000374

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Civil Jurisdiction

Action No. 287 of 1976

Between

HAKIM SHER MOHAMMED s/o Sher Mohammed — Plaintiff

and

1. BURNS PHILP (SOUTH SEA) COMPANY LIMITED
2. AUTOMOTIVE SUPPLIES COMPANY LIMITED

— Defendants

Mr. C. Gordon, Counsel for the Plaintiff
Mr. B.C. Patel, Counsel for the Defendants

JUDGMENT

This is an action arising from the purchase by the plaintiff of a second-hand truck from the defendant Burns Philp (South Sea) Company Limited. The plaintiff, in his Statement of Claim, alleges that on 24th June, 1975 he bought a truck registered as AE556 from Burns Philp (South Sea) Company Limited whom I will call Burns Philp for $3,093. He paid a deposit of $1,031 and executed a bill of sale over the truck for the balance of the purchase price, namely $2,062, which bill of sale was duly registered. Then he sets out the first clause of the bill of sale which shews that he also agreed to pay $412.40 which would appear to be interest on the balance of the price over the period during which instalments were payable namely 2 years. He agreed to pay those two sums of $2,062 and $412.40 at the rate of $104 a month, beginning on 31st July, 1975. Then he says that Burns Philp charged him interest at the end of every month. He says that Automotive Supplies Company Limited, the second defendant whom I will call Automotive Supplies repossessed his truck on 16th September, 1976 claiming that plaintiff was in arrears with his instalments to the tune of $449. The plaintiff claims that if Burns Philp had not charged him interest each month, his account would have been in order, and there would have been no arrears of $449. Then the plaintiff puts forward an alternative claim that his truck was repossessed by the second defendant who had no authority so to do, since the bill of sale was given to Burns Philp, and he claims the value of the truck, amounts for loss of use, various parts put in by him, insurance for two

years charged in the bill of sale, and repayment of his deposit and instalments. Alternatively plaintiff says that Burns Philp wrongfully entered upon his premises and seized his truck. And so he claims certain declarations and damages to the tune of $11,857.52. The defence admits the Bill of Sale and explains that the amount of $412.40 was interest for 2 years. I pause here to observe that if that sum represents interest at 10% on $2,062 for 2 years as would appear to be the case, the plaintiff would appear to be receiving no credit for his instalments - a state of affairs which would result in his paying interest at a rate in excess of 10% and thus infringing the Moneylenders Act. The defence goes on to admit that the plaintiff was charged interest on his monthly statements. Then the defendants admit seizure of the truck and say that it was seized because of arrears of instalments. They say that although the Bill of Sale was executed to Burns Philp (South Sea) Company Limited the first defendant the truck was in fact sold by the second defendant, Automotive Supplies Company Limited which is a subsidiary of Burns Philp, and that all accounts were rendered to him by second defendant and that plaintiff acquiesced in that situation and is now estopped from raising that objection, and they say the seizure was lawful.

In evidence the plaintiff told the Court that the actual price of the vehicle was $2,500 and that in addition to that he had the defendant pay his third party insurance, two years' vehicle insurance and the solicitor's charges. I can well understand that it is reasonable to ask him to pay interest on the first year's insurance, which the defendant had to advance immediately, but I am unable to understand why he should be required to pay interest on money which is not to be advanced for a year. However this is not one of the plaintiff's grounds of complaint. He began to get statements from Automotive Supplies and he found that he was being charged interest monthly. The first statement he received was for June 1975. That shewed two journal entries - a debit for $2,500 which may be intended to be the price of his vehicle and a credit of $1,031 which was his deposit, and the statement shewed that he owed a balance of $1,469. But of course he did not owe $1,469 at all. If his Bill of Sale means anything at all, he owed $2,062 the amount mentioned therein. Then in his July statement again emanating from Automotive Supplies, the statement starts off with a balance of $1,469 from the June statement and then there is a debit of $32.99 for interest and plaintiff is shewn as owing $1,501. Incidentally that July statement bears date 31st July and plaintiff is shewn as being in arrears with his instalment, which he was not, for his instalment did

not become due until that date. Then on 5th August he paid his first instalment and his August statement, still coming from Automotive Supplies shewed that credit, a debit of $31.61 for interest and he finishes with a balance of $1,429.60. Plaintiff says that he complained about these statements and was told that Burns Philp at Lautoka had nothing to do with the preparation of statements, but he was promised that his complaint would be looked into. This complaint is corroborated by an endorsement on the repossession notice when the truck was seized on 25th August, 1976. Nothing, however, appears to have been done and plaintiff began to get behind with his instalments, and he admitted that on several occasions he paid his instalments with cheques which were subsequently dishonoured. Those cheques were credited on payment, but debited again on dishonouring and I regard it as most unsatisfactory that they cannot be identified in the statements rendered to the plaintiff. They are shown simply as 'journal' which is quite meaningless to a semi-literate person. Plaintiff's truck was seized, he said, in September, and he probably means the final seizure for the notices of repossession indicate that there were at least three visits by the bailiff. He came to Lautoka and found that there was a new credit manager to whom he complained and who advised him to go to Suva. He said that he was fed up and I cannot blame him, for I am quite unable to see why he should have had to go to Suva to have his difficulties sorted out. So he went to his solicitors. Unfortunately his solicitors did not give him the type of help that he needed. The Court was not told what was done, but it became abundantly clear after plaintiff had given evidence that he had not been charged double interest and that he had no claim at all against Burns Philp and his counsel conceded that he had no claim. The defendants had made a complete muddle, but it all could have been explained, and it should not have required litigation to explain it. After plaintiff's truck was seized it was sold, and here, I think, the defendants acted responsibly, for they took care to see that the best price they could get was obtained. I can see no reason, however, why a bailiff had to be sent from Suva to seize a vehicle at Sabeto, and if the bill of sale holder wants to do that, it is quite wrong for him to impose such a charge upon the purchaser. The Bill of Sale provides in clause 15 for the proceeds of any sale to be applied first "in payment of all the costs charges and expenses of the mortgagee in the taking of possession of removal care and management of the said chattels and in the execution of the power of sale and of any of the other powers herein contained and of any professional costs and charges incurred by the mortgagee in connection with the exercise of any of the said powers." Those words do not mean 'the actual charges however unreasonable they may be.' The charges must be reasonable. If the bill of

sale holder has to pay his solicitors to issue a notice, he is entitled to recover his solicitors' reasonable charges, if he issues the notice himself, he is entitled to no charge. The bailiff will have to be paid a seizure fee and his fare from Lautoka to Sabeto and back, and again he will not be entitled to an exorbitant seizure fee.

Plaintiff's real claim is that whereas Burns Philp sold him a truck, it was taken from him by someone else, namely Automotive Supplies Company Limited. The defendants concede this, but they say that Burns Philp and Automotive Supplies must be regarded, as one and the same thing, that they work together, that Automotive Supplies are a wholly owned subsidiary of Burns Philp. The Court was told that Automotive Supplies Company were the holders of the franchise to sell Toyota vehicles, that the vehicle sold to the plaintiff was a Toyota, and that it was really sold by Automotive Supplies, although for some reason - perhaps owing to an oversight - the Bill of Sale was put in Burns Philp's name. There is no doubt that the accounts are all issued by Automotive Supplies, although the plaintiff's receipts were issued by Burns Philp and are in Burns Philp's name. The insurance policy is in the name of the plaintiff as owner and Automotive Supplies as mortgagee, and Burns Philp's name does not appear therein.

Mr. Gordon in addressing the Court made the point that Automotive Supplies could not seize because the Bill of Sale which empowered a seizure to be made had not been assigned to them, that they were complete strangers and that therefore their action was tortious. I do not think the matter is as simple as that, but I do think that Automotive Supplies have to justify their seizure. They seek to do so by pointing to the fact that although they and Burns Philp are separate and distinct companies, Automotive is a wholly owned subsidiary of Burns Philp, that is its shares are held either by Burns Philp itself, or by its directors. Its business at Lautoka is carried on in the same office as that of Burns Philp although the two companies appear to have separate offices in Suva. Its directors are all senior officers of Burns Philp, and are appointed by the directors of Burns Philp. Burns Philp's garage decides upon the expansion programme for Automotive Supplies. Automotive Supplies sells vehicles and Burns Philp services those vehicles. It is true that Automotive has its own directors, but they are appointed by the board of directors of Burns Philp. Automotive does have its own employees, and it pays wages to its own employees. Burns Philp and Automotive Supplies use the same repossession notice, with the name altered to suit whichever company is involved. In this particular case the plaintiff's truck was seized under a repossession notice issued by Automotive Supplies.

The plaintiff referred to Matadin Maharaj v Munnalal Maharaj (1936) 3 FLR 197, 200, which he says supports his argument that Automotive Supplies, even if they were agents of Burns Philp had no express power of seizure. That case involved a Bill of Sale given by the plaintiff and another to the defendant Munnalal Maharaj, who seized before the power of seizure had arisen, and there was clearly a trespass. The defendants cited three cases Smith Stone & Knight Limited v Birmingham Corporation (1939)4 AER 116, In re F G Films Limited 1953 1 WLR 483, and D H N Food Distributors Limited v London Borough of Tower Hamlets (1976) 3 AER 463. I must say something about each of those cases. The first was a case where the Corporation of Birmingham wished to acquire compulsorily the property of the plaintiff company, upon which however, a business was carried on by the Birmingham Waste Company Limited, which was a subsidiary company of the plaintiff who owned 497 of the 502 shares in the Waste Company, the other five being owned by the plaintiff's directors, each of whom had signed a declaration of trust that they held them for the plaintiff. Atkinson J held that whether the subsidiary could be held to be carrying on business as the parent company's business or as its own was in each case a question of fact and the question was "who was really carrying on the business?" It must be remembered that prior to this case of Smith Stone & Knight Limited the question had arisen only in revenue cases, and principally as to whether the parent company, an English company, could be taxed in respect of the profits made by a subsidiary company carried on elsewhere. The learned judge thought that six points had to exist. These were first, were the profits of the subsidiary company treated as the profits of the parent company? Secondly were the persons conducting the business of the subsidiary company appointed by the parent company? Thirdly was the parent company the head and brain of the trading venture? Fourthly did the parent company govern the adventure, decide what should be done, and what capital should be embarked in the venture? Fifthly did the parent company make the profits by its skill and direction? Sixthly was the parent company in effectual and constant control? If these questions are posed in the present case, I think that the answers must be that, although there is not sufficient evidence to enable a proper answer to be given to the first and fifth questions, the remaining questions must be answered in the affirmative. Perhaps it is more relevant to say that none of those questions are answered in the negative, on the evidence available.

The next case is In re F G Films Limited which was an application by a British Company to be registered as the makers of a film which would entitle them to exhibit the film in Britain. The

£1 each. There were three directors, one an American citizen who held 90 shares, and the others British subjects, one of whom held 10 shares, the other having no shareholding. The applicants had no place of business other than their registered office and employed no staff. They agreed to produce a film which had been acquired by an American company, of which the applicants' American director was president. He had provided the necessary finance for the film, which had been made in India. Vaisey J. held that the applicants' intervention was purely colourable and that they were brought into existence for the sole purpose of being put forward as having undertaken the arrangements necessary for the making of the film and of enabling it to qualify as a British film and that it clearly failed in both objects. This case does not help the defendants, but it does shew that it is the realities of the transaction which matter.

The third case is D H N Food Distributors Limited v London Borough of Tower Hamlets (1976) 3 AER 462 which again was a case about compensation for compulsory purchase. There there were three companies involved, one, the parent company owned the business of grocery and provision merchants, the second, one of the subsidiary companies owned the land upon which the business was carried on, and the third, also a subsidiary company, owned the vehicles with chich the business was operated. The local authority took the stand that only the company which owned the land was entitled to compensation. Admittedly if it had also owned the business and the vehicles it would have been entitled to compensation for disturbance, but because it did not own the business and the vehicles it was not entitled to compensation for disturbance, and the other companies were not entitled to compensation because they did not own the land. The three companies had the same directors and the parent company held all the shares in the other two companies. The Court of Appeal in England held that they were entitled to look at the realities of the situation, and to treat the group as a partnership and thus entitled to compensation.

I have come to the conclusion that for the purposes of this case Burns Philp and Automotive Supplies should be regarded as a single entity. Mr. Gordon complains that the Bill of Sale being in the name of Burns Philp constitutes a complete obstacle, but it seems to me that it would have been possible at any time for the directors of Burns Philp, quite legitimately, to have transferred the bill of sale to Automotive Supplies. I think that the citation by Goff L.J. in the D H N case at page 469 from the judgment of Danckwerts L.J. in Merchandise Transport Limited v British Transport Commission (1961) 3 AER 495, 518 is apposite, where that learned judge said that the cases "shew that where the character of a company or the nature of the persons who control it, is a relevant feature, the Court will go behind the mere status of the company as a

legal entity, and will consider who are the persons as shareholders and even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance."

On the analogy of the above two compensation cases and on the facts proved I would hold that there was a partnership between Burns Philp and Automotive concerning the plaintiff's truck, and that the realities of the situation require that I hold against the plaintiff's claim.

Counsel for the defendants also submitted that agency should be implied. Although he referred to no authority, I think that the cases support him. They are old authorities, but none the worse for that. There is Hunt v Piskergill (1819) 129 E.R. 731, where the house of the plaintiff, an uncertificated bankrupt was broken into and effects acquired by him subsequent to his bankruptcy seized by defendants who had become creditors of plaintiff since his bankruptcy, and did not know who were the assignees under the bankruptcy. Plaintiff sued defendants in trespass, but before the action came to trial, defendants obtained an assignment of the interest of the assignees in the effects which they had seized. It was held that this was a ratification of the seizure and plaintiff could not recover. Then there is Anderson v Watson (1827) 172 E.R. 392, where a person placed money in the hands of the defendant who was her attorney to invest for her, with an unlimited discretion to do what was best. The defendant advanced money to the plaintiff but finding the security to be bad, had the plaintiff arrested and imprisoned. Plaintiff sued defendant alleging want of authority from his principal but the principal afterwards approved of what her attorney had done. It was held that the plaintiff could maintain no action against defendant so long as defendant had acted bona fide.

The law on this subject is summed up by Willes J in Phillips v Eyre (1870) LR 6 QB 1, 23, delivering the judgment of a Court of seven judges where he said

> "If (for instance from the common law) a mere stranger, acting without authority at the time, takes upon him to do an act of trespass in the name and for the benefit of an absent person, such professed agent becomes liable for his unauthorised act, and a right of action is acquired by the person against whom the wrong was committed: and yet the general rule of the common law, borrowed from the civil law, is that the person in whose name the act was done may, if he thinks fit afterwards ratify and adopt it. Such ratification has the effect of a prior authority and the result is, that if the prior authority of the principal would not have justified the act, both the agent and the principal may be sued as trespassers; and that if such authority would have justified the act - that is the principal could lawfully have authorised it beforehand, then the agent is also justified by matter ex post facto and the vested right of action is extinguished."

That case is well known in constitutional law where the plaintiff sued the Governor of Jamaica in England for acts done outside England. Finally on this matter there is Hogarth v Jennings (1892) where the defendant who was managing director of a company, distrained upon the goods of the plaintiff. Fry L.J. was prepared to assume that the defendant had authority from the company to distrain, and that he was authorised thereby to act as a bailiff. However under the Law of Distress Amendment Act 1888 bailiffs required a certificate and since defendant had no certificate his entry was unlawful and he was liable in damages.

There is no doubt that when the plaintiff's truck was seized, he was considerably in arrears with his instalments, although not to the extent alleged by the defendants, so that the seizure was justified, and therefore the action must fail. If the defendants intend to recover the balance due under the Bill of Sale - and in view of the muddle they have made it would be a gracious action if they wrote it off - a recalculation will have to be made, taking account of what I have said earlier.

I find against the plaintiff and the action is dismissed against both defendants. However, since the action must very largely be regarded as having been brought about by the defendants' muddling, I think there should be no order as to costs.

LAUTOKA,
29th May, 1978.

(sgd.) K.A. Stuart
JUDGE