IN THE FIJI COURT OF APPEAL

Civil Appeal No. 74 of 1985

Between:

BALI MOHAMMED Appellant

- and -

CARPENTERS LIMITED Respondent

Mr. S.J. Stanton & V. Parmanandam for the Appellant
Mr. H. Lateef for the Respondent

Date of Hearing: 22nd July, 1986
Delivery of Judgment: 23rd July, 1986

JUDGMENT OF THE COURT

Holland, J.A.

As is not uncommon the issues raised between the parties on the hearing of this appeal from the judgment of Kermode J. are somewhat different from those raised before the learned trial Judge.

The action commenced as a simple claim by the respondent (Carpenters) for the balance owing under a Bill of Sale given by the appellant (Mohammed) in respect of a logging truck purchased by him. After an accident to the vehicle Mohammed ceased to make payments under the Bill of Sale. The vehicle was subsequently seized by Carpenters and sold. The amount claimed was $25,902.23 representing the

balance due under the Bill of Sale plus insurance premiums and repossession costs paid by Carpenters and $5,306.32 interest on arrears of instalments less the resale price obtained of $21,000. The learned Judge disallowed the claim for interest on arrears, extra insurance premiums apart from the 2nd year, and the costs of repossession which he found not to be proved and entered judgment for $18,481.18 against Mohammed who appeals against this judgment and the dismissal of his counterclaim.

In his amended statement of defence at the time the hearing in the Supreme Court commenced Mohammed denied the allegations in the statement of claim and denied that he owed Carpenters any money. By way of counterclaim he pleaded that he was entitled to the benefit of a rebate of duty from the Government and that on receipt of this payment Carpenters should have adjusted the principal sum owing under the Bill of Sale and recalculated the interest. He further pleaded that Carpenters repossessed the vehicle in July, 1980 "and had kept it in its possession since and until resale, or alternatively took possession of the truck and kept it in its possession illegally because the Bill of Sale is illegal, unenforceable and void". He claimed damages by way of loss of income of $86,492.99, and a declaration that the Bill of Sale was "null, void and unenforceable".

On the 2nd day of the hearing when the last of Carpenters' 4 witnesses had completed his evidence in chief and been cross-examined Mohammed obtained leave to amend his statement of defence by adding a new paragraph:-

> "5. The defendant says the interest provisions in Bill of Sale are voidable in that those provisions are harsh and unconscionable."

In his original Notice of Motion on Appeal Mohammed advanced as his grounds that the trial Judge was in error first, in holding that the evidence disclosed an intention to pass the property in the vehicle to Mohammed at the time he signed the Bill of Sale and second in finding that there was compliance with Section 7 of the Bill of Sale Act (Cap. 225). Neither ground was advanced at the hearing of the appeal and do not need to be dealt with by us.

In a Supplementary Notice of Grounds of Appeal the Solicitor for Mohammed advanced a further 6 grounds of appeal one of which has 12 sub-paragraphs.

In summary Counsel for Mohammed submitted that the judgment of the Supreme Court was in error in dismissing the counterclaim on the grounds that the agreement was harsh and unconscionable in equity, and under the provisions of the Money Lenders' Act (Cap. 234), that the conduct of Carpenters after the accident to the vehicle was such that it was inequitable for Carpenters to be allowed to recover the full amount owing under the Bill of Sale, and that the provision in the Bill of Sale for payment of an "additional sum" of $14,273.28 stated to be in lieu of interest was in the nature of a penalty and irrecoverable.

We think that these grounds of appeal present a very different case from that presented on behalf of Mohammed in the Supreme Court but insofar as his Statement of Counter-claim pleads without particulars that the Bill of Sale is illegal unenforceable and void, if there is evidence to support the grounds in circumstances where Carpenters have not been prejudiced as to presentation of or challenge to facts it is no doubt proper that we should consider the grounds of appeal in order to do justice between the parties.

In support of his argument that the Bill of Sale should be set aside in equity, Counsel for Mohammed relied on the facts that Mohammed was apparently illiterate, he received no independent advice, and was in a weak bargaining position vis a vis Carpenters. He relied on the well known decision of Lloyds Bank Ltd. v. Bundy (1975 1 Q.B. 326 and a number of subsequent cases applying the principles explained therein. Even assuming in favour of the appellant that the dicta of Lord Denning M.R. in that case (and specifically not adopted by the other two members of the court) have enured untarnished so as to have become part of the law of Fiji, it is necessary for Mohammed not only to establish an inequality of bargaining power but that such inequality has been used or is coupled with undue influences or pressures brought to bear upon him by the party with the substantially stronger bargaining power. In this case Counsel for Mohammed submits that the undue influence or pressures are the obtaining of an agreement which is harsh and unconscionable in that it contains terms which are oppressive on Mohammed.

In this regard he relied on the following matters:-

1. The Bill was ambiguous and harsh in that the consideration includes "all other present and future indebtedness" which the trial Judge held was not secured by the Bill there being no covenant for repayment of such future indebtedness. The Judge noted however that Clause 15 provided that the Bill should remain in full force and extend to cover any sums of money which might thereafter become owing.

   We do not necessarily agree with the conclusion of the trial Judge that the Bill did not secure future debts but in any event we cannot see anything harsh in such a provision or any ambiguity arising between Clauses 2 and 15.

2. The "additional sum" was a misleading term in the Bill. In his judgment Kermode J. held that this sum was not a sum in lieu of interest but was in fact three year's interest at 10% per annum flat on the balance owing.

We agree that it may have been misleading to refer to this sum as being in "lieu of interest" instead of stating that it was in fact interest but we do not find anything harsh or oppressive in the facts of this case.

3. There was no provision for rebate of interest for early payment nor any provision entitling Mohammed to pay off early with an adjustment of interest.

The deed provides for monthly instalments of not less than $1,797 and further provides that upon payment of the total sum secured Carpenters would transfer the vehicle back to Mohammed. There undoubtedly was a right to pay in advance with a right of redemption. There was no provision for rebate of interest for early payment. In the absence of legislation requiring provision for rebates for early payment the lack of such a provision in loan transactions is quite common. There is no evidence from which we could conclude that such a lack of provision for rebate is harsh or unconscionable.

4. Counsel for the appellant relied on a passage from the judgment "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%".

With respect to the learned Judge we are unable to understand precisely to what he was referring in the passage quoted. It may be the same point as is covered in paragraph 1 hereof. In any event such a conflict, if it exists, would fall to be resolved by way of interpretation but is not evidence of any harsh or oppressive element.

5. Clause 18 providing for interest on unpaid instalments was used as an engine of oppression to enable Carpenters to claim interest for a full month even if only one day overdue and to allow interest on interest. Clause 18 is as follows:-

> "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."

Such a provision does allow for simple interest on the element of the instalment including "additional sum" which has been held to be interest. Such a provision is in accord with the provisions of the Money Lenders' Act. It does not authorise the charging of interest for any period beyond the day or days overdue but as the learned Judge rejected Carpenters' claim to interest nothing turns on this. The provision in the agreement is neither harsh nor unconscionable. Nor is there any conflict between Clause 18 which provides for interest at 10% on overdue instalments and Clause 6 which provides for interest at 8% on moneys expended by Carpenters on or in respect of the vehicle.

6. Clause 2 of the Bill of Sale provides for redemption on payment of the instalments plus the additional sum but does not entitle Carpenters to refuse to redeem in respect of unpaid interest on arrears or other payments made by Carpenters.

This was the view of the trial Judge. With respect we doubt if such a conclusion is correct on reading the Bill of Sale as a whole. If however the conclusion of the Judge be correct the provision is advantageous to Mohammed and certainly not harsh or oppressive.

7. The Bill of Sale is a printed form unsuitable to meet an unusual transaction of the nature that existed between Mohammed and Carpenters.

Although this was a conclusion reached by the learned Judge we cannot agree that the evidence disclosed anything unusual about the transaction or that the form was fundamentally unsuitable.

8. Interest at a flat rate of 10% per annum for 3 years was equivalent to an effective rate of 19% per annum.

The Judge did not find such a provision to be harsh and unconscionable and we do not consider that on the evidence a finding to the contrary of the conclusion of the Judge could be justified.

9. Mohammed was entitled to a rebate of duty of $8,377.20 on the vehicle because it was being used for logging purposes. This payment was received by Carpenters on 27th November, 1979 some 5 months after the first monthly instalment of $1,797 was due. It was applied towards the monthly instalments for October, November, December, January and part of February.

Although it might have been fairer to readjust the principal sum and the monthly instalments so as to provide for less interest the amount involved would not have been large considering the total payments involved. No such request was made on behalf of Mohammed but in any event we are not satisfied that this action of Carpenters or the lack of any provision for rebate of interest in the Bill was harsh and unconscionable.

It follows that even if there has been established an unequal bargaining factor the evidence does not support a conclusion that the Bill of Sale was harsh and unconscionable either under the general principles of equity or under the Money Lenders' Act.

Counsel for Mohammed submitted that the conduct of Carpenters after the accident was such that in equity it should not be permitted to enforce the Bill of Sale in its entirety. It is clear that this issue was not raised on the pleadings or in argument before the trial Judge. The vehicle was damaged in Labasa in July, 1980 and a claim was lodged by Mohammed with his insurers. Apparently there was difficulty in arranging for repairs in Labasa and in November, 1980 the vehicle was shipped to Suva for repairs. In May, 1981 a certificate of roadworthiness appears to have been issued but it is common ground that not all repairs had been satisfactorily carried out. Nevertheless in August, 1981 the vehicle was shipped back to Labasa and further repairs were carried out by Carpenters both in mid 1982 and in early 1983. In July, 1981 formal repossession of the vehicle had been executed by Carpenters on the grounds of default in payment of instalments. The vehicle was ultimately sold in June, 1984.

It is contended on behalf of Mohammed that no payments were made under the Bill of Sale after the accident on the basis that Carpenters would attend to the repair of the vehicle at the expense of the insurers and that after the satisfactory completion of repairs new financial arrangements would be made between Carpenters and Mohammed. There is but sketchy evidence of this arrangement. Mohammed did not give evidence but his son said:-

> "After the accident we made no payments under the Bill of Sale. An earlier Manager had indicated that as vehicle was involved in an accident they would not be asking for payment."

Although the record does not disclose that Mohammed Junior was cross-examined on this particular topic nevertheless no such arrangement was put in cross-examination of the witnesses called by Carpenters. Mr. Low said:-

"From July, 1980 to December, 1980 no payments made under the Bill of Sale. Defendant did not write to us about payments. I did not speak to him in that period. Did not write to him, until after we repossessed."

In fact, however, he produced a letter dated 20th May, 1981 in which he said:

"We have been advised by Mr. Malakai Kaci of the National Insurance Company that repairs on the above vehicle has now been completed.

Would you please arrange to have the arrears of $18,853.76 paid into Carpenters Motors, Labasa no later than the 5th June, 1981, so arrangement may be made to have the vehicle shipped."

A further letter of 1st July, 1981 referred to non payment and indicated that if the amount outstanding was not settled within 7 days Carpenters would repossess the vehicle. This step was taken on 21st July, 1981. The defendant sought an injunction to restrain Carpenters from seizing and selling the vehicle but this application was dismissed on 6th August, 1981.

On 14th August, 1981 Carpenters wrote to Mohammed giving him an opportunity to refinance. On 20th September, 1982 a letter was written on behalf of Mohammed offering to pay $6,000 in cash and refinance the vehicle once its repairs were satisfactorily completed. On 25th October, 1982 a proposal to pay a lump sum in reduction if the truck could be delivered to Mohammed was written on his behalf. On 9th November Carpenters wrote to Mohammed's Solicitors indicating that they would accept a deposit of $6,000 if the balance was financed at a rate of 13.5% per annum, the then current rate. This offer was not accepted by Mohammed.

Looking at the facts in the most favourable light to Mohammed we are unable to detect any evidence that Carpenters have acted inequitably. If the vehicle was not satisfactorily repaired then Mohammed, or those acting on his behalf should have taken action against the Insurance Company. In any event when negotiations were taking place for refinancing in October and November, 1982 there was no suggestion of the repairs not being adequate. Carpenters made a specific and reasonable proposal in its letter of 9th November, 1982 and Mohammed apparently ignored it. At the trial Mohammed called evidence from a transport officer that there was a crack in the chassis, that the brakes were faulty and that there were other minor faults but that was not a topic raised by Mohammed when Carpenters offered to refinance in November, 1982. The witness acknowledged that it would not be expensive to repair the faults referred to by him, nor was evidence offered on behalf of Mohammed that defects in the vehicle was the reason why he did not accept Carpenters' offer in November, 1982.

It was further submitted that the provision for payment of $14,273.28 was a penalty. There may have been room for such an argument if Carpenters had been out of their money for a period substantially less than 3 years. In fact Carpenters did not receive the $21,000 for the sale of the vehicle until June, 1984 some 2 years after the last monthly instalment was due. Even if Carpenters had accepted the earlier offer of $18,000 there would have been nothing of a penal nature in requiring the full payment of interest or the additional sum in lieu of interest. It must also be observed that the Judge refused Carpenters' claim for additional interest for late payment. In dealing with this aspect of the matter we are not necessarily accepting that an argument could be advanced that the provision for payment of the $14,273.28 was a penalty but even if it could the facts do not support any claim for relief under this head in this action.

It follows that the learned trial Judge was correct in dismissing Mohammed's counterclaim and entering judgment as he did. The appeal will be dismissed with costs to the respondent to be taxed by the Registrar.

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Vice President

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Judge of Appeal

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Judge of Appeal