IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0010/94S
(Lautoka High Court Civil Action No. 368 of 1993)

BETWEEN:

AUTOMART LIMITED — Appellant
(Original Defendant)

and

CATHERINE VERMA
(f/n Benjamine Joseph) — Respondent
(Original Plaintiff)

Mr Suresh Maharaj for the Appellant
Mr A. Singh for the Respondent

Date and Place of Hearing: 8 November, 1994 at Suva
Delivery of Judgment: 11 November, 1994

JUDGMENT OF THE COURT

Before we commenced hearing this appeal Counsel for the Respondent offered to pay into Court the sum of $10,000 to abide the event provided such sum were held in an interest bearing

account. Counsel for the Appellant did not accept this offer but indicated that his client will accept $5000.00 in cash and the balance of $5000 to be deposited in Court. As there was no consensus we proceeded to hear this appeal.

On 6 December, 1993 the Lautoka High Court (Sadal J.) granted the Respondent ((Original Plaintiff) an ex parte injunction on an interlocutory application restraining the Appellant Company (Original Defendant) whether by themselves, their servants or agents howsoever from advertising or placing the car No. E7546 for sale or entering into any agreement for sale until 9 December, 1993 (the prohibitory injunction). The Court also ordered the Appellant to return the car to the Respondent (the mandatory injunction). On 9 December, 1993 after an inter partes hearing the injunctions were extended until further order of the Court . The Appellant subsequently applied for the dissolution of the injunctions and the return of the car to the Appellant. Sadal J. dismissed the Appellant's application on 11 February, 1994 and gave his reasons for doing so on 18 February, 1994. It is from this refusal that the Appellant has appealed to this Court on the following grounds:

1. THAT the learned judge erred in law and in fact in misconstruing the facts of the case to state that "the Plaintiff has already lost the car that was traded-in because it has already been sold by the Defendant," when such conclusion or facts is and was irrelevant to the facts of the case on an application for dissolution of the injunction by the appellant.

2. THAT the learned Judge erred in law and in fact in granting the injunction in the first instant on an exparte application when the facts of the case did not justify granting of an injunction.

3. THAT the learned Judge erred in law in completely misapplying the principles of law relating to granting of injunction and or dissolution of injunction.

Before we deal with the merits of this appeal it is important to bear in mind the nature of the substantive action (No. 368 of 1993) initiated by the Respondent against the Appellant in the Lautoka High Court on 3 December 1993. In this Action the Respondent apart from asking for an injunction and the return of the car (a Nissan Laurel No. E7632) also claims damages for unlawful seizure, and alternatively a declaration that if the property in the car had not passed to the plaintiff then for an order for the refund of $16,000 being the amount of the trade-in value of her car a Nissan Sunny.

Whilst it would appear that the issue which calls for determination by this Court is whether the learned judge erred in law and in fact in refusing to dissolve the ex parte injunctions (extended after an inter parte hearing) the real question for determination is - "Was the learned judge justified in granting the interlocutory mandatory injunction?"

The Appellant Company is engaged in the business of importing and selling motor vehicles. In his "Ruling" the learned judge made the following initial findings of facts -

> *" On or about the 29th September 1993 the plaintiff traded in a Nissan Sunny car registered No. E7546 and purchased from the defendant one Nissan Laurel car registered No. E7632 for a total purchase price of $26000. The defendant allowed a trade-in value of $16000 and credited the amount against the purchase price of $26000 of the Nissan Laurel leaving a balance of $10000. The defendant accepted a post-dated cheque payable on 15th November 1993 and drawn on Bank of Melbourne from the plaintiff.*
>
> *On or about 26th November 1993 the defendant acting through its bailiff seized the motor vehicle No. E7546 because as claimed by the defendant the plaintiff had not paid the balance sum of $10000."*

In refusing the application the learned judge observed as follows:

> *" The Court has been informed that the motor vehicle No. E7546 that was traded-in by the plaintiff has been sold by the defendant. This vehicle at the time of trade-in was transferred by the plaintiff but the vehicle No. E7632 which the plaintiff obtained from the defendant is presumably still in the defendant's name. the plaintiff had paid $170 for third party policy, registration and certificate of road worthiness.*
>
> *Plaintiff contends that at the time of the purchase of motor vehicle No. E7632 (Nissan Laurel) there was an agreement that the defendant will trade-in the Nissan Laurel for a Nissan Cefiro which was not in defendant's stock at that time. The defendant on the other hand states that there was no such agreement regarding Nissan Cefiro. This is an issue to be determined by the trial Court.*
>
> *The question whether the status quo should be maintained, and here I am moved by the consideration that in my view an injunction will be less onerous to the defendant than would its refusal be to the plaintiff. The plaintiff has already lost the car that was traded-in because it has already been sold by the defendant. Such regard as may be had to the balance of convenience would appear to favour the plaintiff."*

The dealing between the parties was not reduced to writing. The Appellant, however, issued to the Respondent on 29/9/93 an invoice and this has been put in evidence by the Respondent as Ex `A' (See page 15 of the Record.)

It is clear from perusal of the Statement of Claim, the Statement of Defence and the examination of the opposing affidavits filed in the interlocutory proceedings that there exist 2 major dispute of facts between the parties. These are -

(a) Whether there was an agreement between the parties whereby the Appellant undertook to further trade-in the Laurel for Nissan Cefiro which was allegedly to arrive within a matter of weeks.

(b) Whether the post-dated Melbourne cheque for $10,000 was a security for payment of the balance by 15/11/94 or

whether it was intended to be a deposit for the purchase of a Nissan Cefiro.

Further, a question of law that will probably require resolution by the trial Court is -

"Did the property in the car Nissan Laurel E7632 pass to the Respondent on 29/1/93?"

There was, therefore, at least a serious question to be tried in the substantive Action.

As to the appeal itself the 1st and the 3rd Ground can be dealt with together. However, we will dispose of the 2nd ground of appeal first.

A Court can grant an interlocutory injunction on ex parte motion if a case of sufficient cogency and urgency was made out. It can extend the interim injunction conditionally or unconditionally after an inter partes hearing if the interest of justice demand it.

We do not find any merit in the complaint that the learned judge was not justified in granting an interim injunction on ex parte application in the first instance. On the pleadings and the affidavit material before him, there existed, in our view, sufficient cogency and urgency to make the interim order until the application could be heard inter partes. Had the Court not granted protection to the Respondent she would have lost not only the use of the car but would have been in danger of losing the car itself, something which she claims to be her property.

Whilst we agree that the learned judge ought to have expressly given some thought to the Appellant's undertaking to pay damages as a means of avoiding the mandatory injunction we

believe acceptance of such an undertaking would not have been fair to the Respondent if she were to continue being deprived of the use of the vehicle.

On the other hand, if the learned judge proceeded on the basis that prima facie there was an outright sale and the property in the car had passed to the Respondent, then by the same token he ought to have regarded the post-dated cheque for $10,000 as prima facie evidence of indebtedness for the balance.

In our view the learned judge was justified in granting a mandatory injunction but it ought to have been made subject to the condition that the Respondent pays into Court the sum of $10,000 to await the outcome of the substantive action. Such a condition would, in our view, achieve a more equitable balance of convenience. We take this view notwithstanding the fact that the Respondent has given the usual undertaking as to damages.

Accordingly, we allow the appeal in part and make the following orders -

(i) Car No. E7632 to remain in the possession and use of the Respondent on the condition that she pays into Court the sum of $10,000 within 10 days of making of this order such deposit to be placed in an interest bearing account to await the outcome of the Civil Action in the High Court.

(ii) If the Respondent fails to comply with the condition laid down herein she is to return the said car to the Appellant who shall retain possession of it subject to prohibitory injunction already existing against advertising and sale.

(iii) Liberty reserved to either to apply to the High Court.

(iv) Each party to bear its cost of this appeal.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Sir Mari Kapi
Judge of Appeal

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Mr Justice Peter Hillyer
Judge of Appeal

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0014 OF 94S

BETWEEN:

ROSY REDDY	**APPELLANT**
-and-	
MANCHAMA WEBB **LAWRENCE WEBB**	**RESPONDENTS**

Mr. V. Kapadia for the Appellant
Mr. H. M. Patel for the Respondents

Date and Place of Hearing : 9 November 1994, Suva
Date of Order : 11 November 1994

O R D E R

The Order of the Court is that the appeal is allowed, Decision of the trial Judge quashed and the caveat lodged in this matter is removed.

We further Order that the respondents pay the appellant's costs of the appeal. Reasons for our decision will be published at a later date.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Sir Mari Kapi
Judge of Appeal

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Mr. Justice Ian R. Thompson