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IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 449 of 1984

Between:

CARPENTERS FIJI LIMITED

Plaintiff

and

BALI MOHAMMED (f/n Butta)

Defendant

Mr. H. Lateef for the Plaintiff
Mr. V. Parmanandam for the Defendant

JUDGMENT

The plaintiff's claim against the defendant is for the sum of \$25,012.66 alleged to be the balance owing on the purchase of a Nissan CW519 truck which the defendant purchased on terms from the plaintiff on the 11th May, 1979.

The defendant on that date executed a Bill of Sale, subsequently registered as Book 79 Folio 1556, to secure the balance purchase price of the truck and certain other moneys which will be referred to when the Bill of Sale is discussed later in this judgment.

The defendant is alleged to have made default in payment of the monthly instalments provided in the Bill of Sale and the company in purported exercise of its powers under the Bill of Sale seized the vehicle and after some delay sold it for \$21,000.

The defendant's defence to the claim is that the Bill of Sale is "illegal, unenforceable and void." He counterclaims for a declaration that the Bill of Sale is "null, void and unenforceable" and seeks damages amounting to \$86,492.99.

The damages purport to be damages for loss of anticipated net income from 11/7/80 to 31/3/84.

The defendant does not appear to have appreciated that the plaintiff's claim is for the balance purchase price of the truck and certain expenses incurred by the plaintiff. The amended Statement of Defence and Counterclaim are not drawn in clear terms and it is difficult to determine what is the basis of the defence to the plaintiff's claim.

No proper basis is laid in the Amended Defence for a claim that the Bill of Sale was null and void and unenforceable. Facts were denied which should not have been denied. Paragraphs 1 and 2 of the statement of claim, which contain a number of allegations are not denied. The defendant in pleading to those paragraphs "does not admit the allegations" which is not the same as denying each and every allegation. To make matters worse he then goes on to admit some of the facts.

The evidence now discloses that the defendant should have admitted the facts in the first four paragraphs of the Statement of Claim and raised his defence thereto i.e. alleging facts that would support his claim that the Bill of Sale was illegal, void and unenforceable and that purported seizure was wrongful thus laying the basis for his counterclaim for damages.

The notes 18/8/1 to Order 18 rule 7 of R.S.C. state:-

"It often is not enough for a party to deny an allegation in his opponent's pleading; he must go further and dispute its validity in law, or set up some affirmative case of his own to answer it. It will not serve his turn merely to traverse the allegation he must confess and avoid it."

Paragraph 5 of the Statement of Claim which is the last paragraph in the claim sets out details of credit and debits involved in the account resulting in the sum claimed by the plaintiff. The defendant's answer to this is that he "does not admit the allegations and/or contents of paragraph 5 of the Statement of Claim." There was, in fact, no explicit denial that the balance sum claimed to be owing was not owing or recoverable or as an alternative defence that the sum claimed was excessive.

Mr Lateef called Mr Low, the plaintiff's credit controller, to prove the items in paragraph 5. He was subjected to close and detailed cross examination which would have been relevant if the issue was the legality of the transaction. It was of no relevance to determine the proper amount owing if the defence was that nothing was owing because the alleged balance moneys were not recoverable.

Mr Parmanandam's line of questioning of Mr Low appeared to indicate that the defendant also challenged the quantum of the debt. Support for this view was given by Mr Parmanandam's application to amend the defence by adding a new paragraph No.6.

"6). The defendant stays the interest provisions in the Bill of Sale are voidable in that those provisions are harsh and unconscionable."

However, Mr Parmanandam in his final address only attacked the validity of the Bill of Sale. This was in support

of the counterclaim. The vehicle was purportedly seized and sold by the plaintiff. In the circumstances the alleged illegality of the Bill of Sale or that it was void or unenforceable could not affect the liability of the defendant to repay the balance moneys properly owing thereunder.

In Faiz Mohammed Khan Sherani v Latchman and Others 14 FLR 3, the Court of Appeal held that there must be some limitation on the words "fraudulent and void" in section 7 of the Bills of Sale Act. While the Bill of Sale might be avoided that could have no effect on the validity of any covenants to pay the principal or interest and other moneys under the Bill of Sale agreed to be paid by the defendant to the plaintiffs.

So far as the plaintiff's claim is concerned all I have to decide is whether the plaintiff has established that the sum of \$25,012.66 is due and owing.

Mr Parmanandam's probing did bring to light some questionable aspects in the plaintiff's method of accounting.

Mr Low stated the total purchase price of the vehicle on terms was \$56,683 made up as follows:-

Actual cost of vehicle	\$48,800
Cost of tray	2,300
Marine freight Suva to Labasa	700
Marine insurance	285
Comprehensive insurance - 1st year	3,500
C.T.P. insurance - 1st year	80
Registration of vehicle	452
Bill of Sale Costs	566
	<u>\$56,683</u>

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This sum less deposit of \$10,000 was then added to the sum of \$14,273.28 which is described in the Bill of Sale as an "additional sum" "in lieu of interest" on the principal sum after crediting a deposit of \$10,000. The sums secured by the Bill of Sale in this case totalled \$60,956.28.

The consideration is expressed to also include "all other present and future indebtedness" for goods supplied or "work done". The covenant for repayment, however, does not include, as it should have, repayment of such indebtedness.

I do not consider such indebtedness is secured by the Bill of Sale although clause 15 purports to so provide, in view of clause 2 which obligates the plaintiff to re-assign the vehicle to the defendant on payment of the balance purchase price and the additional sum.

The "additional sum" earlier referred to is the second matter which calls for comment. It is not in fact a sum "in lieu of interest" and that statement in the Bill of Sale is misleading if it is not in fact, a false statement. The sum is in fact three years interest calculated in advance at 10% on the balance sum owing of \$46,683 which comes to \$14,004.90 leaving an unexplained sum of \$268.38 in excess. Mr Low said the "additional sum" was interest. The \$268.38 must therefore be interest on some item which has not been disclosed.

The sum of \$60,956.28 referred to earlier was to be repaid by 36 monthly payments of \$1797 each and there was also to be an additional payment of \$1337 before 31st July, 1979. This sum was paid, presumably before the due date, but there is no mention of it in the Bill of Sale although in the plaintiff's instructions to Mr Parshu Ram, the solicitor who prepared the Bill of Sale, the additional payment is mentioned. No refund of interest for early payment of part of the balance purchase price appears to have been made. This would amount to about \$400 on my reckoning.

36 payments of \$1797 plus the sum of \$1337 comes to the sum of \$66,029 which is \$5,072.72 more than the defendant was required to pay. The plaintiff apparently anticipated it would have to pay second and third year insurance premia and made allowance for that in determining the amount of the monthly instalment.

The Bill of Sale provides for payment of monthly instalments of "not less than \$1797.00". This imputes that the mortgagor had the right to pay off the whole debt at any time but nowhere in the Bill of Sale is there any explicit provision advising the mortgagor that he can do so nor is there any provision for adjustment of interest charged in advance. On the face of the document the defendant had to pay \$60,956.28 before he could have the vehicle reassigned to him.

Mr. Low stated, that early payment would be accepted and that interest would be adjusted in such a case. If that was the position it is not reflected in any provision in the Bill of Sale as it should have been nor in the account produced.

An extreme example of what would legally be the position if the mortgagor decided to pay off the day after he signed the Bill of Sale and the mortgagor required payment as provided in the Bill of Sale indicates how unfair the transaction could be. It would result in the mortgagor paying the total of \$60,956.28 for a vehicle with tray which he could have purchased for \$51,100 the previous day if he had paid cash.

I have given an extreme example, which would never occur in practice, to emphasise how one sided the transaction could be. When it comes to legal matters a purchaser should not have to rely on a company officer understanding a complicated Bill of Sale and treating a customer fairly and allowing a rebate of part of the additional sum for early payment.

The provision for redemption (Clause 2) requires the mortgagor to pay only the sum of \$60,956.28 before the Company

is required to reassign the vehicle to the mortgagor. This appears to be a defective provision because it does not provide for payment of future indebtedness or any other moneys that might be payable under the Bill of Sale before the vehicle is re-assigned.

Clause 2 also appears to conflict with Clause 6 which allows the mortgagee to make good any default and to require payment forthwith of all costs and charges incurred which until paid is secured under the Bill of Sale and bears interest at the rate of 8%.

Clause 18 provides:

"18. The Mortgagee shall be entitled to charge simple interest at the rate of \$10 per centum per annum on any instalment of the principal sum or additional sum which the Mortgagor shall fail to pay upon the due date thereof."

Included in the balance sum claimed by the plaintiff is the sum of \$5,306.32 for interest for period October 1979 to May, 1982 on alleged overdue instalments.

Mr Low was required by the Court to provide details as to how this sum was made up. The list he provided is quite revealing.

Mr Low stated that irrespective of how late in the month an instalment was paid (ignoring the first day overdue which is apparently treated as a period of grace) the plaintiff charges the purchaser interest for a whole month on the overdue instalments. A payment made 2 days late incurs the same penalty as a payment made 29 days late.

Clause 18 does not permit the plaintiff to charge a month's interest where delay is only a day or so. The clause only entitled "simple" interest to be charged on a number of days actually overdue if interest is calculated monthly.

The list indicates that interest has been compounded which Clause 18 also does not permit. There is no provision for payment of interest on the overdue instalment of interest "on due date." Interest on an overdue instalment should also not have been accumulated.

There is provision for apportioning instalments. Each instalment is a little more than one thirty sixth part of the principal sum plus the same proportion of "the additional sum" which is in fact interest. The plaintiff can only in my view claim interest on the overdue portion of the principal sum in the absence of any account indicating that the instalment was credited in full to payment on account of the additional sum which the plaintiff was entitled to do.

Why clause 18 provides for 10% interest when clause 6 provides for 8% is not known and appears to be an error. It would result in accounting problems.

The instalments which include part of the balance purchase price and part of the additional sum in fact includes part of 3 years advance interest charged in advance. Interest on the instalments overdue does therefore include interest on interest. Clause 18 does not permit this nor does the clause permit compounding of interest on overdue instalments which the list clearly indicates was charged.

Apart from the foregoing criticism of the plaintiff's claim to interest it appears to me that clause 18 on which the plaintiff bases its claim to interest can never operate in view of clause 2 of the Bill of Sale.

The proviso to that clause provides that if the mortgagee makes default in payment of any sum when due "the full amount of the balance shall forthwith become payable as if this security were payable on demand."

Immediately on the first default of payment of an instalment the balance debt became payable on demand. No further monthly instalments were then legally payable and there could not therefore be any overdue instalments on which interest pursuant to clause 18 could be charged.

In any event I am far from satisfied that the sum of \$5,306.32 claimed for interest is the correct figure. If the vehicle had been sold in September 1981 as I think it should have been, a little over a year after vehicle was purchased, the defendant should have been credited with a refund of about 2 of the 3 years interest he was asked to pay in advance in respect of the resale price. This was no small sum and would amount to about \$4,000.

The burden of establishing that the sum of \$5,306.32 was legally due for interest has not been discharged. No proper account was produced from which it would be possible in any event to determine the correct amount (if any) which is due. I accordingly do not allow this sum.

I have criticised the format of the Bill of Sale and could comment on other provisions. It appears to me that a Bill of Sale printed form used for securing a monetary loan has been adopted, not very successfully, to meet an unusual transaction which appears to have been designed to secure an indebtedness on terms which would ensure return to the plaintiff of their money with interest at the rates of 19%. Interest calculated at a flat rate of 10% for three years on a sum repayable in three years by 36 instalments is equivalent to 19% if instalments are paid promptly on due dates.

The plaintiff has not hidden this fact as the rate of 19% is mentioned in the Bill of Sale and the defendant has affixed his thumb mark alongside it. Whether he understood or was ever aware of how the provisions of the Bill of Sale could operate, if he defaulted, as he did, so soon after purchase is not known but I would expect he did not.

The bank trading rate is now 13.5%. A similar transaction to the defendants with interest calculated at that rate could result in the plaintiff being paid 24% interest.

There is another aspect disclosed by the pleadings.

The truck was repossessed on the 14th August, 1981 but was not sold by the plaintiff until June 1984 nearly 3 years later when it was sold for \$21,000. Mr Low explained it was a special type of vehicle and, while a tender for \$18,000 had been received in September 1981, the plaintiff considered the tender too low and did not accept it. Had the vehicle been sold for \$18,000 in September 1981 and the defendant credited with unexpired portion of the "additional sum", pertaining to interest charged in advance on a sum of \$18,000, which in my view, if the Company was concerned in dealing fairly with a customer, the defendant was in equity entitled to, he was probably better off financially than a sale for \$21,000 three years later. The proper course for the company to have followed would have been to take over the vehicle and credit the defendant with \$18,000.

The question arises whether the plaintiff is entitled to charge the defendant for insurance it paid for 3rd, 4th and 5th years. The plaintiff took out temporary cover for those years for fire only.

When the vehicle was first sold the plaintiff included the sum of \$3500 for comprehensive insurance for the first year in the purchase price. Also included in the purchase price were licence fees and Bill of Sale costs on all of which interest at the effective rate of 19% would have paid if all instalments have been paid promptly.

Mr Parmanandam did refer to the Moneylenders Act but admitted he had not pleaded it. I am, not therefore, called

on to decide whether the cash payments made by the plaintiff on behalf of the defendant could be deemed in the circumstances to be loans or whether they were indeed part of the purchase price of the vehicle duly licensed and insured by the plaintiff.

In the instant case the defendant had he paid all instalments would have repaid the \$566 legal costs of Bill of Sale and an additional sum of \$322.62 interest.

Mr Parmanandam did, however, allege the interest was "harsh and unconscionable" a phrase he borrowed from the Moneylenders Act. Under that Act interest in excess of 12% is deemed excessive. Mr Parmanandam has not sought any relief on that issue and in any case I do not consider I can do anything about it other than to set out the facts as I see them to alert the plaintiff to the possibility that the issue may arise in the future.

Except for the provisions in the Bill of Sale which relate to interest there was no need for me to refer to other provisions in the document. On perusing the document, however, it became evident that the printed form had contradictory provisions and was never designed to properly record the transaction entered into by the plaintiff with the defendant.

The evidence in this case also indicates that there might have been a claim, that part of the debt claimed was irrecoverable under the provision of the Moneylenders Act.

Apart from querying the interest during cross examination the defendant has not challenged any of the other alleged expenses claimed by the plaintiff. However, where the claim is denied or not admitted the plaintiff has to prove its case. A proper account should have been produced and it should not have been necessary for the Court to have ordered details of the interest claimed.

Mr Lateef disclosed details of expenses in the statement of claim. At the hearing he amended the figures by deleting claim of \$1189.57 for marine freight from Labasa to Suva.

I have disallowed the claim for interest. Apart from the claim for the second year insurance, premium, \$3,195, paid by the plaintiff which I allow, I do not allow any of the other items of insurance claimed. The items are claims for "temporary" insurance for third, fourth and fifth years. No receipt was produced for fifth year premium.

The so called "temporary" insurance was not insurance which the defendant was required to pay for under the terms of the Bill of Sale which required him to insure against loss by fire and accident.

The vehicle was, in possession of the plaintiff who arranged for cover while the vehicle was at Walu Bay, Suva, against fire and theft. It was clearly cover to protect the plaintiff's interest in the vehicle. The insurer had made it clear after the accident that it would not reinsure the defendant.

There is a claim for \$24.00 for repossession costs. This was not proved. The vehicle was at the relevant time in the actual possession of the plaintiff. I disallow this claim.

The claim for advertising, \$78.75, was established and is allowed. The end result is that the plaintiff is entitled to judgment on its claim for \$18,481.18 made up as follows:-

Purchase price		\$56,683.00
Less deposit		<u>10,000.00</u>
		\$46,683.00
Add 2nd years insurance	\$3,195.00	
Add advertising costs	78.75	
Additional sum	<u>14,273.28</u>	<u>17,547.03</u>
		\$64,230.03

Brought Forward		\$64,230.03
LESS		
Rebate	\$ 8,377.20	
Payments	16,371.65	
Resale price	<u>21,000.00</u>	<u>45,748.85</u>
		<u>\$18,481.18</u>

The plaintiff is also to have the costs of its claim.

I turn now to consider the defendant's counterclaim.

In it he alleges the Bill of Sale is "illegal", unenforceable and void." The basis laid for this allegation is apparently an allegation in the defence that the defendant was called on to execute a Bill of Sale before he was the owner of the vehicle.

In his final address Mr Parmanandam mentioned not only that the defendant could not legally grant a bill of sale over a vehicle of which he was not the owner but he argued that the consideration in the Bill of Sale was not truly stated and by virtue of section 7 of the Bill of Sale, the Bill of Sale executed by the defendant must "be deemed fraudulent and void."

Mr Parmanandam in concluding his submissions conceded that if the Bill of Sale is held to be valid the defendant had no counterclaim.

I do not consider there is any merit in the counterclaim and am satisfied that the Bill of Sale was a valid Bill of Sale.

I deal first with the allegation that the defendant was not the owner of the vehicle at the time he executed the bill of sale.

I do not consider this defence is available to the defendant. In clause 11 of the bill of sale the defendant declares that he "now hath good right and absolute authority to grant and assign the said chattels unto the mortgagee."

The intention of the parties is clear that on executing the bill of sale ownership was to pass. It was not necessary, as Mr Parmanandam contends, that there had to be physical delivery of possession. On executing the bill of sale the plaintiff became the legal owner of the vehicle and at the same time assigned the vehicle to the defendant by way of security. Actual physical delivery of the vehicle was to be after execution of the document and pursuant to the provisions thereof which expressly permitted the plaintiff to retain possession until default was made by him.

As regards the argument that the true consideration was not shown in the bill of sale because certain matters which had been agreed were not included in the bill of sale, Mr Parmanandam has not appreciated that the consideration referred to in section 7 of the Bill of Sale Act is the consideration which the grantor, the defendant, receives not the sum he covenants to pay.

Mr Parmanandam argued that the retail price should have been less the rebate of duty the Government allowed for a vehicle used in the timber industry. This amounted to \$8,377.20. There is no merit in this argument as it was not certain that the defendant would get the rebate or when he would get it. In any event when it was received by the plaintiff it was applied, with the defendant's approval, in payment of instalments payable under the bill of sale.

The consideration the defendant received was the sale to him of the vehicle on terms. This was correctly stated in the bill of sale.

The defendant's counterclaim is dismissed with costs to the plaintiff.

R.G. Kermode
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