

**ARJUN KUMAR v CARPENTERS FIJI LTD (ABU0052 of 2008)**

COURT OF APPEAL — CIVIL JURISDICTION

5 CALANCHINI AP, CHANDRA and MUTUNAYAGAM JJA  
8, 30 November 2012

10 **Consumer protection — fair trading — appeal — defective gearbox in vehicle — merchantable quality — onus of proof — oral evidence — latent defect — Fair Trading Decree s 93 — Sale of Goods Act s 35(1).**

15 The appellant alleged that the gear box in the vehicle that he purchased from the respondent was defective. The appellant returned the vehicle to the respondent to have the gearbox changed. The respondent repaired the gearbox but refused to change it. The appellant did not collect the vehicle from the respondent and purchased a new vehicle from another dealer. The High Court dismissed the appellant's action for damages.

**Held —**

20 (1) The facts in the present case do not bring it within the principle laid down in *Bernstein's* case relating to merchantable quality. The vehicle had been used for a considerable period of time before the defect was complained of, and it had been after the expiry of the warranty period and a successful repair had been carried out.

*Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 1 All ER 220, distinguished.

25 (2) The onus was on the appellant to prove that the gearbox of the vehicle was defective. Merely giving oral evidence would not suffice to draw inferences regarding merchantable quality of a component like a gearbox. Technical evidence from someone with expertise regarding such matters was required.

30 Appeal dismissed

*S.K. Ram* for the Appellant.

*R. Naidu* for the Respondent.

35 [1] **Calanchini AP.** I have had the advantage of reading the draft judgment of Chandra JA and for the reasons stated by him I agree that the appeal should be dismissed with costs.

40 [2] **Chandra JA AP.** The Appellant instituted action by filing a statement of claim with his writ of summons wherein he stated that he had purchased a brand new Nissan UR Van in or about August 2002 for the purchase price of \$56,000.00 from the Respondent and, that after sometime he started to have problems with its engine, that the said problems persisted even after the same was purportedly rectified and repaired by the Respondent on a few occasions, that he finally returned the said vehicle to the Respondent to have the gearbox changed but the Respondent had repaired the gearbox, that he demanded that the Respondent should change the gearbox but the Respondent had refused to do so and that accordingly he had no choice but to return the vehicle to the Respondent and he had to purchase another vehicle from another dealer to carry on his business. The Appellant claimed Special damages of \$65,000.00 made up as \$50,000.00 for the value of the said vehicle and \$15,000.00 for the loss of business, general damages and costs.

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[3] The Respondent in its statement of defence stated that since the day of purchasing the vehicle, servicing had been performed on the vehicle and none of the service reports indicated problems with the gearbox, that the registered problems with the gearbox had been rectified and re-assessed and was operating properly but that the Appellant had not taken possession of the vehicle after the repair was done. They also stated that the problems of the gearbox had arisen after the expiry of the scope of the warranty.

[4] The Appellant himself gave evidence and two witnesses gave evidence for the Respondent and the learned High Court Judge at Lautoka dismissed the action of the Appellant by his judgment dated 23rd May 2008.

[5] The Appellant in his notice of appeal has set out the following grounds of appeal:

(a) The learned Judge erred in law and in fact in not considering all the relevant evidence adequately and/or properly before coming to his final decision.

(b) The learned trial Judge erred in law and in fact and is not properly and adequately considering the evidence of the Plaintiff on the one hand and the evidence of the Defendant on the other having regard to the pleadings in question.

(c) The learned Judge erred in law and in fact in not considering the relevant matters in proper perspectives and taking into account irrelevant matters into account before making the decision.

(d) The decision of the learned trial Judge is unreasonable and cannot be supported having regard to the evidence as a whole.

[6] The Appellant filed Skeletal Written Submissions while the Respondent filed written submissions in respect of the appeal before Court and both Counsel made their oral submissions at the hearing of the appeal.

[7] A consideration of the grounds of appeal set out in the notice of appeal of the Appellant, reveals that they have been formulated in a generalized way though set out on the basis of four different grounds without emphasizing on specific legal issues. The generalized formulation of the appeal would be that the judgment of the learned trial Judge is not in conformity with the evidence and is unreasonable.

[8] At the hearing of the appeal, Counsel for the Appellant made his submissions on the same generalized basis and was basing his arguments on the question relating to the alleged defective gear box in the vehicle that was purchased by him.

[9] It would be relevant to consider the sequence of events after the purchase of the vehicle by the Appellant.

i The Appellant purchased the vehicle from the Respondent on 12 August 2002 for a sum of \$56,000.

ii It was sold with a warranty which stated that the authorized dealer will repair or replace any part on the vehicle which proves defective in materials or workmanship free of charge, except for those items listed under the section titled "what is not covered". The period for the warranty was 24 months or 50,000 km whichever came first.

iii On 21 August 2002 the vehicle had its first service at 1757 km.

iv On 17 September 2002 the vehicle had its 15,000 km service by which time (31 days) it had travelled 14,233 km.

v On 29 October 2002 it had its 30,000 km service by which time it had travelled 29,881 km.

vi On 2 December 2002 it had its 45,000 km service by which time it had travelled 44,407 km.

vii On 8 January 2003 it had its 60,000 km service by which time it had travelled 58,995 km as a result of which it had gone past the warranty period.

viii On 16 January 2003 four counter-shaft bearing had been replaced in the gearbox at the Respondent's expense though the warranty period had expired by then.

5 ix On 17 February 2003 the vehicle had its 75,000 km service by which time it had travelled 74,888 km.

x On 10 April 2003 the vehicle had its 90,000 km service by which time it had travelled 90,144 km.

xi On 14 May 2003 the vehicle had its 105,000 km service by time it had travelled 103,660km.

10 xii On 17 June 2003 at 114,267 km a repair order had been raised in the Respondent's service system and on 9 July 2003 the vehicle had its 120,000 km service at 118,021 km.

xiii On 18 August 2003 the vehicle had its 135,000 km service when it had travelled 132,878 km.

15 xiv In September 2003 the Appellant had left the vehicle at the Respondent's premises and on 6 October 2003 written a letter complaining about the history of his complaints regarding the gearbox and that he had bought a new vehicle. This letter was followed by a letter of 8 November 2003 by his solicitors repeating the Appellants complaint and claims.

20 xv On 11 December 2003 the Respondent had written to the Appellant agreeing to have the transmission of the vehicle repaired at their cost and on 12 December 2003 all the gearbox bearings including the counter-shaft bearings previously replaced had been replaced and also a brass cone. The Appellant had not collected the vehicle from the Respondent's workshop but resorted to file action against the Respondent.

25 [10] i The learned trial Judge in his judgment dated 23 May 2008 concluded thus:

30 *"(19) I have considered the evidence and the submissions at some length. In doing so I have tried to work out what exactly is the cause of action pleaded in the amended statement of claim It seems to be a claim that the gearbox was not of merchantable quality, or that it was not fit for its known purpose. Far from proving either of those two claims the plaintiff was unable to show that there was anything wrong with the gearbox. He brought no evidence at all to show what was wrong with it. His only evidence was that he was dissatisfied with its performance, and that the bearings were being damaged. The defendant's witnesses who knew the inside of the gearbox gave evidence which suggests that the bearing were damaged by the way the gearbox was used.*

35 *(20) That I think is the end of the matter. The vehicle and the gearbox travelled 58,995 km in 5 months before counter-shaft bearings were replaced and travelled at least 132,878 km, which is another 73,883 km at least before all the bearing were replaced. The only evidence I have about the need to replace the bearing is that of the defendant's witnesses. They say the damage was caused by use. They replaced the bearing at their own expense in any event.*

40 *(21) This claim in my view I can only dismiss. To make out his claim that the gearbox was defective the defendant needed some evidence that it actually was. He had none."*

45 [11] The learned trial Judge had arrived at the above conclusions having considered all the evidence before him. As stated by the learned Judge, the cause of action pleaded by the Appellant was that the gearbox was not of merchantable quality or that it was not fit for its known purpose.

50 [12] The onus was on the Appellant to prove his case which is based on the fundamental principle of "He who asserts must prove". All that the Appellant had done in the instant case is to give oral evidence and produce documents which contained correspondence between the Appellant, his Solicitors and the Respondent and copies of documents relating to services carried out in respect of

the vehicle. On the other hand the Respondent led the evidence of two witnesses who had technical knowledge of the vehicle, one of whom who had attended to the repairs on the vehicle and the other who was the Supervisor of the day to day activities regarding vehicles dealt with by the Respondent.

5 [13] The learned trial Judge had focused his attention to the fact of the onus of proof cast on the Appellant at the trial when he stated thus in his judgment:

“*(17) What was wrong with the gearbox? The plaintiff does not know. The defendant’s witnesses say there was nothing wrong with it. They say the bearings are damaged and Vinod says that this may be caused by the way the vehicle was driven. It is clear from the evidence that the plaintiff demanded a great deal of mileage from this vehicle in a short time. His care for the vehicle is a credit to him.*

10 *(18) It is significant that between his first complaint in December 2002, at 44407 kms, and the time he left the vehicle at the defendant’s workshop in September 2003 it had traveled at least another 88,471 km. It had done that by 18 August 2003. That was over 88,000 km in about 7 ½ months. I have to conclude from this that vehicle was not disabled and the gearbox was fit for its purpose.”*

15 [14] In *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220, the Plaintiff had taken delivery of a new motor car from the Defendants. When the car had done 140 miles within a period of three weeks it had broken down on a motorway. The car would not restart and had to be collected by the emergency services. The following day the plaintiff had informed the defendants in writing that he regarded the car as not being of merchantable quality and that he was rejecting it. The car had been repaired under the manufacturer’s warranty at no cost to the plaintiff. After repair the car was good as new, but the plaintiff refused to have it back. The plaintiff brought an action against the defendants, contending that the car was not of merchantable quality and that he was therefore entitled to recover damages and to rescind the contract of sale. The defendants contended that the car was of merchantable quality and that in any event the plaintiff had accepted the car within s 35(1) of the Sale of Goods Act 1979 and was therefore limited to a claim for damages alone.

20 [15] It was held that when determining whether any particular defect or feature rendered a new car un-merchantable, the court had to consider (a) whether the car was capable of being driven in safety, (b) the ease or otherwise with which the defect could be remedied, (c) whether the defect was of such a kind that it was capable of being satisfactorily repaired so as to produce a result as good as new, taking into account not only the part of parts at the site of the defect but also any other potential damage, (d) whether there was a succession of minor defects to be taken into consideration and (e) in appropriate cases any cosmetic factors. On the facts, the car could not be said to have been of merchantable quality when it was delivered to the plaintiff. However, since the plaintiff had driven about 140 miles and had had the car for three weeks, he had had a reasonable time to examine and try out the car and he had therefore lost the right to reject it.

35 [16] In Fiji, the Fair Trading Decree 1992, s 93 refers to actions in respect of goods of un-merchantable quality as being goods not reasonably fit for the purpose which is on similar lines as the provisions in the Sale of Goods Act 1979 in England. The facts in the present case, do not bring it within the principle laid down in *Bernstein’s* case (*supra*) relating to merchantable quality, especially in view of the fact that the vehicle had been used for a considerable period of time before the defect regarding the gearbox was complained of, and it had been after the expiry of the warranty period and further a successful repair had been carried out even after the vehicle had done more than 130,000 kms.

[17] A consideration of the evidence before Court regarding the use of the vehicle shows that the vehicle had been put to heavy use going by the mileage it had covered during the period it was put to use. The learned trial Judge had taken that into account in arriving at his conclusion that the damage was caused  
5 by use and the way the gearbox was used.

[18] The Appellant had not apart from giving oral evidence and producing documents taken steps to prove that the gearbox of the vehicle was defective the onus of which was on him. The learned Judge stated in his judgment that the defect complained of regarding the gearbox related to its merchantable quality  
10 which meant as to whether it was fit for its use. Merely giving oral evidence on such a matter would not suffice as no inferences can be drawn regarding merchantable quality of a component like a gearbox from oral evidence. There has to be technical evidence adduced to show that the gearbox was not of merchantable quality through some person who had some expertise regarding  
15 such matters.

[19] The defect of a component of a vehicle such as the gearbox could be either a patent or latent defect. In the instant case, it certainly was not a patent defect as seen from the evidence, the problems surfaced only after the vehicle was used for several months. If it was a latent defect the Appellant should have taken steps  
20 to prove such a defect through appropriate evidence. Merely stating in his oral evidence that the gearbox was defective would not be sufficient to prove such a latent defect.

[20] In the above circumstances it cannot be stated that the learned trial Judge erred in arriving at his conclusion and dismissing the action of the Appellant as  
25 the Appellant had failed to prove his case.

[21] **Mutunayagam JA.** I also agree with the proposed orders of Chandra JA.

**Chandra JA. Order of the Court**

30 [22] The appeal of the Appellant is dismissed with costs fixed at \$4000.

*Appeal dismissed.*

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