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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 36 of 1982

Between:

MOHAMMED SHAFIK s/o Khuda Buksh — Appellant

and

RAHMAT ALI s/o Dildar Ali — Respondent

A.H. Rasheed for the Appellant
M.S. Sahu Khan for the Respondent

Date of Hearing: 12th November, 1982
Delivery of Judgment: 26th November, 1982

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from a judgment of the Supreme Court at Lautoka for which an order was made in Chambers on the 7th May, 1982.

The action was brought by the respondent and the claim was in essence for the balance of the purchase price of a motor vehicle. The price had been $10,000 and the balance claimed was $5,084.06 and there was a further claim for interest at 10% from the 22nd February, 1982 until the date of judgment. Paragraph 3 of the Statement of Claim alleges that the appellant executed a Bill of Sale in favour of the respondent dated the 26th July, 1978 and duly registered.

In the Statement of Defence the appellant denied that the car was sold on or about the 26th July, 1978.

He admitted that the full purchase price was $10,000 and he admitted executing the Bill of Sale mentioned. He further said that there was a crop lien also executed by him as a collateral security for the repayment of the $10,000. He denied that there was any agreement to pay interest on the $10,000 and then made the further allegations set out in paragraph 6 of the Defence as follows :

"6. AS a further defence the defendant says that the two securities namely the said bill of sale and the said crop lien are 'fraudulent and void' particulars whereof are as follows:

(a) that prior to the execution by the defendant of the said securities the plaintiff and the defendant had verbally agreed that the said sum of $10,000.00 would be repaid by instalment of $2,500.00 per annum and that there would be no interest payable thereof;

(b) that the said documents were executed by the defendant on the 16th May 1978 and not on 26th July 1978;

(c) that at the time of the said execution of the security documents no qualified person as required by section 9 of the Bill of Sale Act Cap.225 and section 3 of the Crop Lien Act Cap.226 was present nor were the contents thereof fully explained to the defendant; in particular, that there was a provision for the payment of the alleged ten per cent interest. "

Further defences were set out in paragraphs 7 and 8 which are as follows :

"7. THAT as a still further defence the defendant will argue that the said Bill of Sale and the said Crop Lien are void and of no legal effect by reason of -

(a) Consideration

that the plaintiff was not the registered owner of the car Registered No. AW025 and therefore had no locus standi to pass any consideration;

and his statement of defence does not disclose any proper grounds of defence and will be struck out. The defendant's replying affidavit claims that certain sums paid to the plaintiff under the crop lien have not been accounted for by the plaintiff. These sums amount to $1,487. There may be argument as to these amounts.

I therefore give judgment to the plaintiff for $5084.06 less $1487 namely $3597.06 together with costs to be taxed if not agreed. The plaintiff will be at liberty to proceed to proof of the remaining $1487 if he disputes the facts alleged by the defendant. "

We would first comment upon the procedure adopted although it would appear that no procedural objections were taken in the lower court. Rule 19(2) of Order 18 reads :

"19(2) No evidence shall be admissible on an application under paragraph 1(a). "

Inspite of this sub-rule the application was heard and the affidavits were used. So far as Rule 19(1)(a) is concerned this is obviously wrong. As Lord Sellers L.J. said in Wenlock v. Moloney (1965) 2 All E.R. 871 at 872 :

" It is not the practice in the civil administration of our courts to have a preliminary hearing, as it is in crime. "

At page 873 he said further :

" It is said before this Court and (no doubt said before the master) that the affidavits were put in not under (a) but under (b) and (d) of Rule 19(1) ..... There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the Court, but not as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try the issues in this way is to usurp the function of the trial judge. "

Mr. Sahu Khan used a similar argument in the present case and additionally pointed out that affidavit evidence could be used where it was sought to call in aid the inherent jurisdiction of the Court. In the present case, however, the learned Judge did not appear to consider and certainly made no findings under any of the subsections of Rule 19(1) other than 1(a), i.e., that no reasonable cause of action or defence was disclosed. In order to decide the application on this point the learned Judge ought to have taken the defences alleged at their face value not relying on affidavits, and, have assumed that the facts upon which they were based could have been established. As is clear from notes in the While Book (we quote from note 18/19/3 in the 1979 Edition) :

> "It is only in plain and obvious cases that recourse should be had to the summary process under this Rule - Hubbock v. Wilkinson /1899/ 1 Q.B. 86, 91; the summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'; A.G. of Duchy of Lancaster v. L. & N.W. Rg. 10 /1892/ 3 Ch. 274. "

The defence alleged that in addition to the Bill of Sale there was also a crop lien and that prior to the execution of these documents the parties had verbally agreed that there would be no interest payable thereon; that the documents were not correctly dated; that no qualified person was present, as required by section 9 of the Bills of Sale Act, when the documents were executed; and that the contents, particularly the provision as to the payment of interest, were not explained to the appellant.

As against this Mr. Sahu Khan relied upon authorities to show that once the documents in question were executed (and this was admitted) it was not open to the appellant to rely on extrinsic evidence to show that he had not understood them or to deny their contents. He also relied on Sherani v. Latchman (1968) 14 F.L.R. 31

in support of a submission that even if the Bill of Sale could be shown to be "fraudulent and void" within the meaning of the Bills of Sale Act the respondent could still rely upon the personal covenant contained therein.

As we have said, the defences put forward must be taken, so far as the facts alleged are concerned, at their face value and in our opinion the questions of law sought to be raised and argued now, are appropriate to the hearing of the action in the Supreme Court, after discovery, viva voce evidence and argument. To attempt to argue law upon facts not settled can be invidious and this can be particularly so in the realm of the admissibility of extrinsic evidence and, we would add, of Bills of Sale.

We need not pause at paragraph 7(a) of the Defence but the argument on uncertainty was indicated by counsel to hinge on a difference in the Bill of Sale and the crop lien as to the time of final payment. The Defence in paragraph 8(a) was one which no doubt the learned Judge could deal with without the aid of the affidavits. That in paragraph 8(b) was dealt with by the learned Judge's severance of the claim for the principal from that for the interest. It could be said that he struck out the Defence in relation to the principal but not as to the claim for the interest so the need to go to trial has not been eliminated entirely. It would appear to us, however, that at least some of the defences relied on in relation to the claim as a whole would go to both aspects, principal and interest.

In our opinion this was not a case which it was either appropriate or procedurally correct, to try upon affidavits. It was not a case in which the Defence put forward was scandalous, frivolous, vexatious nor an abuse of the Court, and the learned Judge made no such finding. The defences disclosed, regarded in the context of Order 18 Rule 19, were sufficient to entitle the appellant to

trial in the usual way.

Accordingly, the appeal is allowed and the judgment of the Supreme Court set aside; the appellant to have his costs of the appeal and of the applic..ion in the court below.

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Vice President

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Judge of Appeal

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Judge of Appeal