IN THE FIJI COURT OF APPEAL

Civil Appeal No. 113 of 1985

Between:

S.L. SHANKAR LTD. Appellant

- and -

FIJI FOODS LTD. Respondent

Mr. S.M. Koya for the Appellant
Dr. M.S. Sahu Khan for the Respondent

Date of Hearing: 7th November, 1986
Delivery of Judgment: 14th November, 1986

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the decision of Kearsley J. in a case in which the appellant, as plaintiff in the Court below, claimed damages for an alleged breach of a contract of cartage.

By its Statement of Claim the appellant alleged that following the expiry on the 31st December, 1980 of a 12 month contract of cartage of the respondent's products at specified rates there was a renewal of the contract by an exchange of correspondence for a further term of two years from the 1st January 1981. The breach alleged was that on the 16th February, 1981 Mr. Gyan Singh, then the Assistant Accountant

of the respondent, rang Mr. Shankar, Managing Director of the appellant, and told him that cartage by the appellant was to cease forthwith. No reason was given for this decision and the appellant alleged that it was without justification.

In its Statement of Defence the respondent alleged that there was no fixed term contract, nor indeed any obligation to hire the appellant's trucks, and that the reason why there was to be no further hire of its trucks was because its service was unsatisfactory. It was then alleged that the respondent could pick and choose its carriers at will and had "hired Motibhai Limited's truck (the agent and distributors of its products apart from being (the) major shareholder)". At the trial Dr. Sahu Khan sought leave to amend the word "hire" in the passage from the defence just cited to "uses", and the amendment was granted without objection. A Counterclaim included in the defence was not pursued.

Mr. T.N. Bogidrau, who at the relevant time was Sales Manager of the respondent, was called as a witness for the appellant. It was he who had been responsible for arranging the cartage contracts. He said that in 1979 the respondent called for tenders for cartage of its products outside Suva and the appellant's tender was accepted. He confirmed that the contract was extended for a further two years from the 1st January 1981, and correspondence was produced which confirmed that. He went on to say that over the period of the appellant's contracts with the respondent no other carrier was engaged to carry the respondent's goods except in Suva where various carriers were used. The only other exception, he said, was where a customer picked up his own goods. Mr. Shankar said in evidence that he was aware of that practice and had no objection to it.

Mr. Bogidrau said that in February, 1981 Motibhai's acquired a majority shareholding in the respondent and he could say nothing about the respondent's cartage arrangements after that as he was transferred to the Motibhai company. Apart from becoming the major shareholder Motibhai's was apparently appointed sole distributor of the respondent's goods in the Western District.

At the conclusion of the re-examination of Mr. Bogidrau he was asked certain questions by the Court, in part at the request of Counsel. His answers are recorded thus :-

"To Court:

My understanding was that the plaintiff company had an exclusive right, the sole right, to cart the defendant company's products to its customers outside Suva. The terms set out in the exhibited letters didn't just apply to such carting to points outside Suva as the plaintiff company might do. There was, according to my understanding, a contract, the terms of which are set out in the exhibited letters, under which the plaintiff company had the sole right to cart the defendant company's products to its customers who were outside Suva.

To Court at Mr. Koya's request:

What happened was that the defendant company called for tenders in relation to exclusive right to cart the defendant company's products to its customers outside Suva. That was the basis of the contract with plaintiff company.

To Court at Dr. Sahu Khan's request:

The reason there is no mention in the exhibited correspondence of exclusiveness, i.e. of the plaintiff company having that sole right, is, I think, that it was an oversight, or negligence even, on the part of the writers. I don't know why the letter calling for tenders hasn't been put in - that would, I think, make the matter clear. "

Mr. Bogidrau's evidence was confirmed by Mr. Gyan Singh, who has already been referred to. He said that whenever the respondent had goods for delivery outside Suva, the appellant was contacted, and that apart from customers who collected their own goods the appellant did all the deliveries.

Evidence of the value of the contract to the appellant was given by Mr. Shankar who said that in 1980 the company was paid $23,047.

No evidence was called for the respondent.

In his decision Kearsley J. concluded that the appellant had carted for the respondent's from the last quarter of 1977 until February, 1981 but that it did not have an exclusive right to the cartage in that customers could elect to do their own cartage. He then concluded that there had been no breach as Motibhai had become the respondent's sole customer so there was no obligation to employ the appellant. He saw it as a case coming within the "customer cartage" exemption to the contract.

Up until the trial that had never been the respondent's basis for terminating the contract.

No reason was given to Mr. Shankar by Mr. Gyan Singh on the 16th February, 1981 as to why the contract was being terminated, and Shankar's letter to the respondent of the 16th February demanding a reason went unanswered. In its Statement of Defence the respondent did not raise the "customer cartage" exemption. Its stand was that it was free to hire anyone it liked, and that the contract was terminated because the appellant's service was unsatisfactory. It then went on to assert that in the exercise of its right to pick and choose its carrier it had "hired" or "used"

Motibhai's trucks. It was not suggested that Motibhai was the sole customer, but was said to be the agent, distributor and major shareholder of the respondent. In the evidence Motibhai was described variously as "sole distributor" or "sole customer".

If it had been made clear in the respondent's pleadings that it was the "customer cartage" exemption the appellant had to meet Motibhai's true status could have been ascertained by discovery or interrogatories.

O.18 r.8 reads so far as is relevant to the case:-

"Matters which must be specifically pleaded (O.18,r.8).

8.-(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

This rule enforces one of the cardinal principles of the system of pleading, namely, that every defence or reply must plead specifically any matter which makes the claim in the preceding pleading not maintainable, or which might take the opposite party by surprise, or raises issues of fact not arising out of the preceding pleading. The effect of the rule said Buckley L.J. in Re Robinson's Settlement, Gant v. Hobbs [1912] 1 Ch. 717 at p. 728 "is for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove".

The misleading state of the respondent's pleadings in the present case resulted in the appellant being left to face in Court a defence which it could not have anticipated or been expected to meet, resulting in a substantial miscarriage of justice.

Furthermore, O.18 r.10 provides that a party shall not in any pleading make an allegation of fact, or raise any new ground or claim inconsistent with a previous pleading of his. The rule means that a party's second pleading must not contradict his first, unless of course he applies to amend the previous pleading. The present case is not one of inconsistent pleadings, but the equally objectionable case of pursuit of a defence inconsistent with the pleadings.

We are satisfied that justice requires that the appeal be allowed and we conclude that a new trial is the most appropriate way to resolve this matter and we so order.

The appellant is awarded costs to be fixed by the Registrar.

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Vice-President

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Judge of Appeal

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Judge of Appeal