

IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 9 of 1989.

(High Court Civ. App. No. 247 of 1987)

BETWEEN:VENKAT SAMI NAIDU
of MARTINTAR, NADIAppellant

- and -

D CHAND BROTHERS
CIVIL ENGINEERING
CONTRACTORS, OF
REWA STREET, SUVARespondentDr M S Sahu Khan for Appellant
Mr V Maharaj for RespondentDate of Hearing : 20th March 1992Date of Delivery of Judgement : 23rd March 1992JUDGEMENT OF THE COURT

On 11 February 1985 Respondent contracted to carry out certain work for the Appellant at an agreed price of \$53,931. The contract provided for progress payments to be made on the certificate of the Appellant's engineer. Upon this basis a progress payment of \$16,023.40 was made.

The Respondent then applied for a further progress payment of \$23,959.22 and the engineer's certificate was issued for that payment. The Appellant paid \$800 of that sum but has never paid

the balance of \$15,982.72. That sum, together with retention money of \$2,104.35 comprised the Respondent claim against the Appellant of \$18,087.07. .

The Respondent applied for Summary Judgement for that amount. After a number of adjournments Summary Judgement for the amount claimed was given by Parmanandam J on 20 November 1987.

The Appellant applied for this judgement to be set aside and asked that he be given leave to defend. On 17 March 1989 Jesuratnam J dismissed the application in a written and reasoned judgement.

The grounds of appeal are, in general terms, that the Judge erred in not granting leave to defend when there was a proper and arguable defence. The Appellant had filed a Statement of Defence which incorporated a Counterclaim for an unliquidated sum.

The Court record shows that a question arose as to whether the Appellant had, since filing his appeal, admitted liability for the amount claimed. There is considerable support for the view that the Appellant had admitted liability and was concerned only with obtaining time in which to make payment. Because of the decision to which we have come, however, it is unnecessary for us to pursue that matter any further.

On behalf of the Appellant it was argued that there was evidence before the Court that the Appellant had an arguable defence to the claim, and also a counterclaim, based on fraud on the part of the Respondent and the failure of the Respondent to carry out certain of the works in the contract.

The Respondent's claim was for the balance of a progress payment which had been certified for by the Appellant's engineer.

In his first affidavit the Respondent has deposed that there was a written contract between the parties, and that it was a term of that contract that progress payments would be made upon the certificate of the Appellant's engineer. In his first affidavit the Appellant admitted that there was such a contract and that this was a term of it. That really was an end of the matter.

It is plain from the various affidavits of the Appellant and from the submissions of his counsel that this appeal has been approached on the wrong basis. Whatever may have been the condition of the works done by the Respondent, once he had received the certificate of the engineer he was entitled to receive payment in accordance with that certificate.

It was argued for the Appellant that the engineer's certificate had been procured by fraud to which the Respondent was a party. If it were the case that there was evidence before the Court to raise that as a genuine issue then there seems little doubt that leave to defend ought to have been given. There is, however, no more than a bare allegation to that effect. This is contained in an affidavit made by the Appellant on 1 June 1987 in these terms :

".....I admit the said engineer authorised the said payment but the same was approved without my knowledge and/or in the alternative the said payment was approved fraudulently and/or the said engineers and the Plaintiff conspired for the approval of the said payment as it shall appear hereinafter."

Notwithstanding the closing words of that passage there was no further reference to those allegations.

In a later affidavit made by the Appellant on 7 June 1988 he deposed that he had issued a writ against the engineers claiming damages "in respect of their negligence". There is no reference to any allegation of fraud or conspiracy.

It is also significant that the Statement of Defence contains no allegation of fraud.

In answer to the application for Summary Judgement it was the obligation of the Appellant to show by affidavit some indication at least of the basic facts upon which the allegation of fraud was made. Without any evidence of that kind there was nothing to inform the Court that this was a genuine issue to be tried. The mere assertion of the Appellant was far from sufficient.

If the engineer ought not to have given the certificate then the Appellant may have a cause of action against him, and we note that he has now issued a substantial claim for damages against the engineer but this cannot amount to a defence to the Respondent's claim.

This is a straight forward case of a claim brought wholly within the terms of the contract between the parties. If the Appellant considers he has a claim against the Respondent in respect of some other matters arising out of the contract he is free to pursue that.

We can see no indication of any miscarriage or failure of justice.

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In our opinion judgement was correctly entered under Order 14 and Jesurathnam J correctly refused the Appellant's application.

The appeal is dismissed with costs.

Moti Tikaram

.....
(Sir Moti Tikaram)

PRESIDING JUDGE

Peter Quilliam

.....
(Sir Peter Quilliam)

JUSTICE OF APPEAL

Amet

.....
(Mr Justice Amet)

JUSTICE OF APPEAL