

C/R.

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC079 OF 2001

24/2006

BETWEEN: **ARUN LATA f/n Ram Dutt**

PLAINTIFF

AND: **B L NAIDU AND SONS LIMITED.**

DEFENDANT

Counsel for the Plaintiff : **Mr R P Chaudhary**
Counsel for the Defendants : **Mr G.P. Shankar**

Date of Hearing: **20 February 2006**
Date of Judgment: **27 February 2006**

JUDGMENT OF FINNIGAN J

Mariappa and Arun Lata were both seriously injured when traveling in a vehicle owned by B L Naidu and Sons Limited. Each separately and at different times commenced an action against B.L.Naidu

and Sons Limited for damages. Mariappa sued also Rukesh Pratap the only other person in the vehicle, who was an employee of the owner and who he said was driving the vehicle. Arun Lata is his wife. She has sued only the owner. The two actions were consolidated into one hearing and I heard the evidence of Mariappa, Arun Lata, Rukesh Pratap, Mr Bala Naidu a Director of the first Defendant and a police officer from Sigatoka Police Station.

The Facts:

Some of the facts are beyond dispute.

It is clear that B L Naidu and Sons Limited on 10 September 2000 owned a white Nissan double cab utility vehicle registered number DO670. All the witnesses are agreed that sometime in the night of 10 September 2000 his vehicle, containing only Mariappa, Arun Lata and Rukesh Pratap was driven with considerable force into a tree on the wrong side of a straight stretch of road between Sigatoka and the premises of Pacific Green. Three photographs were produced in evidence by Mariappa and they show the front of the vehicle pushed in on the left hand side with the front wheels slewed to the left. From the windscreen forward the damage is so serious as to suggest a write-off. Apart from a loose wheel arch trim on the right rear the only other damage shown in the photographs is a webbing fracture of the whole of the windscreen from the center to the right hand side, ie the driver's side, and there may be some buckling of the steering wheel.

To determine the merits of the two claims and the defences, I have to decide who was driving the vehicle and was he driving in the course of his employment? Both Mariappa and Rukesh Pratap at the time were employees of B L Naidu and Sons Limited.

The five witnesses are the five people (hospital staff excepted) who were associated with and know about the accident and its aftermath. Taken together, their account of what occurred falls well short of establishing on the balance of probabilities whatever it was that happened. From the beginning to the end of the events in which they were involved on 10 September 2000, even including how Mariappa got to work that day, how he was to get home, the accident itself and what happened thereafter, the two Plaintiffs and the Defendant's witness told completely different stories. The other occupant of the vehicle, the Defendant Mr Pratap more or less sided with the two Plaintiffs but even between themselves the three occupants of the vehicle differed as to what occurred. All three of them took refuge in a claim of having been made unconscious in the accident but none of them claimed this affected their memory of events up to the accident itself.

As for the police officer, his account was rendered improbable by his assertions that the police had, on the basis of an oral statement made to him in hospital shortly after the accident by Mariappa, charged that man with driving offences but had withdrawn the charges. He said this had occurred because he himself was the prime witness and had been absent from Fiji as a peacekeeper in 2002. Mariappa was asked no questions about this. Since his return in January 2003 it appears the police officer took no interest in this matter whatever until served with a subpoena on the Wednesday before the hearing whereupon he looked for

the police file. He says he was told that it had only just been sent to the Director of Public Prosecutions so that the charges against Mariappa as alleged driver of the vehicle could be laid afresh. He gave his evidence without notes, he had two accounts of where his note book had gone. One was that it is in the file which went to the Director of Public Prosecutions, the other is that it had been put in the archives. About the facts that it is now five and a half years since the events and the alleged driver is still not charged and the fact that he could have made some attempt to retrieve his notebook he had nothing to say. To make matters worse for both him and Rukesh Pratap, the latter towards the end of his evidence, without any prior warning by cross examination of either of the other two witnesses involved, offered as evidence a statement that when the policeman came to the premises of B L Naidu and Sons Limited to take his statement the Defendant's witness gave him a bag of potatoes and a bag of onions whereupon the policeman departed having taken only two or three sentences of a statement.

To mention briefly some of the other inconsistencies, Mariappa gave an account that the accident happened while the vehicle, driven by Rukesh Pratap, was speeding along the highway and he saw the speed mount to 80, 90 then 100 kilometers per hour after which it drove on to the other side of the road and into the tree. I am satisfied he had been drinking alcohol before this and his two accounts of how much he had indicate that he either does not remember or does not wish to say exactly how much. When Rukesh gave evidence, with a similar vagueness in his reluctant answers about how much alcohol he had drunk, he said he was driving and another vehicle blinded him with its head lights whereupon without knowing where he was driving he drove onto the wrong side of the road and into the tree. Not only is it improbable that

Mariappa did not notice such glaring headlights but it is improbable that this could occur without some involvement of the other vehicle.

Added to all this, the two men claim they were in the front seats with Rukesh driving. It was Mariappa who suffered and is claiming for severe head face shoulder and chest injuries. Rukesh suffered no injuries at all, certainly nothing major. If those facts are matched with the obvious damage to the windscreen on the driver's side and the apparent buckling of the steering wheel one is left with the strong impression that Mariappa was driving. Neither witness can be believed. The other Plaintiff Arun Lata understandably adhered to the general line taken by the other two that Mariappa was driving. However she had not sued him. She has sued B L Naidu and Sons Limited only. This is on the basis that her husband, a Defendant in Mariappa's claim, was an employee of B L Naidu and Sons Limited and driving in the course of his employment when his driving injured her. She claims to have been told by the Defendant's witness to go in the vehicle and that she herself was an employee of the company at that time. I do not recall that witness agreeing that she was an employee. She claimed that the company gave no pay slips and so was unable to substantiate that part of her claim, either as to liability or as to quantum. The absence of pay slips was not put to Mr Naidu either. Her husband says she was in the vehicle because he was reluctant to obey Mr Naidu's instruction that he drive Mariappa home and that Mr Naidu had said he could take his wife. By the end of her cross-examination, I was unable to summon sufficient confidence in her account to be able to establish what the truth might have been.

I come now to the Defendant's witness. I was referred by Counsel for the Plaintiffs to an affidavit sworn by him on 6th February 2001. He relied on that affidavit as part of the evidence. At the interlocutory stages of the Mariappa action this witness had sworn an affidavit and had annexed the documents relative to the claim that the Defendant made on its insurer after the accident. In the affidavit he revealed that the insurer rejected outright the Defendant's claim for cover on the ground (as I understand the letter of 8 November 2000) that the Defendant had not revealed all the facts to the insurer at the time it made the claim. The affidavit suggests that the Defendant has not contested this.

Against that background and in the light of the mish-mash of facts put before me by the other witnesses, it came as no surprise when I learned that the account of the accident given to the court under oath by Mr Naidu, particularly about the details of how he went to the hospital in the evening after the accident (10 September 2000) and saw Mariappa and asked him who was driving and he said Mariappa replied that he had been, is all totally contradicted by his own statement made to an insurance investigator just after the accident on 14 September 2000. Among many other notable comments in that statement which he signed, he said **"I don't know which of the two men were driving"** and **"yesterday the 13th September I spoke with Rukesh and he told me that Mariappa was driving when they had the accident"**. The statement also seriously contradicts other parts of the evidence he gave so strongly on oath, e.g. his denial that he brought Mariappa to work that day and was to arrange his return home.

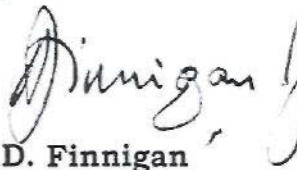
Conclusion

Enough said. I make no decisions about the merits of any of the claims made. I find the evidence unsatisfactory to establish any relevant facts on the balance of probabilities and in each of these actions the Plaintiff's claim is dismissed. Each party will pay its own costs.



At Lautoka

27 February 2006


D.D. Finnigan
JUDGE