

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0009 OF 1997S  
(High Court Civil Action No. HBC0205 of 1996L)

**BETWEEN:**

CREDIT CORPORATION (FIJI) LIMITED

*Appellant*

**AND:**

KENNEDY HOTEL LIMITED  
ASINA SAHU KHAN F/N RAHIM BUKSH  
THE ATTORNEY-GENERAL OF FIJI

*Respondents*

**Coram:**

The Rt. Hon Sir Maurice Casey, Presiding Judge  
The Hon. Sir Ian Barker, Justice of Appeal  
The Hon. Justice Ian R. Thompson, Justice of Appeal

**Hearing:**

Thursday, 4 February 1999, Suva

**Counsel:**

Ms V. Patel for the Appellant  
No appearance for the 1st Respondent  
Mr S. Ram for the 2nd Respondent  
Mr S. Kumar for the 3rd Respondent

**Date of Judgment:**

Friday, 12 February 1999

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**JUDGMENT OF THE COURT**

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This is an appeal from the judgment of Sadal J. given in the High Court on 31 January 1997. The learned Judge delivered a short judgment dismissing the appellant's claim to the ownership of a Landcruiser vehicle and declaring that the second respondent was its rightful owner.

This is one of the those cases where two innocent parties have suffered through the actions of a third party but where only one can succeed, whilst the other is left with the often empty remedy of suing the third party.

The basic facts are undisputed. On 29 June 1993, the appellant, a finance company, hired the Landcruiser to the first respondent under what was called an "asset purchase agreement" but which would be called in most jurisdictions a "hire purchase agreement". The total hiring sum was \$85,716: the first respondent agreed to pay the appellant a monthly sum of \$2,381 for a hiring fee. The agreement, which was in standard form included the following clauses:

- "1. The Hirer acknowledges that the Owner has acquired or will acquire (as the case may be) the goods for the sole purpose of enabling it to enter into this hiring with the Hirer.*
- 9. The Hirer agrees that it does not have any right or property or interest in or to the goods and the Hirer shall be a bailee thereof only, except such right or property or interest in the goods as may accrue to the Hirer if it exercises its rights under clause 10 hereof or as a result of the operation of clause 11.*
- 10(i) The hirer shall have the option at any time during the period set out in the Schedule to terminate the hiring of the goods and to thereupon purchase the goods from the owner, provided that the Hirer is not then in default under any provision of this Agreement.*
- (ii) The option in sub-clause (i) shall be exercised by the Hirer's written notice to the Owner of its intention to exercise the option and payment to the Owner of a sum calculated pursuant to sub-clause (iii) hereof ("the discharge amount").....*
- 11.(i) The hirer shall have an option to terminate the hiring of the goods at any time prior to making payment of the last hiring instalment provided for in the Schedule to this instrument....."*

There were also covenants requiring the hirer to keep the vehicle in its personal control and not to attempt or purport to dispose of or encumber it.

Another term of the agreement reflected the definition of "owner" in s.2 of the Road Traffic Act (cap. 176). The hirer was required to register the vehicle in its name.

In the interpretation section of that Act "owner" includes:

*"In relation to a vehicle which is the subject of a hiring agreement or a hire purchase agreement or a bill of sale, includes a person in possession of the vehicle under that agreement or in apparent possession of the vehicle under that bill of sale".*

Without the knowledge of the appellant, an agent of the hirer, the first respondent, purported to sell the vehicle to the second respondent as part of the consideration for a swap transaction. The second respondent paid \$5,000 and transferred another vehicle in return for the Landcruiser. The second respondent received transfer of the ownership papers and was registered as owner of the vehicle. The second respondent had no notice of the hire purchase agreement or of the interest of the appellant in the vehicle. There was no suggestion that the person who sold the respondent the vehicle was some kind of factor or mercantile agent.

When the appellant's agent attempted to repossess the vehicle after the first respondent fell in arrears under the hire purchase agreement, the agent discovered it was being held at the Nadi Police Station. The Police initially refused to release the vehicle, despite the appellant's solicitor pointing out the appellant's rights. Hence the joinder of the Attorney-General as a defendant. That problem has now been resolved and counsel for the Attorney-General was given leave to withdraw at the hearing.

Sadal J's reasoning for rejecting the appellant's claim was as follows:

*"The second defendant had bought this Landcruiser in good faith and without notice of any prior encumbrances. The first defendant is saying the plaintiff is still the owner of this Landcruiser - if this is true then why Mohammed Aleem than was trying to sell it. The first defendant was owner as the Landcruiser was registered in its name that is why it was being sold.*

*If the plaintiff has any cause of action it should be against the first defendant and not against the second defendant. The plaintiff relied on the case of ANZ Banking Group Ltd. v. Merchant Bank of Fiji Supreme Court Civil Appeal No. CBV. 0001 of 1995. I find this case is not on all fours with the present case as stated by the plaintiff. There is no question of bill of sale here. The plaintiff argues that the Asset Purchase Agreement was a hire-purchase agreement. Does that mean after payment of all money the plaintiff was to transfer the Landcruiser in the name of the first offender. Here the Landcruiser was already registered in the name of the first defendant who wanted to sell it and had given the vehicle with duly executed transfer form to Imtiaz Ahmed Sahu Khan to sell it and he did sell it to the second defendant.*

*The plaintiff is simply saying the transfer of the Landcruiser to the second defendant was null and void without showing any valid ground.*

*The Landcruiser was registered in the name of the first defendant who had it properly transferred in the name of the second defendant who became the registered owner under the provisions of the Traffic Act.*

*Plaintiff's action is accordingly dismissed.*

The reference to the Supreme Court judgment made by the learned Judge is confusing. The Supreme Court merely refused leave to appeal against a judgment of this Court in Australia and New Zealand Banking Group Ltd. v. Merchant Bank of Fiji (Civil Appeal 23 of 1992: Judgment 24 November 1992). The Supreme Court did not consider the merits. Presumably, it was to the judgment of this Court that he was really referring. If it was then he completely misinterpreted it. In the ANZ case, the Court was concerned with a similarly worded "asset purchase agreement" which the hirer had entered into with the respondent.

The factual difference from the present case was that some 6 weeks after signing the "asset purchase agreement" the "hirer" executed a bill of sale in favour of the appellant Bank. The trial Judge held that because of hire purchase agreement between the

respondent the hirer, the latter could not grant a valid Bill of sale over the vehicle in favour of the appellant. This view was upheld on appeal.

The Court found in favour of the hirer under the "asset purchase agreement".

It held, inter alia:

- a) An asset purchase agreement of the kind found in the present case is neither a Bill of Sale nor a charge which requires registration.
- b) It is neither a loan upon security nor a conditional sale agreement.
- c) There is no statutory provision in Fiji for the registration of hire purchase agreements such as the "asset purchase agreement" was.

This Court in its judgment made a strong plea for legislation to control hire purchase transactions. We were pleased to have been informed by counsel that such legislation is currently before Parliament. The Court also noted that the unfortunate situation for innocent purchasers of vehicles subject to hire purchase agreements is exacerbated by the statutory requirement for registration of the vehicle in the hirer's name.

In our view, Sadal J was quite wrong not to apply the ANZ Bank case which fully covers the present situation. Nor did he appear to realise that s.19(8) of the Road Traffic Act (cap. 176) merely creates a presumption that the person in whose name a vehicle is registered is deemed to be the owner, unless the contrary is proved. Here the contrary was proved by the appellant. This point was canvassed in the ANZ Bank case.

Mr Ram for the second respondent did his conscientious best to support the judgment. He referred us to Pearson v Rose & Young Ltd. [1950] 2 All. E.R.1027. The

difference between that case and the present is that in Pearson's case, the person who wrongfully transferred the vehicle to the innocent purchaser was able to give title by reason of s.2(1) of the English Factors Act 1899. That person was held by the Court on the facts to have been a "mercantile agent" and hence covered by the legislation because the true owner had given the agent the car's registration book, even though the agent acquired the registration book by a trick.

There is no suggestion in the evidence that the appellant here had parted with any document of title or that there had been anybody like a factor or mercantile agent involved. Indeed, counsel were unable to point to any Fiji equivalent of the English Factor's Act, such as is found in other Commonwealth jurisdictions.

On the present state of the law, a finding that the appeal should be allowed is inevitable. Whilst we have sympathy for the second respondent, there is nothing in the evidence to indicate that the appellant has not acted other than perfectly properly and in accordance with its legal rights

The appellant is entitled to costs. We fix a global sum for this Court and the High Court in the amount of \$1500 plus disbursements in both Courts as fixed by the Chief Registrar. There will be a declaration that the vehicle is the property of the appellant and must be released to the appellant if it is not already in the appellant's possession. The costs and disbursements are to be paid by the second respondent who is entitled to recover them from the first respondent.

The question of damages, should the appellant wish to pursue them, is remitted to the High Court for assessment.

**Result**

- (a) Appeal allowed
- (b) Toyota Landcruiser, registered number CP175, is declared to be the property of the appellant
- (c) The said vehicle is to be released onto the possession of the appellant
- (d) The second respondent is to pay to the appellant \$1,500 for costs in both Courts plus disbursements in both Courts as fixed by the Chief Registrar.
- (e) The second respondent is entitled to recover the amount paid to the appellant for costs and disbursements from the first respondent.
- (f) The assessment of damages claimed by the appellant is referred back to the High Court for assessment.

*M. G. Casey*  
.....  
Sir Maurice Casey  
Presiding Judge

*Ian Barker, J. a.*  
.....  
Sir Ian Barker  
Justice of Appeal

*I. R. Thompson*  
.....  
Mr Justice Ian Thompson  
Justice of Appeal

**Solicitors:**

Vasantika Patel, Nadi, for the Appellant  
Khan & Associates, Nadi for the 1st Respondent  
Mishra Prakash & Associates, Ba, for 2nd Respondent  
Attorney-General's Chambers, Suva for 3<sup>rd</sup> Respondent