

SUPREME COURT

21

**BRIJ BHUSHAN LAL**

A

v.

**GRAPHIC EQUIPMENT LIMITED**

[SUPREME COURT Madhoji J.—3 September 1980]

B

Civil Jurisdiction

*No workman's lien where no repairs ordered on chattel detained—no entitlement to detain for debt—damages for conversion and/or detention—onus of proof regarding mitigation.*

C

A. B. Ali for Plaintiff

Miss A. Prasad for Defendant

D

Action for conversion and/or detinue to recover photocopying machine wrongfully taken and removed from plaintiff's possession by the defendant on 8 September 1979 and for damages sustained by the plaintiff for the unlawful seizure and detention.

On 23 January 1976 plaintiff purchased the machine from the defendant for \$650, thereafter with it carried on the business of photocopying.

E

Between September 1976 and August 1977 the defendant supplied goods and services to the plaintiff on credit to the value of \$750 for matters unrelated to the copying machine.

On 8 September 1977 the machine was removed by defendant's employees from the plaintiff's possession. The learned judge found it had been taken away because plaintiff had failed to pay its account for other goods or services amounting to \$908. Thereafter it was detained at least until September 1978 and some time later it was sold. The removal ostensibly to be pursuant to a request for maintenance was really to force the plaintiff to pay its other accounts.

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The Court found that there being no request to repair (nor any repair) the machine no workman's lien for costs of repairs done to a chattel could attach. And in fact the defendant did not so claim. The general rule as to measure of damages was discussed; the plaintiff could recover the loss he had suffered by the defendant's act. The Court took into account the time of detention estimated takings and awarded \$650 for the value of the machine with loss of profits at \$5 per day based on assessment of the plaintiff's average daily net profit for 270 days amounting to \$1350, a total value of \$2000.

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The Court rejected the defendant's argument seeking to reduce this sum because the plaintiff should have mitigated his damages, not being satisfied that the defendant, on whom the onus lay, had shown there had been an unreasonable failure to mitigate.

H

Cases referred to:

- A *Strand Electric Engineering Co. Ltd. v. Brisford Entertainments Ltd.* (1952) 2 Q.B. 246  
*Admiralty Commissioners v. S.S. Valeria* (1922) 2 A.C. 242  
*Payzu Ltd. v. Saunders* (1919) 2 K.B. 581  
*Clippens Oil Co. v. Edinburgh and District Water Trustees* (1907) A.C. 291

B

### Judgment

MADHOJI J.:

On the 23rd January 1976 the plaintiff purchased a photocopying machine from the defendant company for the sum \$650.00. The sum of \$300.00 was paid by the plaintiff to the defendant company on the date of purchase and the balance purchase price was paid on the 2nd February 1976 (Ex.1). This machine was thereafter the unencumbered property of the plaintiff.

After purchasing the machine the plaintiff carried on the business of making photocopies from this machine for his clients at Cumming Street in Suva besides using the machine to make photocopies for himself.

Subsequently, between 2nd September 1976 and 11th August 1977 the defendant company supplied goods and services to the plaintiff on credit to the value of \$750.03. (Ex. 3 and 5). The plaintiff in his evidence admitted owing this sum to the defendant company, although he denied it in his defence to the counterclaim. The evidence also shows that a duplicating machine and table were among the goods supplied on credit as aforesaid.

On the 8th September 1977 the defendant company removed the said photocopying machine from the plaintiff's premises to its own premises and has so far despite requests for its return refused to return it to the plaintiff.

The plaintiff alleges that the defendant company wrongfully seized the said machine from his premises and has unlawfully detained it and refused to return it to the plaintiff. He claims \$650.00 being the value of the machine and \$3,570.00 special damages for loss of use of the machine and general damages.

The defendant company admits removing the machine from the plaintiff's premises but says it did so after being requested to service the machine by the plaintiff's servants or agents. It says that as the machine could be serviced at the plaintiff's premises it removed the machine to its premises for servicing with the plaintiff's permission and consent. The defendant company admits that requests for the return of the machine were made by the plaintiff but says that it informed the plaintiff that he could take delivery of the machine "on payment of the necessary repair and other outstanding costs". It says the plaintiff refused to pay and take delivery of the machine.

The defendant company counterclaims the sum of \$820.03 for goods supplied and services rendered to the plaintiff at his request, particulars of which are given in its counterclaim.

It is therefore not disputed and I find that the defendant company removed the photocopying machine from the plaintiff's premises on 8.9.77 and that this machine has never been returned to the plaintiff. What is in dispute is the circumstances in which it was removed and the reason for its removal.

I have seen and heard the witnesses and carefully considered all the evidence before me. I am satisfied and find that the defendant company had not been requested to service the machine on the occasion in question and that the machine was wrongfully removed from the plaintiff's premises by the defendant company without the consent or permission of the plaintiff, his servants or agents. I believe the evidence of the plaintiff's daughter, Chandra Prabha, to be true to find that the machine was removed by the defendant company through its servants in the manner described by her. I accept the evidence of the plaintiff and his witnesses that the machine was working properly at the time it was removed by the defendant company and that no request had been made for it to be serviced. Chandra Prabha said in her evidence that the two persons who came to take the machine told her that they were from the defendant company and that they told her that they were taking the machine as the plaintiff "had not paid money". Exhibits 8 and 9 are consistent with and support her evidence.

Exhibit 8 is a statement sent by the defendant company to the plaintiff and is dated 31.10.77. It shows a debit balance of \$750.03 owing by the plaintiff. The following note is written on this statement:

"The boys brought the machine because you did not pay the A/C on duplicating machine and table. Please settle the A/C in full before we can give the machine back. The machine is in working condition now."

At the bottom of the note appears the signature "K. Chandra Sales Manager".

Plaintiff's witness, Kishore Chandra, who was sales manager for defendant company at the relevant time, confirmed that this note was written and signed by him.

Exhibit 9 is a letter dated 18.11.77 from the defendant company to the plaintiff company and reads as follows:

"Dear Sir,

We understand from your telephone call yesterday afternoon that you refuse to pay your outstanding account with us which stands at \$908.88. We confirm that we are not able to return your Photocopying Machine until the above amount is paid in full.

As you know, \$733.05 of the above has been outstanding for over a year and we feel that we have been patient for long enough.

Please take this letter as formal notice, that unless we receive full payment of the above account by Friday the 25th of November, we shall take the Photocopier into our stock a part payment of the account.

Yours faithfully

Sgd.

For and on behalf of Graphic Equipment Ltd."

The reason why the machine was seized and detained by the defendant company is clearly shown by these two exhibits. The machine was taken away because the plaintiff had failed to pay his account which it is alleged in Exhibit 9 amount to \$908.88.

Exhibit 9 makes it clear that the defendant company refused to return the photocopying machine until the plaintiff paid his account of \$908.88 in full.

A There is no mention of the machine being taken for the purpose of repairs. All that Exhibit 8 says is "The machine is in working condition now". It does not say the machine was taken for servicing or repairs. On the contrary it explicitly says "the boys brought the machine because you did not pay the account on duplicating machine and table". The word "boys" confirms Chandra Prabha's evidence that two persons came to take the machine and not just one person as stated by defence witness, Mr Mudaliar, in his evidence.

B I find that, in the circumstances, the removal of the photocopying machine by the defendant company and its continued detention was unlawful. The machine was the unencumbered property of the plaintiff who had paid its purchase price in full. The defendant company had no right to seize it to recover moneys owing to it by the plaintiff for other goods supplied to him. The defendant company's remedy was to obtain judgment for moneys owing by the plaintiff and then levy execution on plaintiff's goods and chattels.

C Exhibit 7 shows that the defendant company has charged the plaintiff \$70 for servicing the machine on 14.9.77, that is, after it removed it from the plaintiff's premises. It also claims this amount in its counterclaim. However, as I have found the plaintiff had not requested any servicing and is therefore not liable for this charge. The defendant company does not and cannot lawfully claim workmen's lien on the machine in respect of this sum. Paragraph 3 of the Statement of Defence says, inter alia, that "the plaintiff" was informed that he could take delivery of the same (machine) on payment of the necessary repair and other outstanding costs". Although the sentence is not very clear as to "outstanding costs" it appears that defendant company is referring to Exhibits 8 and 9 referred to above in which the defendant company says it was not prepared to release the machine unless the plaintiff paid the amount of \$908.88.

E To create a workmen's lien for costs of repairs done to a chattel the repair must be done at plaintiff's request. I have found there was no such request in this case. Besides, a workmen's lien only extends to the actual cost of repairing the chattel given for repairs. Here the defendant was insisting on payment of an account almost all of which had nothing to do with repairs to this machine. In any case defendant company does not claim to have a workmen's lien on the machine.

F In the result I find that the defendant company wrongfully and unlawfully took and removed the plaintiff's photocopying machine on the 8th September 1977 and has since then unlawfully and wrongfully detained it. The defendant company is therefore liable to pay the plaintiff the full value of the machine and damages for its unlawful seizure and detention.

G The defendant company has not said anything as to where the machine now is. The only evidence on this point came from the plaintiff. He says that the defendant company has sold the machine but that it had it in its possession in September 1978 when, before purchasing a replacement machine, he inquired from it about the machine. This evidence was not challenged and I find as a fact that the defendant company detained the machine at least until September 1978 and if it had been sold, it was sold at some later date. The unlawful conversion of the machine if it was converted therefore took place at some time after September 1978.

H I now come to the question of measure of damages. In assessing damages the general rule is that the plaintiff recovers the loss he has suffered by the defendant's wrongful act.

The plaintiff here has, first of all, lost his machine which he purchased for \$650 in January 1976. This is the amount he claims for it. He has said in evidence that the price of such machines has gone up since then.

In *Strand Electric Engineering Co. Ltd. v. Brisford Entertainment Ltd* (1952) 2. Q.B. p. 246, a case of wrongful detention of goods, Denning L.J. says at page 255:

"If the goods are retained by the wrongdoer up till judgment, the hiring charge runs up to that time, and in addition the owner will get the return of the goods or their value at the time of judgment (*Rosenthal v. Alderton & Sons Ltd*) but if the goods have been disposed of by the wrongdoer the hiring charge will cease at the time of such disposal, but the owner will get in addition damages for the loss he has sustained by the conversion, which is usually the value at the time of conversion."

In this case the defendant company retained the machine at least until September 1978. I consider the value placed on the machine to be reasonable and I allow it.

The next claim is for loss of use of the machine. The plaintiff claims \$3,570 under this head. He claims at the rate of \$10 per day from 8.9.77 to 31.8.78 and says this comes to 357 days. In the present case I am satisfied that the machine was profit earning in the hands of the plaintiff. He was carrying on the photocopying business with it charging clients for making photocopies for them as well as using it for his own purposes. This was the only photo machine he had and as a result of its wrongful seizure and detainer by the defendant company on 8.9.77 his photocopying business ceased completely from that date until he was able to replace it with another machine in September 1978. The plaintiff has therefore clearly suffered loss of profits during this period.

In *Admiralty Commissioners v. S. S. Valeria* (1922) 2 A.C. 242, a collision case, Lord Buckmaster said with regard to a freight-earning vessel:

"What has to be considered is what would this vessel have earned for the period of seven days that she was incapacitated owing to the accident; and that amount is the true measure of damage which the vessel who was to blame is called on to pay."

The aim of awarding damages is to compensate the party aggrieved and the inquiry is: what loss has plaintiff suffered by reason of the defendant's wrongful act?

In this case the plaintiff has lost profits he would have otherwise earned from the machine from the date of the seizure of the machine, namely, 8.9.77 until September 1978 at least.

If a plaintiff sues a defendant within a reasonable time after his profit earning goods are unlawfully detained by a defendant he would be entitled to claim loss of profits until the date of the judgment unless the goods have been disposed of by the defendant prior to judgment.

In this case the plaintiff claims loss of profits until 31.8.78 the date when he was able to purchase a replacement machine. I have therefore to consider whether the claim for this period is reasonable in all the circumstances of this case.

The plaintiff issued the present writ on 3.5.79 but he does not claim loss of profits to date of judgment.

- A The defendant company seized the machine on 8.9.77. The plaintiff made demands for its return. There was correspondence on this matter until 25.11.77 when plaintiff's solicitors demanded the return of the machine. No reply was received to this letter but defendant company had informed plaintiff that unless he paid his outstanding account in full by 25.11.77 it would take the machine as part of its stock. The defendant thereafter did not inform plaintiff what it had done with the machine nor did it send any further statement to plaintiff crediting him with the value of the machine.

The plaintiff, after his efforts to get the defendant company to return the machine had failed, should have sued the defendant company within a reasonable time to entitle him to claim loss of profits up to the date of judgment or the date of an earlier disposal of the machine by the defendant company.

- C The machine was still with defendant company on 31.8.78. It is difficult to say whether, if the plaintiff had sued within a reasonable time after November 1977 the trial would have taken place and judgment given before 31.8.78. Taking all this into account and also the fact that Sundays, Public Holidays and all day Saturdays are included by the plaintiff in calculating 357 days, I consider loss of profits for a period of 270 days from 8.9.77, the date of seizure of the machine, would be a reasonable period for allowing damages for loss of profits.

- D In *Strand Electric Co. Ltd. v. Brisford Entertainments Ltd.* quoted above where the detention of the chattels commenced on 8.1.51, there were a number of letters demanding return of chattels until 17.3.51 when a writ was issued by the plaintiff. Damages at the full market rate of hire of goods was given from the date of detention until judgment which came to a period of 43 weeks, that is 301 days.

- E It was submitted by defence counsel that plaintiff did not take reasonable steps to mitigate his damage. A plaintiff is, of course, under a duty to mitigate his damages. The onus of proof that plaintiff has failed to take reasonable steps to mitigate his damages is on the defendant.

- F It has not been shown that such machines were available on hire and what the rental for such hiring was if they were available. The plaintiff has said he was unable to purchase another photocopying machine until September 1978, due to the fact that he did not have the resources at the time. He was left without income from the machine by the plaintiff's wrongful act as his photocopying business ceased completely. He did not have another machine with which he could carry on his business. It was only when he got his insurance commission that he was able to purchase another machine on term payment basis.

- G In cases of this nature, where a plaintiff's profit earning chattel is detained, it has been held that a plaintiff will not be prejudiced by his financial inability to take steps in mitigation.

Halsbury 4th Ed. Vol. 12 at paragraph 1194 dealing with the question of mitigating damages says that the plaintiff's impecuniosity or financial weakness may properly be taken into account in deciding whether he has acted reasonably.

- H In *Payzu Ltd. v. Saunders* (1919) 2 K.B. 581 at page 588 Bankes L.J. says:

"It is plain that the question of what is reasonable for a person to do in mitigation cannot be a question of law but must be one of fact in the circumstances of each particular case."

In *Clippens Oil Co. v. Edinburgh and District Water Trustees* (1907) A.C. 291 at page 303 Lord Collins says: A

“In my opinion the wrongdoer must take the victim *talem qualem*, and if the position of the latter is aggravated because he is without means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act.”

I have considered the circumstances of this case and I am satisfied that the plaintiff's being unable to purchase another machine for almost a year was due to his financial weakness at the time and he was without means of mitigating the damages any earlier. In fact the defendant company's very act contributed to his financial weakness as he had ceased to have an income from his photocopying business by the defendant company's own wrongful act. B

This leaves to be considered the plaintiff's claim for loss of profits at the rate of \$10 per day. The plaintiff did not produce any accounts or records to show what his average daily gross earnings were and what his average daily overheads and expenses incurred in earning such income were over a period of time to enable his average daily net earnings to be determined. Nor has he produced his profit and loss accounts in respect of this business to give an idea of his annual net profits. I am not satisfied that he has properly worked out his average daily income or profits from his accounts and I do not accept his figure. What he is entitled to claim is not average gross daily income but average net daily income. I will allow \$5 per day as his average daily net profits. At this rate his loss of profits for 270 days comes to \$1,350. C D

In the result there will be judgment for the plaintiff for \$2,000, being \$650 for the value of the machine and \$1,350 for loss of profits, with costs to the plaintiff to be taxed. E

On the defendant company's counterclaim there will be judgment for the defendant company for \$750.03 and costs to the defendant to be taxed.

*Judgment for the plaintiff on the claim; judgment for the defendant on the counterclaim*