IN THE FIJI COURT OF APPEAL

Civil Appeal No. 15 of 1986

Between:

JANG BAHADUR & SONS LIMITED Appellant

- and -

BANK OF BARODA Respondent

Mrs. A. Hoffman for the Appellant
Mr.H.M. Patel & Miss Shashi Govind for the Respondent

Date of Hearing: 6th March, 1987
Date of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

Speight, V.P.

This appeal is against a Judgment of Kermode J. delivered in the Supreme Court at Suva on 4th October, 1985.

The litigation arose from transactions surrounding the sale of sawmill assets from the Appellant Company to another company, somewhat tardily incorporated - R. Lal

Sawmill Limited (hereinafter called Lal Company). In fact at the time of the sale deed the purchaser company was not incorporated - a fact known to Mr Tahir the proprietor of the Appellant, as he admitted in evidence. As a result of that the sale document was a nullity. Fortunately, that fact had little relevance to the Appellant's action against the Bank, but figured in a contemporaneous action which Appellant took against Lal Company - which was heard and determined along with the claim against the Bank.

The sale price was $117,000 comprising an initial sum of $70,000, with the balance in later instalment. Both Appellant and the Lal Company were customers of the Bank. It held a debenture and a bill of sale over the Appellant company and its chattels, as security for an Overdraft of some $200,000, but it did not initially have security over the land on which the mill was standing that was Native leasehold land held by Mr. Tahir.

Part of the arrangement between the vendor and the purchaser, of which the Bank was aware, was that Lal company would establish a loan with the bank for the initial $70,000 which sum would on settlement be credited to the Appellant's Overdraft. It was to pay the balance of purchase money to the Bank in instalments and these would again be transferred by the Bank to Appellant's account.

There was correspondence between the Bank and a firm of Labasa Solicitors, which was acting for both companies, confirming this arrangement and setting out quite clearly the securities which it would require before these matters were carried out. These included, a debenture and bills of sale over Lal's assets, plus

a third party mortgage by Mr Tahir of the appellant company over the Native Lease.

Not only do the correspondence produced,and the inter office Bank records evidence this requirement, but also Mr Tahir in evidence agreed that that was a condition of the rearrangement of the finances of the vendor and purchaser. In this Court Mrs. Hoffman for the appellant acknowledged that such a concession had been made by her client's witness Tahir.

In the event, although Lal Company took some of the machinery (improperly as the Judge found) payments were not made by it in accordance with the arrangement and consequently the credits were not passed to the Appellant's account.

The principal reason for this breakdown was Mr Tahir's refusal to execute the mortgage which was an integral part of the arrangement. After many requests by the Bank, the Solicitors finally wrote to the Bank on 24th May 1979 "Re: Advance Account. K Lal Sawmill Limited", saying they had prepared the mortgage but Tahir would not sign and "We are therefore unable to proceed further in this matter." At a much later stage (August 1980) $55,000 was paid to the Bank by the Lal Company which together with some amounts of interest have been credited to Appellant's account.

The action by Appellant against the Bank sought discharge of all its liability and the action against Lal Company was for return of plant allegedly converted.

In the Supreme Court, judgment went against the Appellant in the Bank claim, but it succeeded against Lal. We are not concerned with the details of the latter action.

The allegations against the Bank were twofold.

1. For breach of contract in failing to give credit of $70,000 to the

Appellant as allegedly promised at the time of the negotiations between the two milling companies.

2. For false pretences in allegedly representing that it had already given or promised to give credit to Lal to be applied to Appellant's account, thereby inducing the appellant to sell to Lal. Although it was not clearly stated the inference is that this representation was that the Lal Company only was to provide security. Although these claims were framed alternatively in contract and in tort their factual bases were common - namely, the extent and nature of the Bank's agreement with its two customers arising out of their sale and purchase agreement.

The Statement of Claim was diffuse and contained allegations which the evidence did not bear out, the grounds of appeal filed by Mr Koya and subsequently argued by Mrs. Hoffman were prolix and confusing, and seem to bear little relation to the bald facts proved in evidence, and succinctly set out by the learned trial Judge in his findings, which findings were fatal to the Appellant.

Contrary to what was contended in the Supreme Court the Bank was not a party to the Appellant/Lal contract of sale. Indeed, that contract was a nullity. However, the Bank knew of the transaction between the two companies, and it agreed in accordance with orthodox practice to readjust the accounts of its two customers at their request. But it was at no time a party to that contract. There was no evidence of representations made to induce the Appellant to act as it did. Nothing can be clearer from the exhibits which the trial Judge had before him, and which we have examined, than that the Bank agreed that it would make certain debits and credits to the two

Companies upon certain securities being given. It is equally clear that both Companies knew this, but the arrangements collapsed because the Appellant's principal officer refused to carry out his part by signing the mortgage, as he had previously agreed. The Judge rejected the allegations of misrepresentation and was clearly right in doing so.

On appeal Mrs Hoffman again canvassed matters advanced in the Supreme Court by Mr Koya, but for reasons just discussed we concur that the submissions as to misrepresentation or breach of undertaking were without foundation.

She also made submissions in support of a supplementary ground that there had been a breach of duty of care by the Bank in giving erroneous and misleading advice - a submission based on the principles derived from Hedley Byrne & Co. v. Heller & Partners (1964) AC 465.

This submission had no relevance for there was no evidence of advice being sought or given.

Mr Patel's reply to all this was a detailed and accurate examination of the evidence. He spelled out in greater detail than we have given, the insurmountable obstacles which the appeal faced.

There can seldom have been a more hopelessly founded appeal brought to this Court based, as we perceive, solely for the purpose of delaying a bona fide creditor.

The appeal is dismissed with costs.

.....
Vice-President

.....
Judge of Appeal

.....
Judge of Appeal