IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO.5 OF 1995
(High Court Civil Action No. 369 of 1993)

BETWEEN

DEOJI AND SONS LIMITED — APPELLANT

v.

THE SAGAR TRADING COMPANY — RESPONDENT

Mr H. Lateef for the Appellant
Mr A.K. Narayan for the Respondent

Date and Place of Hearing : 11 August, 1995, Suva
Date of Delivery of Judgment : 18 August, 1995

JUDGMENT

This is an appeal against the summary judgment for the respondent for $25,292.87, interest thereon and costs given in the High Court by Sadal J. pursuant to Order 14 rule 3 of the High Court Rules.

The grounds of appeal are:

"1. *THAT the learned Trial Judge erred in law in giving judgment to the Respondent when there was no evidence before the Court that the Bills had been duly protested as required by the Bills of Exchange Act.*

267

2. *THAT the learned Trial Judge erred in law in failing to consider the reasons why the Appellant failed to initially accept Bills of Exchange No. 92/1263."*

The provisions of Order 14 rule 2 were complied with by the respondent, who was the plaintiff in the action in the High Court. Its claim was against the appellant (the defendant in that action) as acceptor of two bills of exchange for amounts totalling US$15,600 plus interest and bank charges. The total claim was for F$27,935.23. The respondent, a firm, expressly pleaded in its statement of claim notice of dishonour, due protest of the bills and written demand. The appellant filed a defence and counter-claim. In the defence it did not deny notice of dishonour, due protest or written demand.

The summons applying for summary judgment was supported by an affidavit sworn by a partner in the respondent firm. There was no reference in the affidavit to notice of dishonour or due protest. In response to that affidavit the appellant filed an affidavit sworn by its managing director. The managing director did not refer to any notice of dishonour, due protest or written demand or allege that the respondent had failed to give them. That affidavit was presumably intended by the appellant to support its case in showing cause against the application for summary judgment, with a view to the Court giving the appellant leave to defend (Order 14 rule 4). Subsequently there was an

affidavit filed, which was sworn by a law clerk employed by the respondent's solicitors, but not until after summary judgment had been given. It appears to relate to an application filed after the summary judgment for a stay of execution of the judgment. Exhibited to that affidavit were protests against the two bills, each attested by a notary public. They were not, however, in evidence before Sadal J. when he gave judgment in favour of the respondent and we thus disregard them.

On the return of the summons issued under Order 14 rule 2 Sadal J. heard counsel for both parties. Counsel for the appellant is recorded in His Lordship's notes as stating that the defence raised issues of breach of contract, of consent by the respondent to deferment of payment and of dispute as to the terms of the contract between the parties for the supply of the goods in respect of which the bills of exchange were executed. Counsel for the appellant then asserted that the respondent had not given notice of dishonour to the appellant and said that there was no evidence of protest. His Lordship found that the appellant had not raised a valid defence and gave judgment for the respondent. The claim was in order; so there were no grounds for dismissing the application for summary judgment (see Dhirai Lal Hemraj and Another v. Vinod Kumar Ramalal Patel (Civil Appeal No. 19 of 1993; judgment delivered on 24 February 1994). As His Lordship found that no valid defence had been raised, he was obliged to give judgment for the respondent (Order 14 rule 3).

So far as the first ground of the appeal is concerned, section 51(2) of the Bills of Exchange Act (Cap. 227) requires due protest to be made when a foreign bill of exchange is dishonoured by non-payment. If it is not protested, the drawer and every endorser are discharged; but the drawee and the acceptor are not discharged. The bills both showed on their face that they were drawn in Singapore. There is no doubt that the bills were foreign bills, as defined by section 4 of the Act. However, the appellant is not discharged by failure to protest unless it is the drawer or an endorser of the bills; plainly it is neither. It is the drawee and acceptor of them. Acceptance of the first bill was complete when the appellant's director signed the back of it and gave notice to the respondent of having done so. Acceptance of the later bill was complete on the date specified by the appellant's director on the back of the bill, notice of the acceptance having been given to the respondent. However, even if there had been no protest for non-payment, that would not have discharged the appellant. As we have already stated, the acceptor of a bill of exchange is not discharged on the grounds that non-payment has not been duly protested. The appeal, therefore, cannot succeed on the first ground. We record that Mr Lateef accepted that the appellant was the acceptor of the bill but was not prepared to concede that the first ground therefore failed. However, as already stated, we are satisfied it does. This first ground of appeal accordingly fails.

270

We turn now to the second ground of the appeal. Mr Lateef informed us that this ground related only to the later of the two bills of exchange, which was for US$5,760. It was dated 28 January 1993. The appellant presented evidence by affidavit in the High Court that on 15 December 1992 it had cancelled its order for the goods in relation to which the bill was drawn by sending the respondent a fax saying that they were not to send any more goods unless the appellant advised them. It added they already had 400 cartons of Ninja Turtle sports shoes (the goods involved in these transactions). At this stage the respondents had sent the appellant a bill of exchange for US$7,608.00. There were obviously further discussions, though there is no direct evidence of them, because on the 20 January 1993 the respondent sent the appellant a fax in order to induce it to take the consignment saying. "You do not pay until due date. If on due date you fail to sell the cargo, we will arrange to extend the date further." It is clear that then there were still more discussions and a fresh bill of exchange dated 28 January 1993 was drawn by the respondent and sent to the appellant. This bill was for US$5,760, some $1,848 less than the first bill. There must have been even further discussions because on the 22 February the appellant sent the respondant a fax referring to "terms and conditions agreed by yourselves (the respondent)" by reference to a fax sent by the respondent to the appellant and dated 27 January but which was not produced in evidence.

271

The fax of 22 February mentioned above sent by the appellant to the respondent said

> *"We regret to inform you that we are unable to accept this bill as you have not drawn the bill as per our terms and conditions agreed by yourselve, refer your fax DTD 27/1/93.*
>
> *We had very clearly advised you to draw the bill as follows:*
>
> *1) 120 days D/A (Free of interest)*
>
> *2) All the bond charges, Shipping Co. charges private customs bond charges to be deducted from the bill amount.*
>
> *3) Bill amount to be reduced to USD 5760-00 (This is o.k.).*
>
> *PLS (sic) be advised today was the last day to clear the goods and we cannot accept as the documents are not in order. These goods will be auctioned on Wednesday 25/2/93. Therefore, now we refuse this bill and under no circumstances we will accept as there is too much unnecessary running around and this is costing us a lot."*

It seems clear that at that stage the appellant was refusing to accept any responsibility or liability in respect of the goods - already shipped according to the respondent - or the bill of exchange. It follows, in our view, that whatever arrangement the parties might have made prior to that date was terminated in terms of the fax.

272

We think it clear that there must have been further later discussions but the record does not show what they were. The respondent in his affidavit in reply to appellants affidavit refers expressly to the fax of 22 February and says that the respondent had little choice but to accept new terms including the reduced figure and 120 days free of interest but asserts they did not include the provision that payment would be made only after the goods were sold.

The next step in the matter was that on 4 March the appellant wrote on the back of the bill "The day the goods will be cleared then only this bill be accepted". Then on 19 March the bill had written on it that it was sighted and accepted by the appellant. Mr Lateef in his written submission for the appellant had submitted that that was not an unconditional acceptance. We are unable to agree with him it set a date when, without any conditions, the acceptance occurred. The goods were cleared on the 19th March and the bill was thus accepted.

A number of other matters were raised by Mr Lateef for the appellant which could raise issues of breach of contract in relation to the goods and their supply but ordinarily breach of contract is not a defence upon a bill of exchange action. The pleadings show the appellant has filed a counter claim for a substantial amount and, of course, he can proceed with that claim. The Court had thought, during the argument, that if the

appellant had been able to show on the evidence some basis for a defence on the ground that it had been induced to accept the bill by a promise by the respondent to defer the time for the payment of the bill, then the equitable defence of promissory estoppel might arise. However, in our view the appellant has not, on the evidence shown any such basis. Such evidence as there is appears to show that whatever had been represented, on both sides, before 22 February was terminated or rejected by that fax. There is nothing by way of evidence from the appellant to show otherwise or to contradict the evidence of the respondent (affidavit of Bakulkumar Chandrakant Goda) when it asserted that the matter of the deferment of the payment was not again raised. It follows that the second ground of appeal also fails as there was no prima facie evidence of a defence before the High Court.

There is a further matter. Mr Lateef asked that an order be made directing that moneys held in Court be not paid out pending the hearing of the appellants counter claim. We are not prepared to do that. We understood that there had already been an application for stay of execution of the High Court judgment and that it had been refused. There is no appeal nor was any application filed in this court for a stay order pending determination of the appeal against that order before us. Mr Lateef informed us that there is no statutory provision for the enforcement in Singapore of judgments given in Fiji Courts.

It appears to us that questions relating to funds held in the High Court are matters for the High Court. However, we direct that the funds in the High Court should not be paid out of the High Court until the High Court so orders, this direction to lapse in two weeks, from the date of the delivery of this judgment.

The appeal is dismissed. The appellant is to pay the respondent its costs of the appeal.

Sir Moti Tikaram
President, Court of Appeal

Mr Justice I.R. Thompson
Justice of Appeal

Mr Justice R. Savage
Judge of Appeal

C:/WPDOCS/USHA/ABU0005J.95S