

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 30 OF 2019
[High Court Civil Action No. HBC 42 of 2015]

BETWEEN : **KALABO INVESTMENTS LIMITED** *Appellant*

AND : **BANK OF BARODA** *Respondent*

Coram : **Lecamwasam, JA**
Almeida-Guneratne, JA
Jameel, JA

Counsel : **Mr B C Patel for the Appellant**
Mr D S Naidu for the Respondent

Date of Hearing : **12 February 2020**

Date of Judgment : **28 February 2020**

JUDGMENT

Lecamwasam, JA

[1] This is an appeal filed by the appellant against the judgment of the High Court at Lautoka dated 13 March 2019. The facts of the case are lucidly stated by the learned High Court Judge in his judgment, which I reproduce in verbatim for ease of reference:

“The background

[06] According to the statement of claim, Kalabo Investments Limited, the plaintiff is a company carrying on business in Suva and elsewhere in Fiji under the name and style of “Shop N Save Supermarket”. Bank of Baroda, the defendant is a foreign bank incorporated in the Republic of India and registered in Fiji under the [Companies Act](#) and carrying on banking business in Suva and elsewhere in Fiji; and operating a branch in Lautoka. It is alleged that the plaintiff was the owner of a Dommet 20 ft Swing Lift and a Dommet 2 Axle Semi-Trailer (“side loader/side lifter/the property”) in good working condition. The defendant held a mortgage debenture charge over certain vehicles of Chandar Sen Brothers Transport Limited (“Chandar Sen Brothers), a customer of the defendant at its Lautoka Branch, as security for advances made by the defendant to Chandar Sen Brothers. The plaintiff’s side loader was lawfully stored for safe keeping at Chandar Sen Brothers yard in Natabua, Lautoka. On or about Saturday 26 January 2013, the defendant, by its bank officers, wrongfully seized the plaintiff’s side loader from Chandar Sen Brothers yard purporting to act under the authority of the mortgage debenture given by Chandar Sen Brothers. It is alleged that: despite request by the plaintiff to release the side loader the defendant refused to do so. The side loader was the property of the plaintiff and not of Chandar Sen Brothers and the defendant had no charge over or interest in the side loader. The defendant sold the side loader to one of its customers without making proper enquiry as to its owners or value and wrongfully converted the sale proceeds to its own use. As a result, the defendant has wrongfully deprived the plaintiff of the side loader and the use of it.

[07] It was on this background the plaintiff brought its claim for damages for wrongful derivation of the property and the use of it.

Defendant’s case

[08] The defendant in its statement defence states: the defendant was not aware of and had no knowledge that the plaintiff’s side loader was stored for safe keeping at Chandar Sen Brothers Yard in Natabua, Lautoka. The defendant was only a party to the seizure of items enumerated in the schedule to the debenture mortgages given and executed by the mortgagors Chandar Sen Brothers Transport Limited in favour of the defendant as mortgagee. The defendant did not act in a deliberate, high handed and unlawful manner as alleged and the plaintiff’s claim against the defendant is misconstrued and wrong in law and as pleaded does not disclose any cause of action against the defendant.

[2] In view of the facts of this case, it is clear that the appellant stored the side-loader at Chandar Sen’s yard, which fact is accepted by the learned High Court Judge in paragraph

14 of his judgment. It is common ground that the respondent held a mortgage debenture charge over Chandar Sen's property including the vehicles and that the respondent bank seized vehicles owned by Chandar Sen including the disputed item i.e. the side-loader which was parked in Chandar Sen's yard.

[3] As the respondent bank had the right or power of sale upon a default being made by the mortgagor, the initial action of seizure of the Respondent was well within its power. However, the dispute arose when the respondent exercised the power of seizure over the side-loader, which was claimed by a third party on the basis of a right of ownership.

[4] In the circumstances, the burden was on the respondent bank to prove that the items it seized were covered by the mortgage documents. Only the respondent possessed this special knowledge which was not available to the plaintiff/appellant. The minutes of the pre-trial conference too reveal this to be an agreed fact: "*at all material times the defendant held, inter-alia a mortgage debenture charge over certain vehicles of Chandar Sen Brother Transport Limited.*" Accordingly, the Respondent did not have a charge over ALL of the vehicles of Chandar Sen Brothers. The charge was only in respect of „*certain*“ vehicles. Therefore, it is only reasonable to presume that the Respondent possessed information of the vehicles which were subject to the charge. In any event, it obviously does not include all the vehicles in the yard.

[5] As a claim based on ownership existed, it was incumbent on the respondent not to proceed with the sale of the side-loader but to halt the sale and ascertain the ownership of the claimant. It is pertinent to mention that there were no other claimants except the appellant. Document PE5 proves the ownership of the appellant. This evidence was not sufficiently challenged so as to render it unacceptable to the learned judge to hold that the appellant had failed to prove ownership. This court, of course is satisfied with the ownership of the appellant, having perused PE4 and PE5 (pages 152 and 153 of the HCR) at length.

- [6] The conduct of the Respondent subsequent to the initial seizure further reveals its *mala fides*. The Respondent had published a list of properties including 37 vehicles in the „Sun“ (page 168 of HCR). This list of properties does not include any description corresponding to the disputed side-loader. I also observe that all 37 vehicles in the list bear registration numbers whereas the disputed side-loader does not carry a registration number. Hence, it is abundantly clear that the disputed side-loader did not form part of the debenture charge list.
- [7] The respondent Bank cannot deal with any property beyond those published in the advertisement of mortgagee sale which appeared in the „Sun“ as it would contravene the law. Hence it was *ab initio* wrong for the Respondent to have dealt with the side-loader.
- [8] When the representative of Chandar Sen renounced any claim of ownership to the disputed side-loader, it was obligatory for the Respondent bank to have released it to the appellant, after the verification of ownership, as the appellant was the sole claimant. Pages 290 and 291 disclose that Rakesh Kumar had requested for the release of the side-loader which was admitted by Saleshi Naidu, contrary to the Respondent“s assertion, in verbatim *“that a demand of the return of the side-loader was likely not made”* (3.1.15 Respondent“s submission).
- [9] I cannot agree with this contention as it is clear that Rakesh Kumar in no uncertain words had made the demand for the return of the side-loader. This verbal demand, which was admitted by the Respondent“s witness Saleshi Naidu, constitutes a sufficient demand. It need not necessarily have been in writing, especially as this is already admitted by the Respondent“s witness. A written demand may have been insisted on by this court in the absence of an admission by Saleshi Naidu.
- [10] Having refused the return of the side-loader, the Respondent sold it to AutoCare. The proceeds of sale were appropriated by the Respondent, which amounts to conversion. Therefore, the Respondent cannot deny liability for conversion.

[11] Against the above backdrop, the appellant filed the present appeal on the following grounds of appeal:

Grounds of Appeal

“(1) (i) *The Appellant’s side lifter was on Chandar Sen’s property when the Respondent seized Chandar Sen’s property and the chattels on it on 23 January 2013; and*

(ii) The side lifter did not belong to the mortgagor, Chandar Sen; and

(iii) The side lifter was not charged to the Respondent; and

(iv) There was no other claimant to the side lifter, the learned Judge misdirected himself on the onus of proof by requiring the Appellant to prove documentary title to the side lifter when he said at [19]:

“All of the properties of Chandar Sen Brothers including vehicles were seized under mortgagee sale. Any third party claiming to exclude certain property from the mortgagee sale must establish that that property is owned by him or her and not owned by the mortgagor.”

and at [32]:

“On the evidence, I would find the defendant bank was exercising its rights under mortgagee sale over Chandar Sen Bros properties on 26 January 2013. The unregistered side loader was parked in the Chandar Sen Bros yard. It was Chandar Sen Bros property. If the plaintiff claims the side lifter to be theirs, the burden was on them to prove that they are the owners of it. I conclude that the plaintiff was failed to discharge this burden. This translates that the defendant had failed to establish their ownership of the side loader before the mortgagee sale proceeded. Presumably, even if we accept that PW1 gave the letter given by Anish Kumar (PW3), one of the directors of Chandar Sen Bros that the side loader does not belong to them (Chandar Sen) to Sailesh Naidu (DW1), the defendant could not have acted upon that letter because the mortgagee sale was against Chandar Sen Bros.”

Whereas the onus was on the Respondent as mortgagee exercising his power of sale to prove that it had a charge on the side lifter under its mortgage debenture, which it did not have. Consequently, the learned judge wrongly held that the Respondent could take possession and sell the side lifter even

though it was not charged to the bank merely because it was amongst other charged property.

2. *In holding that the Appellant had failed to prove the tort of conversion against the Respondent, the learned judge misdirected himself on the adequacy of the evidence required to prove ownership of the side lifter. In particular:*
 - (a) *The learned judge failed to appreciate that exhibits P1 to P5 proved the chain of ownership of the side lifter from the date of importation in 2002 up to the date of conversion on 23 January 2013 and that P5 and the testimony of Rakesh Kumar that Kalabo Investments Ltd was the successor to Lami Investments Ltd was sufficient proof of Plaintiff's ownership at the date of conversion.*
 - (b) *The learned judge was wrong to insist on proof registration at the Land Transfer Authority as the only credible evidence of Appellant's ownership of the side lifter when it was common ground that the side lifter was never registered with the LTA.*
 - (c) *The learned judge failed to appreciate that the Appellant was a bailor of the side lifter parked at Chandar Sen's yard and as such it had an immediate right to possession of the side lifter and that gave the Appellant a right to claim against the Respondent for the tort of conversion.*
3. *No valid or justifiable reasons have been given by the learned Judge for not accepting the evidence of the Appellant's witnesses Rakesh Kumar and Anish Kumar."*

[12] The Respondent relies heavily on **Flack v National Crime Authority & Another** [1997] FCA 1331 to augment his position. In page 13 of its written submissions, the Respondent relies on a passage in ***Pollock & Wright's*** Essay on Possession in the Common Law at p41 referred to by Lord Russell in **South Staffordshire Water Company v Sharman** [1896] 2 QB 44, in turn quoted in **Flack v National Crime Authority & Another** (supra) as a defense. The passage reads thus: "*The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also.*"

[13] It is pertinent to note that the ratio of **Flack v National Crime Authority & Another** (supra) relates to an instance of an occupier of a premises with possessory rights over

goods (a sum of money) found on her property seized pursuant to a search warrant, suing in conversion, the police. Dealing with the central issue of whether the applicant in the case had sufficient possessory title over the good to sue in conversion, Hill J. states quoting *Russell v Wilson* [1923] HCA 60; (1923) 33 CLR 538 at 546 “*Possession is thus not just evidence in support of ownership, it confers what the law refers to as a "possessory title", which is as good as an absolute title of ownership, as against all the world except the true owner*”(emphasis added). This dictum is in relation to the applicant’s rights over the property on which the goods were found, in order to ascertain whether the applicant manifested an intention to exercise control over the premises in which the goods were found, in order to claim possessory title over the goods.

[14] If I am to draw an analogy between the factual circumstances of **Flack** and that of the matter at hand, it does not require elaborate analytical expeditions to come to a finding that the Respondent has possession of Chandar Sen’s yard (property). As such, following the reasoning in **Flack**, the Respondent has possession of everything on the property as well including the side-loader. It appears that the Respondent has attempted to proceed on the basis that the side-loader in question is a chattel and therefore accedes to the owner of the soil.

[15] It is, I believe unnecessary to venture into an exploration of whether the side-loader was a chattel or not, in order to decide the issue at hand. Suffice it to say that the side-loader is commonly agreed to have been on the premises, whether affixed, under, or on the land. Therefore, proceeding on the basis of **Flack**, it is possessed by the Respondent.

[16] However, all would have been well for the Respondent if there was no superior title to the side-loader. Respondent again relies on **Flack**, in regard to conversion and cites the following passage quoting the dicta of Dixon J. in *Penfolds Wines Pty Ltd v Elliot* (1946) 74 CLR 204 at 229:

„The essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel An intent to do that which would deprive “the owner”

of his immediate right to possession or impair it may be said to form the essential ground of ,tort."

- [17] The attempt here, it appears, is to equate the position of the Respondent to that of the „owner“ of the chattel, in this instance, the side-loader, thereby refuting any allegation of conversion.
- [18] Conversely, at page 20, the Respondent had taken up the position that the side-loader has been at Chandar Sen“s yard for a long period and prior to that had been lying at Veitari Lautoka. Therefore, the Respondent argued that this is abandoned property. I cannot agree with that contention merely because it had been lying in the yard of Chandar Sen. If the appellant had no interest in the side-loader there would not have been any reason for him to shift it from Veitari to Chandar Sen“s yard. Interestingly, in this instance, the Respondent assumes the stances of both a possessor of the property as well as that of a finder of abandoned/lost property. This position is confusing, not to mention quite unhelpful to the Respondent. At the same time, the reliance on **Flack** is diminished by this stance.
- [19] I refute the contention of abandoned property for another reason. At page 20 paragraph 4.2.4, the Respondent states *“at some point the tyres were removed and placed on top allegedly for servicing, that never took place.”* That itself demonstrates that the side-loader was not an abandoned item but the owners of it had shown some interest in the property by shifting it from one place to another and attempting to service it. Maybe, it was not in regular use, but it certainly was not an abandoned item.
- [20] Even if I am to entertain the contention that the respondent is the finder of abandoned property, relying on the same authority relied on by the Respondent, i.e. **Flack**, I come to the same conclusion as Hill J. when he agrees *“that the finder of a lost article is entitled to it as against all persons except the real owner”* quoting ***Parker v British Airways Board*** [1982] 2 WLR 503. The Appellant in the matter at hand has proved his ownership to the goods i.e. side-loader to the satisfaction of this court. Therefore, even in the event

the Respondent had a claim of possession to the side-loader, such claim becomes inferior to that of the Appellant.

[21] In his written submissions, the Appellant heavily relied on the „user“ principle. In his written submissions and in the original statement of claim he sought \$84,000.00 for the use of the side-loader or any other sum maybe found due by the court. It further states that it was not an “*income producing chattel.*” As per the submissions, the appellant did not suffer any actual income loss by being deprived of the use of the side-loader. He however computes the loss for 12 months from January 2013 to January 2014 on the basis of $\$230.136 \times 365 \text{ days} = \$84,000$ relying on the user principle.

[22] It is in evidence that after the side-loader was sold to AutoCare, another 20 foot long side-loader had been welded to the disputed side-loader and had been used by AutoCare for their business. This would have prompted the appellant to move for a claim on the basis of the user principle. It is also in evidence that the disputed side-loader had not been used for a long time by the Appellant while the appellant himself admits it had not generated any income.

[23] The Appellant“s claim for loss of income is solely prompted by AutoCare making use of the disputed side-loader. However, as per evidence it is crystal clear that it was lying in a yard without being used. Therefore, it can be reasonably inferred that the appellant did not have the intention of using the disputed loader and under such circumstances I do not think it is correct for this court to act under the user principle and award any sum to the appellant. Hence the claim of the appellant under the user principle is dismissed.

[24] Considering the facts of this case, I hold that the ownership of the side-loader has been established by the Appellant satisfactorily and accordingly the appellant had made a justifiable demand to release the same. Nevertheless, the Respondent had sold it to a third party and converted the proceeds for its own use. Hence, the Appellant is entitled to sue in conversion.

[25] Taken cumulatively, I answer the grounds of appeal in favour of the appellant.

[26] In his statement of claim before the High Court, as per page 22 of the HCR, the Appellant had made the following claims against the Respondent/Defendant:

“A. Judgment for \$99,800 being the value of the side loader.

B. Judgment for \$84,000 for the loss of use of the side loader or such other sum as may be found due by this Honourable Court.

C. Special damages of \$25,000.

D. General Damages for the Defendant’s deliberate, high handed and unlawful actions.

E. Interest on the judgment sum from the date of seizure (26/1/13) to the date of judgment at the rate of 9% per annum compounded daily.

F. Indemnity costs of this action.”

[27] Having considered the facts of the case, the following relief is granted:

- i. Claim „A“ is granted.
- ii. Claim „C“ is granted subject to a ceiling of \$15,000.00.
- iii. FJ\$10,000 is ordered in granting claim „D“.
- iv. Claim „E“ is granted subject to an interest of 4%.

[28] The claims „B“ and „F“ are refused.

Almeida-Guneratne, JA

[29] I agree with the judgment, the reasons, conclusions and the orders proposed by His Lordship Justice Lecamwasam.

Jameel, JA

[30] I agree with the reasons and proposed orders of Lecamwasam, JA.

Orders of the Court:

- 1) *Appeal allowed subject to the reasons in paragraph [23] above;*
- 2) *Costs of \$10,000.00 payable by the Respondent to the Appellant within 28 days of this Judgment.*



Lecamwasam

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Almeida-Guneratne

Hon. Justice Almeida-Guneratne
JUSTICE OF APPEAL

Jameel

Hon. Justice F Jameel
JUSTICE OF APPEAL