IN THE HIGH COURT OF FIJI

APPELLATE JURISDICTION

Civil Appeal No. HBA 27 of 2012

BETWEEN	**:**	**VASANT RAI t/a VM BULSARA & CO**. of 329 Toorak Road, Suva, Businessman
		APPELLANT
AND	**:**	**AUTOWORLD TRADING (FIJI) LIMITED** a limited company having its registered office at Unit 2, Level 2, Velop House, 371 Victoria Parade, Suva
		RESPONDENT
BEFORE	**:**	**Justice Deepthi Amaratunga**
COUNSEL	**:**	**Ms. R. Naidu for the Appellant** **Mr. S. Chandra for the Respondent**
Date of Hearing	**:**	**9 April 2014**
Date of Judgment	**:**	**26 September 2014**

JUDGMENT

INTRODUCTION

1. This is an appeal from the judgment of the learned Resident Magistrate delivered on 27th January, 2012. The Respondent (Plaintiff) filed an action against the Appellant (Defendant) for recovery of balance payment of money regarding a sale of a vehicle and for storage costs as general damages. In the statement of defence, a counterclaim was made against the Plaintiff for damages. The learned Magistrate dismissed the counterclaim and also Plaintiff's claim for general damages for storage and ordered the Defendant to pay $15,000 being the remaining sum for a sale of a Honda CRV vehicle.

FACTS

2. The Plaintiff is a company that deals with sale of second hand vehicles. The Defendant purchased a Honda CRV unregistered used vehicle for a sum of 25,000 and said sum was paid by a cash payment of $3,000 and a trade-in value of Defendant's vehicle for $7,000 and the remaining 15,000 by two post dated cheques. The Defendant took the ownership of the Honda CRV vehicle on 9th June, 2004.

3. The Honda CRV vehicle was registered and insured in the name of Defendant and it was driven to Defendant's residence but the buyer complained about a sound when breaking and driving and also of the reception of radio and quality of CD player etc. Allegedly said complaints were made on the following day but no one attended to them for 2 days and on 12th June, 2004 morning a representative from the Plaintiff visited the residence of the Defendant and vehicle was taken for the rectification of the said complaints. It was also stated in evidence that the vehicle was to be returned on the same day by 12 pm, but it was never returned.

4. The Plaintiff took the vehicle for rectifications of the complaints and by 15th June, 2004 the Defendant stopped the payments of post dated cheques for the the balance payment of 15,000. The Honda CRV remained in possession of the Plaintiff even todate.

5. The Plaintiff instituted action claiming the balance $15,000 based on the contract of sale, and the Defendant counter claimed for damages. In the court below the Learned Magistrate dismissed the Defendant's counterclaim and said the contract of sale was not repudiated hence ordered the Defendant for payment of sum of two post dated cheques.

6. The learned Resident Magistrate in his judgment made following final orders;

   a. The contract has not been validly repudiated therefore the Defendant shall pay to the Plaintiff the balance of $15,000 such sum to be paid in one month.

   b. Upon payment the Plaintiff shall deliver to the Defendant the vehicle registration number EL 192 with all the defects that have been highlighted by the Defendant in their fax of 15th June, 2004 remedied.

c. Costs are awarded to the Plaintiff summarily assessed at $750.

d. There shall be no award of interest as this was not part of the original agreement.

7. Being aggrieved by the said judgment of the Magistrate the Defendant appealed to the High Court and the grounds of appeal are as follows;

1. That the Learned Magistrate erred in Law and in fact in not properly considering the evidence adduced by the Appellant and his witness when the evidence was very clear that the Respondent's representative took the vehicle from the Appellant and promised to return it on the same day after attending to the minor defects.

2. That the Learned Magistrate erred in law and in fact in ordering the Appellant to pay the balance sum of $15,000.00 when the said payment was stopped by the Appellant due to the Respondent's failure to give the vehicle to the Appellant as per the representation made to the Appellant by the Respondent.

3. That the Learned Magistrate erred in law and in fact in failing to consider that the Respondent has not abided by the oral contract entered between the parties. The Appellant by his facsimile dated 15th June 2004 advised the Respondent that he is willing to make the payment once he is satisfied with the vehicle. The Trial Magistrate failed to give any emphasis on this.

4. That the Learned Magistrate erred in law and in fact in dismissing the Appellant's Counter Claim when the Appellant had suffered loss for use of the Motor Vehicle for a month. This was adduced by the Appellant and his witness during the cause of the Trial. This piece of evidence was not challenged by the Respondent and the Trial Magistrate made an error in not considering the Appellant's Counter Claim.

5. That the Learned Magistrate erred in law and in fact by failing to consider the evidence of the Appellant that the Respondent has unjustly enriched himself by taking the Appellant's car CX 901, selling it with trade in value of $7,000, taking a cash deposit of $ 3000.00 as well as taking back the car EL 192 for repair works in June 2004 but never returning it to the Appellant.

ANALYSIS

8. At the trial only one witness gave evidence on behalf of the Plaintiff and Defendant and his son gave evidence on behalf of the Defendant. The Learned Magistrate held that the contract of sale was not repudiated. Both parties have acted in similar manner. The

Plaintiff had sold the Defendant's vehicle which was traded in for a cash value of $7,000 as a part payment. This was done after the return of the Honda CRV vehicle for the repair of certain complaints, while the said Honda CRV was in their possession.

9. The Defendant as well as his son said they informed of the defects of the vehicle to the Plaintiff on the following day after taking delivery of the vehicle. The son of the Defendant who gave evidence admitted that he may have test driven the vehicle. He did not complain about the condition of the vehicle then and proceeded to finalize the sale. The payment method consisted of trade in of a vehicle for $7000 and also payment of cash 3,000. The remaining amount was to be paid from two post dated cheques for $7,500. These cheques were handed over and the vehicle was registered in the name of the Defendant's business and third party insurance was also obtained in favour of the registered owner. All these were arranged by the Plaintiff prior to the delivery and the price of the vehicle included the insurance and registration.

10. At the trial both the Defendant and his son said the vehicle was returned to a representative of the Plaintiff to rectify the complaints. The person who took the possession of the vehicle for the repair did not give evidence. The Defendant also said that the said representative had indicated that the complaints can be rectified within the same day by 12 pm.

11. The evidence was that when the Defendant requested for a written confirmation as to the delivery of the vehicle on the same day after rectification of the complaints but that was not complied with. This gives an indication that the delivery of the vehicle on the same day was not a condition or warranty.

12. It is also noted that when the vehicle was delivered for rectification of the complaints a written note was given and it was marked as D3 dated 12.6.20004 and it had not indicated even a probable date for the return of the vehicle. So, even if the representative of the Plaintiff had stated that the vehicle could be returned on the same day that cannot be

considered as a condition or representation or a binding promise that can lead to a cause of action for damages.

13. Even if the contention of the Defendant is admitted, the statement of the representative of the Plaintiff to return the vehicle on the same day, had happened after the sale had completed and ascertained good, the Honda CRV was delivered to the Defendant and by that time the sale of the vehicle is completed and warranty was only for limited aspect relating to the engine and gear box.

14. Both parties agreed that there was a warranty for the engine and gear box. The Defendant did not rely on this warranty. The complaints at the time of the deliver of the vehicle to the Plaintiff's representative as per D3 were;

1. sound during braking and driving.
2. CD player not working.
3. Remote control for door locks.
4. Poor Radio reception.

15. The Defendant had not taken possession of the vehicle after repair and had not even inquired as to status of the vehicle. The Defendant's evidence was that he had instructed the bank not to honour the two post dated cheques as the vehicle was not returned on the same day as stated by the person who took possession of the vehicle.

16. The vehicle was not returned on the same day or even the following day and this had resulted the Defendant's action of stop payment of the post dated cheques. The issue was whether he could legally stop the payments.

17. In the letter written on 15th June, 2004 the Defendant admitted taking the delivery of the vehicle on 9th June 2004 and making **full payment for the same on the same day**. In the circumstances, the statement that the vehicle would be returned by 12pm on the same

day, on 12th June 2004 cannot be considered as a condition for refusal of the payments by their own admission.

18. In the circumstances the Learned Magistrate is correct in ordering the payment of the outstanding $15,000 for the sale of Honda CRV vehicle.

19. The evidence of Defendant's solicitor's letter dated 1st July, 2004 and the oral evidence of the Defendant as well as his son is that the vehicle was that the representative of the Plaintiff had assured the Defendant that he would return the vehicle by 12pm on the same day (12.6.2004). The issue is whether the Defendant could refuse the payment for vehicle Honda CRV if it was not returned by 12 pm on 12.6.2004.

20. Already the goods have passed to the Defendant upon the payment and delivery of the good to the Defendant. Along with the deliver y of the goods the risk had passed to the Defendant. According to the Defendant's evidence when the vehicle was sold, he had taken it with all the said defects. He also said a cordial relationship between the Plaintiff and himself remained at that time.

21. And under section 20 of the Sale of Goods Act (Cap230) the property relating to sale passes to the buyer as in Rule I which states:

> *"where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer where the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed."*

22. So, when the Defendant accepted the delivery on 9th June 2004 of the Honda CRV and made payments through a trade in of another vehicle for a sum of 7,000 and a cash payment of 3,000 and post dated two cheques for the remaining 15,000 the risk of the good had transferred to the Defendant.

23. In ***Oscar Chess Ltd v Williams*** [1957] 1 All ER 325, where the issue was date of manufacture of a vehicle which was stated incorrectly in the log-book, Denning LJ said

'The crucial question is: Was it a binding promise or only an innocent misrepresentation?'

24. Further in ***Oscar*** (supra) Lord Denning held,

> *"If the seller says: "I believe the car is a 1948 Morris. Here is the registration book to prove it", there is clearly no warranty. It is a statement of belief, not a contractual promise. If, however, the seller says: "I guarantee that it is a 1948 Morris. This is borne out by the registration book, but you need not rely solely on that. I give you my own guarantee that it is", there is clearly a warranty. The seller is making himself contractually responsible, even though the registration book* is wrong."

25. From the evidence before the Learned Magistrate I cannot see any such binding promise at the time of the delivery of the vehicle or at any time after. In the absence of such condition at the time of sale would make the sale unconditional and the risk of the good had transferred to the buyer. So, even if the Defendant's version is admitted there will not be a change in the findings of the Learned Magistrate. The alleged assurance to return the vehicle on the same day of the delivery for rectification and the failure to do so would not amount to condition or a warranty of the contract of sale. Hence I reject the appeal ground 1 and 2 for the reasons given above.

26. The learned Magistrate had considered the letter written on 15th June, 2004 and had stated that the said letter indicate the intention of the Defendant not to repudiate the contract. For the reasons given above, by 15th June 2014 the sale is completed, and for that reason the appeal ground 3 cannot succeed.

27. Since the risk in goods passed to the Defendant upon the delivery of the vehicle on or around 9th June, 2004 he cannot claim damages for alleged complaints unless there is breach covered in the limited warranty. No evidence was in court below for breach of limited warranty on the engine and gear box. So, the learned Magistrate is correct in dismissing the counter claim of the Defendant for damages. The appeal ground 4 cannot hold water.

28. In the statement of defence there is no claim for unjust enrichment against the Defendant, hence there cannot be an award for unjust enrichment as stated in the appeal ground 5and that ground of appeal cannot substantiate, too.

CONCLUSION

29. The sale of the Honda CRV was completed in terms of the Sale of Goods Act with the delivery of the vehicle to the Defendants. The method of payment and time of the payment is immaterial for passing of the risk in the good. Any assurance given after the sale being completed cannot result in refusal for payment for the completed sale. There is no evidence of breach of limited warranty on the gear box or engine. So the counter claim of the Defendant fails. The counter claim was based on non return of vehicle within the same day. The Plaintiff had claimed for the storage costs, but the Learned Magistrate had rejected it and there is no appeal from the Plaintiff relating to said rejection of claim. In the circumstances the appeal is dismissed with cost of appeal summarily assessed at $1,000. The decision of learned Magistrate is affirmed.

FINAL ORDERS

a. The appeal is dismissed.

b. The order of the learned Magistrate affirmed.

c. The cost of the appeal is summarily assessed at $1,000.

Dated at **Suva** this **26th** day of **September, 2014**.

HIGH COURT OF FIJI
SUVA

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Justice Deepthi Amaratunga
High Court, Suva