

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**Civil Action No. HBC 148 of 2009**

**BETWEEN** : **MERCHANT FINANCE & INVESTMENT COMPANY LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Level 1, Ra Marama, 91 Gordon Street, Suva.

**PLAINTIFF**

**AND** : **VITI FUEL INJECTION AND TURBO CHARGER SERVICES LIMITED** a limited liability company duly incorporated in Fiji under the Companies Act Cap 249 and having its registered office at 164 Ratu Mara Road, Samabula, Suva

**FIRST DEFENDANT**

**AND** : **LAWRENCE PREM MASIH** of Tokotoko, Navua.

**SECOND DEFENDANT**

**BEFORE** : **Justice Deepthi Amaratunga**  
**COUNSEL** : **Mr. S. Nandan for the Plaintiff**  
**Ms. M. Rakai for the 2<sup>nd</sup> Defendant**  
**Date of Hearing** : **20<sup>th</sup> March, 2014**  
**Date of Decision** : **19<sup>th</sup> September, 2014**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff filed this action against two defendants for the recovery of the money, lent on a Bill of Sale, by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant was not a party to the said bill of sale between the Plaintiff and the 1<sup>st</sup> Defendant or a guarantor to the said loan.

When the Plaintiff tried to take possession of the items stated in the Bill of Sale, 5 out of 7 items were in possession of the 2<sup>nd</sup> Defendant, and they were subsequently damaged due to floods. The Plaintiff is claiming money due on the bill of sale between the Plaintiff and the 1<sup>st</sup> Defendant, and a declaration for seizure of chattels in the 2<sup>nd</sup> Defendant's possession. Since the items were removed from the initial place of business, the Plaintiff is also seeking transportation cost.

## FACTS

2. The Plaintiff filed a writ of summons against the 2 defendants, and sought following orders ;

*(1). A declaration that the Plaintiff is entitled to seize the Chattels identified in paragraph 5 of this Writ of Summons from the Second Defendant.*

*(2.) An order that the abovenamed Defendants by themselves or by their officers, agents servants and or associates forthwith disclose the whereabouts of all the chattels under the Bill of Sale with the Plaintiff and such disclosure to be verified by Affidavit to be made by the Defendants or by their authorized proper officer and served on the Plaintiff's solicitors within (7) seven days of the service.*

*(3). An Order that the Defendants by their officers agents, servants and /or associates immediately release the chattels secured by the Plaintiff under the Bill of Sale with the First Defendant and identified in paragraph 5 of the Writ of Summons.*

*(4). An order that the Second Defendant by its officers, agents, servants and or /associates immediately release the chattels secured by the Plaintiff under the Bill of Sale with the First Defendant and identified in paragraph 5 of the Writ of Summons.*

*(5). An Order that the Defendants **pay of costs and or charges associated with the conveying of the chattels to Suva.***

*(6) An order that the Police Officers do act and render of assistance required by the Plaintiff of the enforcement of the Order.*

*(7) **Judgment against the Defendants in the sum of \$71,624.93***

(8) Interest at the rate of 16.00 280%(sic) per annum on the judgment sum pursuant to the Bill of Sale.

.....'(emphasis added)

3. It is noteworthy that the Plaintiff is claiming the sum stated in the Bill of Sale from both Defendants in prayer (7) above, but there is no cause of action revealed in the statement of claim against the 2<sup>nd</sup> Defendant for such a claim based on Bill of Sale against a non party to the said Bill of Sale.
4. In any event the sum claimed under the Bill of Sale can be claimed only from the 1<sup>st</sup> Defendant as the 2<sup>nd</sup> Defendant was not a party to the said claim and it cannot be jointly and or severally claimed from 2<sup>nd</sup> Defendant without revealing the basis of the said claim. If the Plaintiff desired to claim said sum in terms of the Bill of Sale between the Plaintiff and the 1<sup>st</sup> Defendant the basis of that should be revealed in the statement of claim.
5. The following facts are agreed between the Plaintiff and 2<sup>nd</sup> Defendant;
  - i. The Plaintiff is a limited liability company duly incorporated under Companies Act of Fiji Cap 247 and is engaged *interalia* in the business of commercial lending.
  - ii. The First Defendant at all material times was a customer of the Plaintiff in respect of certain credit facilities advances to it in exchange for certain chattel secured to the Plaintiff by a Bill of Sale.
  - iii. The Second Defendant is in the possession of the chattels secured by the Plaintiff under a Bill of Sale with the First Defendant.
  - iv. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into Bill or Sale which was registered as a company charge and certificate to that effect was issued by the Registrar of the Companies.
6. At the hearing only the 2<sup>nd</sup> Defendant was represented and the action against the 1<sup>st</sup> Defendant was abandoned.

7. After entering a Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant , regarding 7 items the 1<sup>st</sup> Defendant had entered in to a second Bill of Sale regarding 5 items out of the said 7 items , with the 2<sup>nd</sup> Defendant . Both Plaintiff and the 2<sup>nd</sup> Defendant had lent money to the 1<sup>st</sup> Defendant on the security of respective Bills of Sale. The Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant was registered in terms of the Companies Act within the stipulated time period.
8. The 2<sup>nd</sup> Defendant in his evidence said that he was unaware of the earlier Bill or Sale, relating to identical items, till he was informed by the Plaintiff after taking possession of the items.
9. At the hearing one witness gave evidence on behalf of the Plaintiff. He said that he was unaware of the events personally as he was not with the Plaintiff at that time but said he was familiar with the documentary evidence. So he could only states the facts contained in the documents.
10. The 2<sup>nd</sup> Defendant gave evidence and also marked the documents for the defense. Plaintiff filed a written submission and Defendant did not file any submissions though time was granted for such submission.

## ANALYSIS

11. In the statement of claim there is only one paragraph that mention about 2<sup>nd</sup> Defendant and that is paragraph 3 which describes the 2<sup>nd</sup> Defendant as follows;  

*‘3. The Second Defendant is in possession of the chattels secured by the Plaintiff under a Bill of Sale with the First Defendant.’*
12. 2<sup>nd</sup> Defendant in his Statement of Defence while admitting paragraph 3 of the Statement of Claim, quoted above, counter claimed against the Plaintiff and stated that the items seized, were kept in their possession without auctioning, due to the request of the Plaintiff.

13. In any event 2<sup>nd</sup> Defendant could not have legally sold the items as they were subjected to an earlier Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant. Since the identical items in the second Bill of Sale were subject to encumbrances contained in the said first Bill of Sale, such could not have been entered for the second time without the first Bill of Sale being discharged.
14. There is no cause of action revealed in the statement of claim against the 2<sup>nd</sup> Defendant. The court can allow a defence which is not pleaded (see *Price v. Richardson* [1927] 1. K.B.448 at 453). Though this defence was not pleaded it can be considered as a defence as it is a question of law.
15. 2<sup>nd</sup> Defendant was added as a party as he had possession of the 5 items out of 7 items contained in the Bill of Sale. Without revealing a cause of action against the 2<sup>nd</sup> Defendant the Plaintiff cannot seek an order to recover money claimed in pursuant to a Bill of Sale between the 1<sup>st</sup> Defendant and the Plaintiff, where the 2<sup>nd</sup> Defendant was not a party.
16. There is no cause of action revealed in the statement of claim in order to claim under the Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant. The Plaintiff's claim for the amount stated in the prayer of the statement of claim is in accordance with the Bill of Sale and there is no statement contained in the statement of claim against the 2<sup>nd</sup> Defendant, for a claim for the said sum. In the circumstances the sum claimed in the prayer 7 against the 2<sup>nd</sup> Defendant should be dismissed.
17. Apart from the claim for money in pursuant to the Bill of Sale between the Plaintiff and the 1<sup>st</sup> Defendant the Plaintiff in his prayer 5 sought cost of transport of the items to Suva. The 5 items that were taken in to possession were permanent fixtures of the 1<sup>st</sup> Defendant's place of business and the 2<sup>nd</sup> Defendant had removed them to his place of residence at Navua.

18. The 5 items out of 7 items contained in the first Bill of Sale were removed purportedly by virtue of a Bill of Sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants regarding the default of a sum of money borrowed from the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant had signed a Bill of Sale with the Plaintiff regarding a certain financial facility given by the Plaintiff, relating to 7 items, including the 5 items taken in possession by the 2<sup>nd</sup> Defendant. They were contained in the Schedule of Bill of Sale, Exhibit P(A). The items numbered 1-5 in the said schedule are identical to the subsequent Bill of Sale, Exhibit D(3) .
19. So when the 2<sup>nd</sup> Bill of Sale was signed between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants all the items contained in the schedule of the said Bill of Sale were already, subjected to the Bill of Sale entered between the Plaintiff and 1<sup>st</sup> Defendant and the said Bill of Sale was properly registered in terms of the Section 98 (1) of the Companies Act.
20. The 2<sup>nd</sup> Defendant denied the knowledge of the earlier Bill of Sale. Since the 2<sup>nd</sup> Defendant had engaged a firm of solicitor for the preparation of the Bill of Sale it was their responsibility to do a search and ascertain the status of the items in the Bill of Sale before it was inked.
21. According to the evidence of the 2<sup>nd</sup> Defendant he had lent \$15,000 to the 1<sup>st</sup> Defendant and for that a Bill of Sale was obtained as security. Out of that sum 1<sup>st</sup> Defendant had paid \$10,000 and only \$5,000 outstanding. Upon the default of the payments the 2<sup>nd</sup> Defendant took possession of the items contained in the schedule of the said Bill of Sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
22. The 2<sup>nd</sup> Defendant in the counter claim sought following orders against the Plaintiff;
  - a. The balance sum owing under the 2<sup>nd</sup> Defendant's Bill of Sale;
  - b. The sum of \$1,200 being transport and labour costs;
  - c. The sum of \$ 13,000 being storage or holding fees arrears as at the filing of this Defence and Counter claim;

- d. Future storage or holding fees from to date until judgment in this matter
- e. Interest.
- f. ....

- 23. In the counter claim the 2<sup>nd</sup> Defendant stated that once he seized the items contained in the Bill of Sale between him and the 1<sup>st</sup> Defendant, he desired to sell the items in auction in order to recover the remaining debt of the 1<sup>st</sup> Defendant, but did not do so since the Plaintiff requested not to sell the items. 2<sup>nd</sup> Defendant also stated that he was unaware of the prior Bill or Sale relating to same items, between the Plaintiff and 1<sup>st</sup> Defendant, till he was informed of that fact by the Plaintiff.
- 24. If so, the 2<sup>nd</sup> Defendant could not have sold the items on the Bill of Sale between him and 1<sup>st</sup> Defendant, irrespective of any request not sell them. The said items were already subjected to a Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant hence he cannot claim any damages from the Plaintiff.
- 25. The 2<sup>nd</sup> Defendant had seized the items and transported them at his own peril. He had engaged a firm of solicitors for the preparation of Bill of Sale and cannot seek relief stating he was unaware of the existence of prior encumbrance of the Bill of Sale relating to identical items. For this, no fault could be imputed on to the Plaintiff. These facts could have been easily ascertained by the firm of solicitors as the first Bill of Sale was registered in terms of the Companies Act.
- 26. The items that were seized had already been subjected to a valid Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant and they could not have been removed from the premises until the discharge of the obligations under the said Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant. In the circumstances even without knowledge of the prior Bill of Sale, the removal of the items from the premises cannot be justified. So no cost of transportation can be claimed from the Plaintiff.

27. The items had got destroyed due to an act of god and in any event there is no cause of action for negligence or otherwise claimed in the statement of claim in order to seek such damages. Even to establish a claim for transportation of the items there is no cause of action against 2<sup>nd</sup> Defendant, revealed in the statement of claim for such a claim.
28. The Plaintiff is entitled to the possession of 7 items contained in the Bill of Sale. Out of that 7 items 5 items were subject matters of a subsequent Bill of Sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and these items are now in the possession of the 2<sup>nd</sup> Defendant, but as stated earlier these items belong to Plaintiff. So the Plaintiff is entitled to possession of the same from the 2<sup>nd</sup> Defendant without payment of any storage or other cost as they were removed from the initial premises without the Plaintiff's consent. There is no evidence that the Plaintiff had promised any payment for storage. In fact at cross-examination the 2<sup>nd</sup> Defendant said he did not want money from the Plaintiff but sought money for storage if it can be given to him as his house is very small. These items were belonged to the Plaintiff under the Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant, till the discharge of the said Bill of Sale. So initial removal without the consent of the Plaintiff was wrongful, hence no money can be claimed from the Plaintiff.

## **CONCLUSION**

29. The Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant was not discharged at the time of the seizure of the items by the 2<sup>nd</sup> Defendant. Hence, the items that are in possession of the 2<sup>nd</sup> Defendant belonged to the Plaintiff. Admittedly, these items were removed from the business premises of the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant without knowledge of the prior Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant. So, any request for refraining from the sale of the items were subsequent to the initial removal of the items done without the knowledge of the Plaintiff. So, the 2<sup>nd</sup> Defendant cannot claim storage fees or transportation fees from the Plaintiff as the said transport was not done with the consent of the Plaintiff. There is no cause of action revealed in the statement of claim against the 2<sup>nd</sup> Defendant for claim of money as per the prayers. Plaintiff cannot seek the relief



against the 2<sup>nd</sup> Defendant other than possession of the items belonged to them. The Plaintiff is granted a cost of \$1,000 assessed summarily.

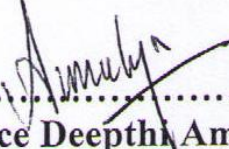
#### **FINAL ORDERS**

- a. The Plaintiff is entitled to the items stated in the Bill of Sale between the Plaintiff and 1<sup>st</sup> Defendant that are in the possession of the 2<sup>nd</sup> Defendant.
- b. Subject to the above, the statement of claim and the counter claim of the 2<sup>nd</sup> Defendant is struck off.
- c. The Plaintiff is entitled to cost summarily assessed at \$1,000 from the 2<sup>nd</sup> Defendant.
- d. The counter claim of the 2<sup>nd</sup> Defendant is dismissed.

There is no cause of action revealed

Dated at **Suva** this **19<sup>th</sup>** day of **September, 2014**.



  
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**Justice Deepthi Amaratunga**  
**High Court, Suva**