I have already mentioned.

11 Mr. Saran's version of the 4 February 1993 transaction is that he was told by Mrs. Saran that they owed Atwal $54,500, which he agreed to pay with the $42,000 payment and further payment of $12,500 the next day. Mr. Saran testified the parties agreed this sum settled all accounts between them. Mr. Saran testified he had been "instructed" by Mrs. Saran to make out the $42,000 cheque on 3 February 1993 as representing her accounting of what was owed Atwal, although he does not know to this day why Atwal was owed this amount. He says he trusted Mrs. Saran to provide this advice as well as the further figure of $12,500 at the meeting the next day, although again he has never received any explanation from her as to why the money was owed.

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12 The day Atwal returned from India Mr. Saran, suspicious Mrs. Saran would not keep her word to end her contact Atwal, began to tape her telephone calls. Translated transcripts of taped conversations between Atwal and Mrs. Saran were used in subsequent criminal proceedings, I was told. According to Mr. Saran they disclosed the fact Mrs. Saran had a kilo of gold he did not know she had and over $300,000 in personal accounts he did not know she had. He testified Atwal and Mrs. Saran discussed transferring some of the gold jewellery to Atwal's mother, as well as details of their sex life.

13 This case largely turns on whose version of the events of 4 February 1993 is accepted, which in turn rests on the credibility of the parties.

14 Atwal's credibility was significantly undermined by his reluctance to admit the extent of his relationship with Mrs. Saran. He admitted, in light of telephone records showing his number in contact with hers on a regular basis, to some continuing contact which he insisted was rare and only concerned PKS business. He said others in his family, including children, used his cellular telephone to contact Mrs. Saran's residence. Atwal knew Mrs, Saran's number without hesitation when asked for it on cross-examination, from which I infer he had called her with some frequency. He also claimed the fact he had a second cellular

telephone had "slipped his mind", despite a court order to disclose his records. I find Atwal has consistently minimized his relationship with Mrs. Saran.

15 Atwal's credibility is further undermined by his claim that he waited patiently for two months after February, 1993, before seeing a lawyer to collect the balance he alleges is owed him, because he trusted Mr. Saran's word that he would pay. In fact, on the basis of a complaint by Atwal, Mr. Saran was charged with threatening Atwal between January and March, 1993. This is hardly consistent with a relationship of trust. The charge went to trial and was dismissed.

16 There were numerous instances where Atwal 's evidence at the trial diverged from what he had said at discovery or in his pleadings in matrimonial proceedings. For example he was unable to explain why he deposed in a Property and Financial Statement that he was owed $56,570 by the defendants not the $43,000 he now alleges, other than to say he was "confused and upset" by the matrimonial proceedings.

17 In his evidence at trial he indicated that he had written a note calculating the total he was to receive in the three repayment instalments to 4 February 1993, on that date. The note was on the corner of a xerox copy of a bank statement dealing with the deposit

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of the $42,000 and $12,500 cheques to his mother ′s account on 4 February 1993. In his discovery evidence he had said these numbers were written on the sheet after he got it from the credit union in the September or October following. He admitted on cross-examination this was true. His only explanation for the divergence was that he might have transferred the note from another slip of paper to the xerox copy, having made the original note as he said he had back in February. I found this explanation incredible.

18 Atwal wholly failed to mention anything at his discovery about Mr. Saran′s alleged promise to pay a further $43,000 plus part of the proceeds of the sale of any property. Atwal′s explanation for this oversight was “maybe I forgot”, “maybe I got nervous”. Since this is key to his claim, that explanation I find incredible.

19 I have concluded that Atwal′s credibility is dubious. I do not accept his version of the events of 3 and 4 February 1993. That is, I do not accept that Mr. Saran agreed at that time to pay Atwal a further $43,000, thereby acknowledging the alleged debt. It remains to determine if in fact that money was advanced on terms which entitle Atwal to repayment from Mr. Saran.

20 According to Mr. Saran′s testimony any money received from Atwal was without his knowledge and at the behest of Mrs. Saran, who kept track of all family and business accounts. At the trial

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Mr. Saran's counsel formally abandoned a claim for third party indemnity against Mrs. Saran on the basis their joint and several liability for this as a family debt, if Atwal succeeds here, could be determined in their outstanding matrimonial proceedings. With no third party claim against her, Mrs. Saran did not testify.

21 There is no question the $155,000 went into accounts of the defendants, at least some of it to a joint account. There is no question all but about $43,000 of it was repaid from their accounts to Atwal. What the evidence fails to explain is why the money was paid in both directions.

22 I am left to puzzle why Mr. Saran, when he had heard the tapes disclosing Mrs. Saran had personal accounts of over $300,000 previously unknown to him and intended to transfer family gold to Atwal's mother, would not demand full explanations from her as to why she had paid Atwal $57,522.98 and why he should pay Atwal a further $54,500. His explanation, as I understand it, was that he wanted done with Atwal so he could repair his relationship with his wife and therefore he did not inquire deeply into this in early February. He was ordered out of the family home under a restraining order on 13 February 1993.

23 In their subsequent attempts to reach a matrimonial settlement, the Sarans engaged an Accountant, Mr. Sadler, to advise

on the tax consequences of liquidating their assets and try to mediate a settlement. Working papers he prepared on the basis of information from both of them refer to an item of indebtedness to Atwal in the amount of $52,500. Mr Sadler could not recall whether it had been or was to be paid, nor the origin of his information about it. Mr. Saran said he never disputed it with Sadler, but that since it had been introduced by Mrs. Saran he had talked to her about it and been told to leave it in for discussion so he did, hoping to achieve an overall settlement of their assets of about $2 million. I find the appearance of the notations in these working papers does not constitute an acknowledgement of debt to Atwal by Mr. Saran.

24 An almost complete lack of records compounds the fact finding problems in this case. I am able to find that money went from Atwal to the Sarans and part of it was repaid to Atwal. I am unable to conclude what the reasons were for the payments in either direction. There is no evidence, apart from Atwal ′s assertion, that any of the money was ever invested in real estate, or any profit made from any such investment.

25 I cannot understand why if the one investment asserted by Atwal was to be repaid to him plus profit, Mr. Saran would agree to pay back all of Atwal′s capital before the profit was realized on the sale, as Atwal testified Mr. Saran had agreed to do. Nor do I

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understand why if Atwal considers himself entitled to a share of the anticipated profit he has not pursued that claim.

26 Atwal's version of the whole transaction is that the money went to the Sarans for investment purposes and ought to be returned in full after his falling out with Mr. Saran. In light of the Sarans' estrangement and the evidence of Mrs, Saran's relationship with Atwal, her admission of the debt cannot be accepted as evidence against Mr. Saran. Mr. Saran's version is that the money went to Mrs. Saran for business between her and Atwal of which he was not aware and if anything was owed Atwal as a result, it was agreed by Atwal the relevant amount was $54,500, on top of the $57,522.98 which was paid. Some credence is given this explanation by the fact Atwal waited months to pursue the promise he said was made by Mr. Saran to pay a further $43,000 within a week or two of the meeting of 4 February 1993.

27 I find Mr. Saran's version of the transactions, while hard to accept, at least as credible as Atwal's. Therefore I find that Atwal has failed to discharge the burden of proving his claim against Mr. Saran on a balance of probabilities. In light of her admission that the money is owed to Atwal, I find Atwal is entitled to judgment against Mrs. Saran.

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28 I asked counsel for Atwal why, in light of Mrs. Saran's admission of liability and the fact she obviously had sufficient assets to pay the claimed $43,000, this trial was necessary. A *bona fide* plaintiff would be indifferent as to which of two defendants he recovered against and would be content to let the defendants sort out between them their respective liability. Counsel offered no explanation for proceeding except that he did so on instructions. I infer that Atwal and Mrs. Saran, who though she attended the trial did not testify, are in league to ensure that liability be visited on Mr. Saran.

29 It is no doubt for that reason that counsel for Mr. Saran asked that the case be dismissed against both defendants. Otherwise, the issue of whether the judgment against Mrs. Saran represents a family debt might still have to be resolved in the context of the impending matrimonial litigation between the Sarans, to which Atwal is a party by virtue of his paternity of Jessica. I was told a ten day trail is scheduled.

30 As should be clear from my reasons, but for the admission by Mrs. Saran, I would have dismissed the action against both defendants. Judgment having been granted against her as a result of her own admission means she assumed, in effect voluntarily, that

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liability long after the marriage breakdown. In the circumstances, it cannot be a family debt.

31 In the result, I dismiss the action against Jarnail Singh Saran and grant the plaintiff judgment against Parminder Kaur Saran in the amount of $42,978.35 plus pre and post judgment interest. In light of his having brought this action to trial unnecessarily, the plaintiff will receive no costs. The plaintiff and Mrs. Saran, who I have found acted in concert with him, shall be jointly and severally liable for Mr. Saran′s costs on scale 3.

"E.R.A. Edwards, J."

April 11, 1996
Vancouver, B.C.

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