

IN THE FIJI COURT OF APPEAL

201

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 61 OF 1991
(Civil Action No. 139 of 1984)

BETWEEN:

RAM PADARATH BROTHERS LIMITED

APPELLANT

-and-

THE NATIONAL MARKETING AUTHORITY

RESPONDENT

Mr. K. P. Mishra and Mr. V. Mishra for the Appellant
Mr. L. Namasivayam for the Respondent

Date of Hearing : 22nd and 23rd June, 1992
Date of Delivery of Judgment : 1st July, 1992

JUDGMENT OF THE COURT

This is an appeal against a decision of the High Court sitting in Lautoka.

The appellant sued the respondent for damages arising out of a loss of considerable stock of chicken which were stored at the premises of the respondent at Walu Street, Lautoka. The cause of action arose out of a rental of the respondent's freezer No. 3 A/B by the plaintiff to store chicken for human consumption. This particular rental commenced on 26th May 1983 at a rental fee of \$1600 per month. On the 5th December, 1983,

when the agents and servants of the appellant visited the freezer, the freezer had not been working and the stock inside had become thawed soft with blood dripping exuding foul smell. This stock was declared unfit for human consumption by the health authorities and subsequently destroyed.

The appellant in the statement of claim pleaded two alternative claims. A claim for damages arising out of a contract, or alternatively, a claim for damages arising out of bailment.

The trial Judge concluded that there was a contract and the terms of the contract are set out in the respondent's letter of 25th May, 1983. The issues before the trial Judge were:

- (a) whether the contract provided expressly or impliedly that there would be continuous refrigeration and, if so
- (b) whether there was a breach of this term of contract?
- (c) and if there was a breach whether the appellant suffered damages as a result of the breach?

With respect to the issue stated in (b), the trial Judge concluded in the following terms:

"Upon visit on the 5th December, 1983 at 4 pm by the workers of the plaintiff for the purpose of removal of certain stock for sale distribution it was found that the refrigeration system in the Freezer No. 3 A/B was not functioning and the chicken stock inside had become thawed soft with blood dripping giving foul smell."

There can be no doubt from this passage that the trial Judge found that there was no continuous refrigeration for a period of time which affected the chicken.

With respect to issue stated in (c) the trial Judge concluded:

"Subsequently upon inspection the chickens were declared unfit for human consumption by the Health Authorities and therefore were unsaleable."

He further concluded:

"There is no dispute that a big stock of chicken went bad. Chickens were ordered to be destroyed. A Certificate of Condemnation of Food was issued on 1st January 1984 by Daniel Narayan (PW4), the Pure Food Inspector. According to the Certificate 41825.4kg of chicken went bad and were unfit for human consumption."

There can be no doubt from these passages that there was a finding by the trial Judge that the failure of the freezer No. 3 A/B resulted in damages to the appellant.

The dispute before the trial Judge related to the issue stated in (a), namely, whether the contract provided that there would be continuous refrigeration? The trial Judge concluded:

"If one looks at the letter dated 25 May 1983 there is no assurance of continuous refrigeration given."

Later in his judgment, the trial Judge considered whether the assurance of continuous refrigeration could be implied and concluded:

"This Court cannot imply terms into the contract on the evidence before it."

The appellant has appealed against the latter finding and submits that assurance of continuous refrigeration can be implied in the circumstances of this case.

Before we consider the terms of the contract in the letter, we need to set out the relevant facts relating to the discussions which led to the writing of the letter dated 25th May, 1983. Before the unit was rented, the respective managers of both parties discussed the terms of the rental. The terms were later confirmed by the respondent in letter dated 25th May, 1983. It is not disputed that during the discussions, the appellant was aware that the respondent did not have a back up system. In paragraph 5 of the defence, the respondent pleaded that at the time the appellant inspected the said unit in order

to rent the same, it was set at minus ten (10) degrees centigrade of which fact the appellant was advised. In paragraph 10 of the defence, the respondent further pleaded that the said freezer unit was regularly serviced and maintained and was at all material times in good working order.

We now consider the terms of letter dated 25th May, 1983. The letter reads as follows:

"25 May 1983

The Manager
Padarath Brothers Limited
BA

Dear Sir,

Re: Rental of Freezer No. 3A/B

This is to confirm that the monthly rent for our unit above leased to you from 26/5/83 shall be \$1,600/month. As a standing procedure, rent should be paid at the beginning of the rental month. The rental is inclusive of 24 hours inward and outward services Ex NMA Warehouse.

You will be required to arrange your own lock and key, and insure your goods against natural disasters. Our units are regularly checked and serviced monthly, and the premises guarded by the General Security Services after hours. In case of inspection of the unit inside, you would be advised to allow entry. You will be advised when more Freezer space become available at our premises.

Yours faithfully

Sgd. A Pillai
Manager - Western Division

c.c. Chief Executive, NMA Suva"

It is true that there are no expressed words of assurance of continuous refrigeration. However, such a term may be implied from all of the circumstances of the case. The words that call for construction in this context are:

"Our units are regularly checked and serviced monthly,....."

The trial Judge in fact set out these words in the judgment. However, he failed to give any construction to them. In our view, he fell into error when he directed his mind to the question of a backup system and appear to have reached the conclusion that as the appellant was aware of no backup system, that there was no implied assurance of continuous refrigeration. In our view, the fact that there was no backup system is of no consequence. The issue was whether the respondent gave any assurance of continual refrigeration of the unit rented to the appellant?

It is clear from the nature of contract, namely storing of chicken in a freezer for human consumption, that the freezer having been set at 10 degrees centigrade was so important. If this could not be assured, there was no point in entering into the contract. We agree with the appellant's submission that continual refrigeration was the essence of the contract. The words "our units are regularly checked and serviced monthly" can only mean an assurance by the respondent that the unit which was set at 10 degrees celsius would be maintained at that level.

The assurance was that this level of refrigeration would be maintained by regularly checking and servicing the unit. We therefore hold that it was an implied term of the contract that there would be continuous refrigeration.

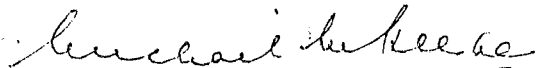
We would allow the appeal in this regard.

The question of whether the stock of chicken was destroyed as a result of a natural disaster was not pleaded in the defence and therefore it did not arise for consideration in the Court below. The respondent, however, pleaded in the alternative that the malfunction of the freezer was due to lack of water circulation and not negligence on its part. However, this is relevant to the claim for damages in bailment and as the trial Judge did not consider this claim, we cannot consider this on this appeal.

As the appeal is successful on contract, it is not necessary to consider the alternate claim based on bailment.

We would allow the appeal, quash the decision of the trial Judge and we would give judgment for the appellant for damages to be assessed.

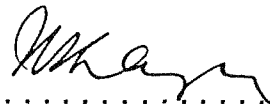
We further order that the respondent pays the appellant's costs of this appeal.



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Mr. Justice Michael M Helsham
President, Fiji Court of Appeal



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Sir Moti Tikaram
Resident Judge of Appeal



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Sir Mari Kapi
Judge of Appeal