

441.

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0071 OF 2000S
(High Court Civil Action No. HBC0032 of 1998)

BETWEEN:

DOMALCO LIMITED

Appellant

AND:

SUBHASH CHANNDRA SINGH

Respondent

Coram:

Hon. Sir Mari Kapi, Presiding Judge
Hon. Robert Smellie, Justice of Appeal
Rt. Hon. John Henry, Justice of Appeal

Hearing:

Thursday, 8th August 2002, Suva

Counsel:

Mr. G. P. Shankar for the Appellant
Mr. R. P. Chaudhary for the Respondent

Date of Judgment

Friday, 16th August 2002

JUDGMENT OF THE COURT

This is an appeal against a decision of the High Court which found Domalco Limited (Appellant) liable for injuries received by Subash Chandra Singh (Respondent) and awarded \$42, 175.00 in damages and \$3000.00 in costs.

The appellant appeals against finding on liability as well as on quantum of damages. However, at the hearing before us, counsel for the appellant abandoned the appeal against quantum of damages.

The relevant facts that gave rise to the issue of liability are these. The machine, the subject of these proceedings, is a press machine which is used for manufacturing pots. It stands about 8 feet high and it is powered by electricity.

The central part of the machine for making pots consists of a top dial and a receiving dial. Pieces of aluminium are placed on the bottom dial and the top dial is brought down on top of the bottom dial and this action moulds the pots. The movement of the top dial is controlled by a lever on the right. The movement of the top dial may be stopped by the application of brakes. After a pot is mouldered, the top dial moves up again and cannot come down until the lever is shifted.

The operator stands in front of the machine. He selects a piece of aluminium and places it on the bottom dial. Any adjustment in placing the aluminium is done by the left hand and when the operator is ready, he removes his left hand and shifts the lever with his right hand and the top dial comes down and moulds the pot. This is how each pot is made.

The machine is a second hand machine manufactured in Sydney, Australia by John Hinde & Company. The appellant acquired the machine in December 1995 in New Zealand in a dilapidated state but got it to operate again after it was refurbished. The machine went into full production after an initial period of testing.

On the 6th May 1996, the respondent was operating the machine with his left hand placing the aluminium on the bottom dial, when according to the respondent's evidence, the top dial came down suddenly without any warning and without shifting the lever, and injured him by amputating his middle fingers of his left hand at the metacarpophalangeal joint.

In the course of the hearing, we dismissed the appellant's application to call further evidence. We were not satisfied that the criteria for admitting fresh evidence were met.

After hearing all the evidence, the trial judge concluded that the appellant was negligent in (a) failing to maintain the press machine in a safe condition and (b) failing to properly recondition the machine. He did not make a definite finding on why the top dial fell in the manner it did. He simply found that the defendant's failure in properly reconditioning the machine ***"led to the plaintiff's unfortunate accident, the former being unable to satisfy the court that it had refurbished the double action press machine to the standard set in the manual issued by the manufacturer."***

Counsel for the appellant attacks the trial judge's finding of liability on two grounds. The first is that the trial judge erred in not allowing the appellant's witness, Anish Kumar Sami who came to the aid of the respondent soon after the accident, to give evidence of the explanation given to him by the respondent as to the cause of the accident. The second ground is that there is no evidence to support the finding that the appellant failed to maintain

the machine in a safe condition and failed to properly recondition the press machine.

We do not consider that there is any merit in the first ground. The relevant evidence of witness Anish Kumar Sami which is relied upon is set out in his affidavit:

“That the respondent whilst he was crying on the wheel chair said to me that he should have listened to his wife and should not have come to work on Monday because the previous Saturday and Sunday he consumed too much liquor during wedding celebration and he still had the hangover, and am feeling sleepy. Then he said if he had listened to his wife he would not have been injured.”

In our view, this statement does not go far enough to point to any fault on the part of the respondent in causing the top dial to fall in the manner it did. We do not consider that this statement would have impacted the determination of the cause of the accident. We would dismiss this ground of appeal.

The second ground of appeal calls for examination of the evidence.

Mr. Kalivati Silimaibau, an experienced fitter machinist with Fiji Sugar Corporation gave evidence that when the machine arrived, it was rusted and was not operational. After he had dismantled and reconditioned the machine, it started working again. He admitted in evidence that he did not use the manual of the machine to recondition the machine but used his own knowledge and experience.

The trial judge considered the machinist's evidence in the following passage:

"In this regard the evidence of Kalivati Silimaibau is crucial. He oversaw the refitting of the machine and the court does not doubt his expertise and experience. However he clearly stated in evidence that he did not rely on the manual of the machine and worked from his own knowledge. Mr Chauhan contradicted this assertion but Kalivati Silimaibau must be taken to know what he was doing. The Manual of any Machine is the guide to its intricate workings. It is issued by the manufacturer to assist mechanics, engineers, toolsman working on their machines in understanding how they work. How can Mr Silimaibau assure the court the machine was in good working order without any reliance on the manual? Can it be assured that the clutch plates were functioning normally, as were the brake lines, the con rod, press ring and other component parts? It is only by reference to the manual that one can say with any confidence how a machine can best operate at optimum level both production wise and in terms of safety."

We make the following comments. The trial judge accepted Mr Silimaibau as an experienced machinist and knew what he was doing. The fact that he did not use the manual does not necessarily lead to the conclusion that the work carried out was unsatisfactory and that the machine was in an unsafe condition.

The manual was not led in evidence nor did it form the basis of any cross-examination of Mr Silimaibau during the trial that the recondition work that was carried out on the machine was done contrary to the instructions in the manual. In the circumstances, the failure to make any reference to the manual is of no consequence and can have no bearing on the issue of the quality of work carried out and the condition of the machine.

The onus was on the respondent to prove that the machine was not kept in a safe condition and that the top dial came down suddenly due to a technical breakdown in the machine for which the appellant should properly be held responsible. There is no evidence to suggest that there was any defect in the mechanical operation of the top dial before the accident.

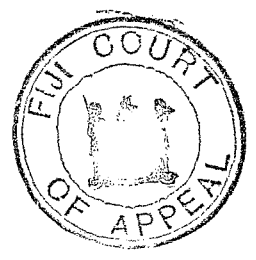
On the contrary, there is overwhelming evidence that the machine was in good working order before the accident. The evidence of Mr Silimaibau establishes this and the trial judge accepted his evidence. Mr Vijay Ram a fitter machinist with the appellant company gave evidence that before the accident occurred on 6th May 1996, he was at work and he applied oil and grease to the machine and checked the clutch and the brakes and found the machine in working order.

In respect of the condition and state of the machine after the accident, the evidence of Anish Kumar Sami, the co-worker who came to assist the respondent gave evidence that the top dial was still working. Mr Silimaibau examined the machine after the accident and found it in good working order. Mr Vijay Ram also examined the machine after the accident and found it in good working order. In fact the respondent started work again on the same machine two months after the accident occurred. Mr Thakor Bhai who has a diploma in Tool Changing dismantled the machine some two years later and found everything normal and did not find any evidence of wear or tear in the machine.

We conclude from all the evidence that the trial judge fell into error in finding that the top dial fell due to the appellant's failure in properly reconditioning the machine and failure in maintaining the machine in a safe condition.

In the result, we would allow the appeal and set aside the decision of the trial judge with costs of \$750.00 to the appellant.

The respondent in his pleadings made an alternative claim for compensation under the *Workers Compensation Act* (Cap 94). Counsel for the appellant does not contest this claim and we enter judgment for the respondent in the sum claimed, \$5616.00.



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Sir Mari Kapi, Presiding Judge

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Hon. Robert Smellie, Justice of Appeal

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Rt. Hon. John Henry, Justice of Appeal

Solicitors:

Messrs. G. P. Shankar and Company, Ba for the Appellant
Messrs. Chaudhary and Associates, Lautoka for the Respondent