IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 11 of 1982

Between:

1. SUNDARJI NARANJI BHINDI
(s/o Naranji)

2. BHIKHABHAI SUNDARJI BHINDI
(s/o Sundarji)

3. DESMUKHBHAI SUNDARJI BHINDI
(s/o Sundarji)

Appellants

and

CHANDULAL NARANJI BHINDI
(s/o Naranji)

Respondent

H. K. Nagin for Appellants
H. M. Patel for Respondent

Date of Hearing: 24 March, 1983

Delivery of Judgment: 24 March, 1983

ORAL JUDGMENT OF THE COURT

Quilliam J.A.

This is an appeal against the decision of the Supreme Court in an action which arose out of the disposal of a business. To avoid confusion it is convenient to

retain the expressions plaintiff and defendants. The plaintiff and the first defendant are brothers and the second and third defendants are sons of the first defendant.

The principal facts as found by the learned Judge are these. The plaintiff was carrying on business as a jeweller at 11 Waimanu Road, Suva. He occupied those premises pursuant to a lease from On Wah Chang & Co. Ltd. to whom he had paid a deposit of $4,000. In March, 1977, he decided to give up his business. He negotiated a sale of his furniture and fittings to the three defendants, who were carrying on the business of jewellers in partnership under the firm name of Apsara Jewellers.

On the 6th April, 1977, the plaintiff and the second defendant called at the offices of Mr. Singh, a partner in the firm of Munro, Leys & Company Solicitors. They both called again to see Mr. Singh on the following day. In the course of those two visits Mr. Singh prepared two letters and a Sale Note. It is not entirely clear which document was prepared on which day, but this is not a matter of significance.

In the presence of the plaintiff and the second defendant Mr. Singh prepared a letter which is dated the 6th April, 1977, which was addressed to On Wah Chang & Co. Ltd. and was signed by the plaintiff. That letter was to notify On Wah Chang & Co. Ltd. that the plaintiff had agreed to sell his business to the three defendants and it was to confirm an oral discussion with a director of the company in which it had been agreed that the defendants would be accepted as tenants in place of the plaintiff once certain renovations had been completed. The letter also stated that the defendants had refunded to the plaintiff the deposit of $4,000 paid by him and that the defendants would in due course pay direct to the company the increased deposit which was to be payable.

The second letter prepared by Mr. Singh was dated the 7th April, 1977. It was also addressed to On Wah Chang & Co. Ltd. and was signed by the second defendant. It was a confirmation on behalf of the three defendants that they would take over the plaintiff's tenancy and set out the terms which were to apply. That letter referred also to the payment of $4,000 to the plaintiff by way of refund of his deposit and acknowledged the liability to pay an increased deposit.

The third document was a Sale Note dated the 7th April, 1977, evidencing the sale by the plaintiff to the defendants of his business, furniture, fittings, plant, machinery and effects for the price of $15,000. The Sale Note also records that payment of that sum was to be made on the 15th September, 1977, and that a post-dated cheque had been handed over to meet that payment. The Sale Note was signed by the plaintiff as vendor. The cheque for $15,000 was never presented for payment because the plaintiff acceded to a request that it should not be.

On the 15th February, 1979, the plaintiff issued a writ against the defendants and in his original statement of claim he claimed to recover the sum of $19,279 for goods sold and delivered. In an amended statement of claim, however, he divided his total claim into $15,000 for the sale of the business and chattels and $4,279.25 for goods allegedly sold on credit. The defendants denied liability for payment of either sum. They admitted the sale of the business and chattels to the second and third defendants but said that the purchase price was to be the amount of the book values which, however, had never been supplied to them. They counterclaimed for three sums totalling $5,096 which they alleged to be owing for goods sold to the plaintiff and for rent, and, in the course of the hearing obtained leave to amend the counterclaim by specifying that two of these sums were owing to the second and third defendants and the third sum to the third defendant.

They also obtained leave to add a prayer for recovery of $4,000 which it was alleged had been fraudulently obtained by the plaintiff in respect of the refund of his deposit on the tenancy.

The learned Judge gave judgment for the plaintiff against all three defendants for $15,000 in respect of the sale of the business and chattels and against the second and third defendants for $3,416 for goods sold on credit. He dismissed the counterclaim.

The defendants now appeal against the judgment entered for the plaintiff on the claim, and against the dismissal of two of the sums claimed in the counterclaim.

Of the seven grounds appearing in the Notice of Appeal three have been abandoned, and we deal with those which remain.

The first ground originally related to the findings of indebtedness in respect of the sums of $15,000 and $4,279.25 claimed by the plaintiff, but Mr. Nagin elected to present no argument in respect of the sum of $15,000. His argument as to the award of $3,416, which comprised part of the $4,279.25, was that the learned Judge was in error in entering judgment because there was no proof of compliance with the provisions of section 6 of the Sale of Goods Act No. 14 of 1979. That section, so far as is relevant for present purposes, provides:

> "6. - (1) A sale of goods on credit or an agreement to sell goods on credit in the course of trade shall not be enforceable by action at the suit of the seller unless -
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> (a) at the time of the sale or agreement to sell, an invoice or docket, serially numbered, be made in writing in duplicate, both original and duplicate containing -
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> (i) the serial number;

(ii) the date of the transaction;

(iii) the name of the buyer;

(iv) the nature and, except in the case of goods exempted from this provision by order of the Minister, the quantity of the goods, in the English language and in figures; and

(v) the price in English words or figures; and

(b) at the time of delivery of the goods, the original or duplicate of the invoice or docket be delivered to the buyer or to some person to whom the goods may properly be delivered on his behalf:"

It was contended that there was no evidence of invoices or dockets complying with section 6. It is necessary to observe, however, the course which the proceedings took. In his evidence the plaintiff said he had given invoices to the defendants from time to time. He referred to one particular sale of 427 sarees on the 18th September, 1977, at cost, namely $3,416. No invoice was produced at that stage. The second defendant, however, having given evidence that no invoices had been received, was confronted by copies of invoices showing a sale of 427 sarees at $3,416 and he then conceded that this sale had taken place, but he claimed the sarees had been paid for. When the argument in respect of section 6 of the Sale of Goods Act was advanced in the course of counsel's submissions the learned Judge observed that the point had not been pleaded. It is not necessary to plead the law, but it would seem there ought to have been a pleading as to the fact that no invoice or docket had been delivered.

However that may be, it seems clear that there was produced to the learned Judge, even if not put in evidence, an invoice or invoices which appear to have contained the details required by section 6.

We have derived some assistance from two previous decisions. They are Safia Bibi v Jora Singh & Sons 16 F.L.R. 27, a decision of the Supreme Court and Gyan Prakash v Abdul Hakin F.C.A. 67/74 a decision of this Court, from which it will be seen that prima facie proof from the plaintiff, against which nothing else is tendered will suffice. A fortiori where the defendant in the face of a tendered invoice concedes delivery.

In the light of this situation we observe that the ground of appeal does not expressly refer to the argument which has been offered. This argument was raised under ground 1 of the Notice of Appeal which was that "the learned trial Judge erred in law and in fact in deciding the case in favour of the respondent when this was against the weight of the evidence adduced." We think it is now too late to try and introduce into that ground an argument which is unrelated to the question of the weight of evidence.

We should perhaps add that the purpose of the legislation is to ensure that litigation over the sale of goods on credit cannot succeed without contemporaneous documentary evidence. It is apparent that prima facie evidence was before the Court, and the second defendant conceded the point.

This ground of appeal must accordingly fail.

The second ground argued was that the learned Judge erred in rejecting the defendants' counterclaim for $4,000 which was alleged to have been fraudulently obtained by the plaintiff. This ground depended upon the argument that the letter prepared by Mr. Singh, addressed to the landlord and signed by the plaintiff, contained a representation as to payment upon which the defendants were entitled to rely as raising an estoppel. We need deal only briefly with this argument.

It overlooks one of the basic principles of estoppels which is that they must be mutual or reciprocal, and that a stranger can neither take advantage of nor be bound by them (16 Halsbury, 4th Ed., p. 1017, para. 1513). In this case the plaintiff's representation was made to the landlord and not to the defendants so they may not seek to raise an estoppel in their favour. This ground of appeal must fail.

Next, it was argued that the learned Judge erred in rejecting the defendant's counterclaim for $3,150 by way of rent. The argument was that a defence witness, Usha Patel, had given evidence which was not taken into consideration by the learned Judge. That evidence was to the effect that the witness had on three or four occasions visited the shop and had seen the plaintiff there, and that he was selling his jewellery from that shop. This evidence however, added nothing to what the plaintiff himself had acknowledged to be the position. The decision reached by the learned Judge was based upon his acceptance of the plaintiff's evidence that there had never been any agreement for the payment of rent. That was a finding he was entitled to make upon the evidence and we are not prepared to interfere with it.

The last ground concerned the finding by the learned Judge that the first defendant was liable to the plaintiff for the sale of the business in the capacity of a partner with the other two defendants. This finding was based upon the provisions of section 15 of the Partnership Act, Cap. 248, which, omitting the proviso which has no present application, is as follows:

> "Everyone who by words spoken or written or by conduct represents himself or who knowingly suffers himself to be represented as a partner in a particular firm is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to

> the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made."

It was acknowledged by Mr. Nagin that it was possible for there to have been a holding out even though the normal characteristics of a partnership may not have been present. The only question is whether there was evidence which entitled the learned Judge to find as a fact that there had been a holding out. It was submitted there was not. We have no doubt, however, that this submission must fail. The plaintiff's evidence was that the first defendant was "in the deal", and that he had discussed the sale with him over a period of a couple of weeks both at the shop and at the first defendant's residence. That evidence, together with the learned Judge's assessment of the plaintiff as a straightforward witness, and the fact that the first defendant elected not to give evidence in contradiction of what the plaintiff had said provided an ample basis for the finding which was made.

The appeal is dismissed with costs.

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Vice President

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Judge of Appeal

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Judge of Appeal