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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 53 of 1979

BETWEEN:

SHIRI SHANKARA s/o Raghunath Maharaj — Appellant

A N D:

JOHN R. THOMAN s/o Deosi Thoman — Respondent

Mr. K.C. Ramrakha with Mr. A.S. Singh for the Appellant

Mr. A.B. Ali for the Respondent

Date of Hearing: 17th June, 1980.

Delivery of Judgment: 30/6/80

JUDGMENT OF THE COURT

Spring J.A.

The appellant appeals from the Supreme Court of Fiji sitting at Suva against a decision awarding the respondent the sum of $700 by way of damages. The facts may be briefly stated.

On 4th November, 1975 the respondent was driving his Datsun motor car along King's Road towards Suva at approximately 7.30 a.m. There was a long line of traffic ahead and the respondent had almost come to a stop when he saw a motor truck fully laden with logs approaching from the rear. The motor truck crashed into

the rear of the respondent's car when it was stationary causing it to surge forward and hit the vehicle ahead.

The driver of the motor truck claimed that his brakes failed; he was subsequently prosecuted for careless driving and duly convicted. The respondent obtained from Suva Motors Ltd., a quotation in excess of $1,000 to repair the car; the respondent obtained another quotation of $958.03 from Sohan Lal & Sons. As a result of the impact the back of respondent's car caved in; the front was pushed in and substantial damage was occasioned to the vehicle. The respondent stated that he considered the estimate of $958.03 fair and reasonable having regard to the damage to his car. The final account received from Sohan Lal & Sons was $966.95 which amount included some additional work and respondent paid this amount.

The respondent issued proceedings out of the Magistrate's Court on 9th February, 1979 citing Jai Kissun the owner of the motor truck as 1st defendant and the appellant the driver thereof as 2nd defendant.

Counsel for respondent produced at the hearing a copy of the invoice dated 12th December, 1975 and a copy of the quotation dated 11th November, 1975 from Sohan Lal & Sons. The latter stated (inter alia) "repair damage to front and rear portion of car. Removing and filling new parts. Paint compound and polish same." A detailed list of parts then followed together with labour charges and painting. The total was $958.03. The learned Magistrate admitted the quotation. The respondent paid $1,600 for the car - which was in his words - "a give-away price" - and had owned it for 15 to 16 months before the accident; the whole car was repainted no doubt at the respondent's suggestion. Respondent's counsel desired to call the repairer and advised the Court accordingly; he had issued a subpoena but the repairer had left Fiji and was not available as a witness. The case was adjourned on 14th February, 1979 to enable counsel for respondent to call another witness as to the repair account.

On the 18th May, 1979 the plaintiff abandoned his claim against the first defendant but maintained his action against the second defendant who had been unrepresented by counsel. On the 1st June, 1979 Mr. A.S. Singh appeared as his counsel and was given leave to file a Statement of Defence.

When the hearing resumed respondent was recalled and he produced the original account from Sohan Lal & Sons. Counsel for appellant called no evidence.

At the conclusion of the hearing the learned Magistrate gave judgment for the respondent in the sum of $966.95.

The appellant appealed to the Supreme Court against the decision of the learned Magistrate upon the grounds that there was no satisfactory or admissible evidence -

(a) to prove the nature of the damage sustained by respondent's car;

and

(b) to support the award of $966.95.

The learned Judge in the Supreme Court found that the whole of respondent's car was painted and that the damages awarded were higher than the evidence justified and accordingly reduced the amount of the damages to $700.

The appellant's appeal to this Court is limited by virtue of section 12(1) (d) Court of Appeal Ordinance, (Cap.8) to a question of law only.

The grounds of appeal are that the learned appeal Judge erred in that the award of $700 cannot be supported by the evidence and that the quotation given by Sohan Lal & Sons to the respondent was inadmissible and should not have been admitted in evidence nor relied upon for any purpose at the hearing.

Mr. K.C. Ramrakha argued that the quotation given by Sohan Lal & Sons should not have been admitted by the learned Magistrate; that in any event it was only a guide; it was not evidence in the case as to the extent of the damage caused to respondent's vehicle; further that the respondent's vehicle was purchased at a cost of $1,600 and that a claim of over $900 for repairs was excessive; further the repairer should have been called to prove the repair costs and that in his absence the claim for the cost of repairs should have failed; that the learned trial Judge adopted a "rule of thumb" method in awarding the sum of $700 as there was no clear evidence as to how the repair costs were made up; there was no evidence as to how the repair costs were made up; there was

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no evidence as to the necessity for new parts to be used in the repair of the vehicle.

Mr. Ali on behalf of the respondent submitted that appellant had not challenged in Magistrate's Court the need for new parts to be used in the repair of the vehicle; that the cost of repairs as set out in the quotation from Sohan Lal & Sons was not tendered to the Court purely as a guide but as part of the evidence in the respondent's case and to support the payment of the sum of $966.95 by the respondent to Sohan Lal & Sons. Further that by virtue of section 3(2) of the Evidence Ordinance, Cap. 31 the learned Magistrate had a discretion to admit the quotation as evidence and that such discretion had been correctly exercised.

On this appeal the only matter raised is whether the sum of $700 awarded to the respondent can be supported by the evidence. The learned Judge in the Supreme Court reduced the amount awarded in the Magistrate's Court to that sum as the evidence showed that not all the repairs effected had been proved as being the result of the accident, including the complete repainting of the respondent's car.

The burden of Mr. Ramrakha's argument was that the document evidencing the quotation given by Sohan Lal & Sons was inadmissible in evidence. It was not disputed that the respondent paid the sum of $966.95 to Sohan Lal & Sons.

The quotation given by Sohan Lal & Sons was admitted in evidence in our view not as a medium of proof in order to establish the damage caused to the respondent's car, but as being in itself part of the transaction and explanatory of the amount which the respondent testified he paid to Sohan Lal & Sons for repairs to his car; in other words the quotation accompanied the act of payment by the respondent and explained the circumstances surrounding same.

First, a photocopy of the quotation from Sohan Lal & Sons was admitted in evidence by the learned Magistrate and he said :

> " I will exercise my discretion to allow in the photocopy on this occasion. Plaintiff should have brought the original."

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The original invoice was furnished by the respondent when he was recalled later in the hearing. The learned Magistrate was advised that the maker of the quotation had gone overseas and despite the issue of a subpoena it was not possible to call a witness who had prepared the quotation and could speak to it. Section 3 subsection 2 of the Evidence Ordinance (Cap.31) reads :

> "(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in the last preceding subsection shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence -
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> (a) notwithstanding that the maker of the statement is available but is not called as a witness,
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> (b) ....."

Mr. Ramrakha urged that as no order had been made by the learned Magistrate under the Evidence Ordinance for the admission in evidence of the quotation it was not properly before the Court.

However, in our view the learned Magistrate had a discretion to admit the quotation in evidence without any such order being made and notwithstanding that the maker thereof had not been called as a witness.

The learned Magistrate, as appears from the record, so exercised his discretion and admitted the quotation and subsequently the invoice and for our part we would be loath to say that in the circumstances, he was wrong.

The appellant was served with proceedings on 14th October, 1978 and while he appeared at the hearing unrepresented by counsel it is obvious that every assistance was lent him by the Court. On 18th May, 1979 as no defence had been filed by the appellant and an adjournment was granted until 1st June, 1979 to enable appellant to file one. On 1st June, 1979 appellant appeared by counsel and respondent was recalled, who produced the original quotation

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from Sohan Lal & Sons and was cross examined by appellant's counsel.

It is true that it is for the Judicial Officer whether Magistrate or Judge to make sure so far as he can, that no prejudice or injustice will be done to the opposing party by reason of a statement such as the quotation being allowed to be put in evidence notwithstanding that the maker had not been called. If there is any ground to suppose that there will be any injustice caused or that the other party will be materially prejudiced or embarrassed as a result then the Magistrate or Judge should either refuse to allow the document to be admitted or in his discretion allow it on terms such as an adjournment.

We are satisfied however that in the present case there was no possibility that the appellant was prejudiced or that injustice was occasioned by reason of the admission of the quotation notwithstanding that the witness who could speak of the quotation was unavailable.

We agree with the learned Judge in the Supreme Court when he said :

> " In my opinion, the document in question is admissible as a document upon which the respondent in fact made payment for the repairs of damage to his car. The document was prepared and supplied by Sohan Lal at the request of the respondent. Although the document is not evidence of the actual repairs carried out on the car, it is nonetheless evidence of the general nature of repairs that the respondent's car required and of the probable costs such repairs would entail. As can be seen the admission of the document is therefore for a limited purpose only but be that as it may be nevertheless provides in the absence of anything better some material on which the court may assess damages."

We turn now to consider whether the award of $700 is reasonable. Shortly after the accident the respondent obtained from Suva Motors an assessment as to the cost of repairing the damage; the quotation was in excess of $1,000; the respondent then obtained another quotation from Sohan Lal & Sons of $958.03; respondent said "it was much lower

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than the other estimation. .....
"I thought the estimate was fair and reasonable having "regard to the damage on the car."

In our opinion the respondent acted reasonably in endeavouring to obtain a cheaper quotation than that offered by the importers of the Datsun car - Suva Motors Ltd.

Whether the respondent acted reasonably is in every case a matter of fact, not law. (Payzu v. Saunders (1919) 2 K.B. 581.

Banco de Portugal v. Waterlow (1932)

A.C. 452 was a case in contract, but the remarks of Lord Macmillan at p.510 apply equally in the field of tort when he said :

> " Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficulty situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

Accordingly in our view the quotation and the invoice prepared by Sohan Lal & Sons were correctly admitted in evidence; further we agree with the learned Judge in the Supreme Court when he said :

> " I am satisfied the award should be reduced to $700. This amount appears to me to be fair and reasonable in the circumstances of this case and in the absence of any better proof of damages from the respondent."

The appeal is therefore dismissed with costs to the respondent to be agreed and failing agreement to be fixed by the Chief Registrar.

(Sgd.) C.C. Marsack
Judge of Appeal

(Sgd.) G.D. Speight
Judge of Appeal

(Sgd.) B.C. Spring
Judge of Appeal