

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 42 OF 2015

BETWEEN : **KALABO INVESTMENTS LIMITED** a limited liability company having its registered office at 411 Fletcher Road, Nabua, Suva carrying on business in Suva and elsewhere in Fiji under the name and style of "Shop N Save Supermarket".

PLAINTIFF

AND : **BANK OF BARODA** a foreign Bank duly incorporated in the Republic of India and registered in Fiji under XII of the Companies Act (Cap. 247) with its principal place of business at Suva and carrying on banking business in Suva and elsewhere in Fiji.

DEFENDANT

Appearances : Mr B.C. Patel with Mr R. Singh for the plaintiff
Mr D. S. Naidu for the defendant

Date of Hearing : 27 & 28 November 2018

Date of Submissions : 14 December 2018 (by plaintiff) and 25 February 2019
(by defendant)

Date of Judgment : 13 March 2019

J U D G M E N T

Introduction

[01] The plaintiff brought this claim against the defendant seeking:

- a) *Judgment for \$99,800.00 being the value of the side loader.*

- b) *Judgment for \$84,000.00 for the loss of use of the side loader or such other sum as may be found due by this Honourable Court.*
- c) *Special damages of \$25,000.00.*
- d) *General damages for the defendant's deliberate, high handed and unlawful actions.*
- e) *Interest on the judgment sum from the date of seizure (26/1/13) to the date of judgment at the rate of 9% per annum compounded daily.*
- f) *Indemnity costs of this action.*

[02] The claim is based on trespass and conversion of the property.

[03] The defendant denied the claim and stated, among other things, that the plaintiff's claim against the defendant is misconstrued and wrong in law and as pleaded does not disclose any cause of action against the defendant.

[04] At the trial, three (3) witnesses gave evidence on behalf of the plaintiff and one (1) on behalf of the defendant and both parties tendered their respective documents in respect of their claim. At the end of the trial, counsel sought time to file their closing submissions. The court accordingly granted time for the parties to file and serve their respective submissions. Both parties have filed their respective submissions and the defendant has also filed a responding submission. I am grateful to counsel representing both parties for their extensive and valuable submissions. I was immensely assisted by their submissions.

The background

[05] I have gathered the background facts from the pleadings.

[06] According to the statement of claim, Kalabo Investments Limited, the plaintiff is a company carrying on business in Suva and elsewhere in Fiji under the name and style of "Shop N Save Supermarket". Bank of Baroda, the defendant is a foreign bank incorporated in the Republic of India and registered in Fiji under the Companies Act and carrying on banking business in Suva and elsewhere in Fiji; and operating a branch in Lautoka. It is alleged that the plaintiff was the owner of a Dommet 20 ft Swing Lift and a Dommet 2 Axle Semi-Trailer ("*side loader/side lifter/the property*") in good working condition. The defendant held a mortgage debenture charge over certain vehicles of Chandar Sen Brothers Transport Limited ("*Chandar Sen Brothers*"), a customer of the defendant at its

Lautoka Branch, as security for advances made by the defendant to Chandar Sen Brothers. The plaintiff's side loader was lawfully stored for safe keeping at Chandar Sen Brothers yard in Natabua, Lautoka. On or about Saturday 26 January 2013, the defendant, by its bank officers, wrongfully seized the plaintiff's side loader from Chandar Sen Brothers yard purporting to act under the authority of the mortgage debenture given by Chandar Sen Brothers. It is alleged that: despite request by the plaintiff to release the side loader the defendant refused to do so. The side loader was the property of the plaintiff and not of Chandar Sen Brothers and the defendant had no charge over or interest in the side loader. The defendant sold the side loader to one of its customers without making proper enquiry as to its owners or value and wrongfully converted the sale proceeds to its own use. As a result, the defendant has wrongfully deprived the plaintiff of the side loader and the use of it.

[07] It was on this background the plaintiff brought its claim for damages for wrongful derivation of the property and the use of it.

Defendant's case

[08] The defendant in its statement defence states: the defendant was not aware of and had no knowledge that the plaintiff's side loader was stored for safe keeping at Chandar Sen Brothers Yard in Natabua, Lautoka. The defendant was only a party to the seizure of items enumerated in the schedule to the debenture mortgages given and executed by the mortgagors Chandar Sen Brothers Transport Limited in favour of the defendant as mortgagee. The defendant did not act in a deliberate, high handed and unlawful manner as alleged and the plaintiff's claim against the defendant is misconstrued and wrong in law and as pleaded does not disclose any cause of action against the defendant.

Agree Facts

[09] At the Pre- Trial Conference ('PTC') held between the parties, the following are agreed facts:

1. *The defendant is, and was, at all material times:*

- (a) *A foreign Bank duly incorporated in the Republic of India and registered in Fiji under Part XII of the Companies Act (Cap. 247) with its principal place of business a Suva and elsewhere in Fiji; and*
 - (b) *Operating a branch in Lautoka.*
2. *At all material times the defendant held, inter alia, a mortgage debenture charge over certain vehicles of Chandar Sen Brothers Transport Limited ("Chandar Sen Brothers"), a customer of the defendant at its Lautoka branch, as security for advances made by the defendant to Chandar Sen Brothers.*
3. *The plaintiff operates its business under the name and style of Shop & Save Supermarket.*

Issues to be determined

[10] The issues to be determined as agreed between the parties are as follows:

4.
 - (a) *Was the plaintiff the legal owner of the side loader (being Dommet 20ft Swing Lift and a Dommet 2 Axle Semi-trailer).*
 - (b) *Did the defendant wrongfully seize the side loader on 26 January 2013, while it was parked at Chandar Sen Brothers yard?*
 - (c) *Whether the side loader was parked there lawfully.*
5.
 - (a) *If wrongly seized then were the actions of the defendant deliberate, high handed and unlawful in seizing and/or selling the side loader?*
 - (b) *Was proper inquiry as to the ownership or value of the side loader made or determined by the defendant. Did the plaintiff ask for its release before its sale?*
6. *Is the plaintiff entitled to loss of use and special and general damages, and if so, for what amounts?*
7. *Should the defendant pay compound interest on the judgment amount? If so, for what period and at what rate?*
8. *Is the plaintiff or the defendant entitled to indemnity costs of this action?*

The Evidence

Plaintiff's evidence

- [11] Plaintiff called 3 witnesses, Rakesh Kumar (Logistic Manager) ('PW1'), Salendra Prasad ('Businessperson') ('PW2') and Anish Kumar ('PW3') in support of its case. Some 16 documents were marked on behalf of the plaintiff ('PE1'-'PE16'). I will state where necessary what each of the witnesses stated in evidence shortly in my discussion.

Defendant's evidence

- [12] The defendant called one witness namely Sailesh Naidu (Trade Unionist), ex bank officer ('DW1'). Three documents were marked on behalf of the defendant- 'DE1', 'DE2 (A)' and 'DE2 (B)'.

Discussion

Whether there was conversion by the defendant

- [13] Firstly, I would deal with the primary issue. The primary issue in this case is whether the defendant wrongfully seized the side loader (the property or the side loader) on 26 January 2013, while it was parked at Chandar Sen Brothers yard and sold or gave it to Autocare without any enquiry as to its ownership.
- [14] It was common ground that the property in dispute was parked at Chandar Sen Brothers yard in Natabua, Lautoka, which is the main place of business of Chandar Sen Brothers.
- [15] It was also common ground that the defendant held a mortgage debenture charge over certain vehicles of Chandar Sen Brothers, a customer of the defendant at its Lautoka Branch, as security for advances made by the defendant to Chandar Sen Brothers.
- [16] It is of note that the side loader was parked in the yard along with other vehicles owned by Chandar Sen Brothers and that it had no registration number to be used on the road, i.e. it was not registered with the Land Transport Authority

('LTA') and the same was never given to the defendant by the plaintiff for safe keeping.

- [17] The defendant as mortgagee seized the vehicles owned by Chandar Sen Brothers which included the property in question, exercising its right under the mortgage debenture charge over the vehicles. For the present purpose, I would say the defendant bank as the mortgagee was entitled to pursue its rights and/or remedies by way of mortgagee sale under the agreement it had with Chandar Sen Brothers because a mortgagee has the power of sale immediately upon or at any time after default in payment.

Whether the plaintiff was able to establish its ownership of the side loader

- [18] The plaintiff was claiming the side loader to be theirs under the mortgagee sale. Therefore, the burden of proof of its ownership was on the plaintiff. The question is whether the plaintiff was able to discharge this burden.
- [19] All of the properties of Chandar Sen Brothers including vehicles were seized under mortgagee sale. Any third party claiming to exclude certain property from the mortgagee sale must establish that that property is owned by him or her and not owned by the mortgagor.
- [20] PW1, who is a logistic manager of the plaintiff based in Lautoka, gave evidence on behalf of the plaintiff. He testified that:
- i. The side lifter was purchased in 2002 by Kalabo's predecessor Lami Investment Ltd from Growers International of Brisbane Australia (Grocers International Invoice *PE 4*).
 - ii. The side lifter arrived at Lautoka Wharf on 29 May 2002. (Bill of Lading – *PE 1*).
 - iii. He said the side lifter remained at Veitari yard until about 2011 when it was moved to Chandar Sen's yard due to lack of space at Veitari yard.
 - iv. He visited Chandar Sen's yard virtually daily to access Kalabo's dry goods containers and saw the side lifter parked next to the office building.
 - v. He said it was a red 20ft side lifter which had 2 peculiarities – the engine was in the middle compared to other side lifters who had theirs either in the front

or at the back and its hydraulic levers were unique in that no other side lifter in Fiji had such levers.

- vi. He produced Exhibits **PE 1 to PE 5** as proof of Kalabo's ownership of the side lifter at Chandar Sen's yard (PE 5 was the Invoice from Lami to Kalabo transferring ownership to the latter).

Under cross-examination PW1 stated:

- vii. The loader was purchased on 29/5/02. It wasn't used as there was no tractor head. It was never registered with LTA and it was not operational. The document was sent to him by the Suva office. He admitted that there was no date on the document. Kalabo did not import the side loader. Lami Investment Ltd imported it.
- viii. He admitted that P5 is dated 31/12/03 – 19 months after the side lifter came into the country.
- ix. He took a letter from the Director of Chandar Sen Brothers Ltd that the side loader belongs to Kalabo. When suggested that there was no such letter, he said: *'there was a letter and I put it inside the envelope'*.
- x. He said he took the Bill of Lading to Sailesh Naidu.

He was asked:

- xi. Q: I put it to you that that incident never took place. You never went to Sailesh Naidu or gave him (a letter) or tried to give him the Bill of Lading 3 weeks later?

A: I met Sailesh Naidu face to face and they (he) said: *'it's too late now'*.

- xii. Q: Did you ever write to the bank in regards to this from the company letterhead?

A: I am not aware of that.

[21] Sailesh Naidu (DW 1), ex officer of the defendant gave evidence on behalf of the defendant. In his evidence, he states:

- i. In January 2003, he was working in Bank of Baroda, Lautoka branch as the Customer Services & Marketing officer. Chandar Sen Bros had borrowed \$2.7m

from the bank and all the assets of Chandar Sen Brothers was covered under security documents-mortgages debenture document.

- ii. He with some other bank staff of the bank and the bailiffs went to secure the assets of Chandar Sen Brothers because we had called for a mortgagee sale and there was a risk the bank could lose some of their assets because of the advertisement in the newspaper to sell the property under mortgage.
- iii. When we seized the yard there were some items which belonged to Shop N Save (plaintiff) in the yard which they did come and claim from us. He said he released certain containers to Shop N Save.
- iv. He asked them (Rakesh) for the shipment documentation and in this case since it was an imported item, the best way to verify the shipping documents and the information available in the Bill of Lading if these documents would match then only (I) he would release the containers. Mr Rakesh in the Shop N Save was dealing with the containers.
- v. Anish Kumar, one of the Directors of Chandar Sen Bros did not give him any letter in regards to the ownership of items on the yard.
- vi. He said Shop & Save did not write any letter stating that they had a side lifter on the yard.
He said in cross-examination that:
- vii. He said Rakesh didn't come and see him in the branch, but he came a few times (one or two or three times) while he was in the yard.
- viii. Rakesh came soon after 26th, 'I would presume a Monday or Tuesday' because they had their goods in there which they wanted to uplift. He told Rakesh to produce the necessary documents for the containers which should include, shipping documents and the most important would be the copy of the Bill of Lading which should give the specification of the container.
- ix. Rakesh did mention another item (a side lifter of Kalabo) for that he said to bring in ownership documents.
- x. Rakesh brought documents for the containers.
- xi. He said:
Q: And he (Rakesh) told you that it will take some time to get the Bill of Lading for side lifter?
A: He said that they will have to look for the documents because this has been lying for a while.
Q: And did you at that time say well in that case it will take a while if you get me a letter from Chandar Sen to say that this doesn't belong to them?
A: No, I didn't say that, because the trust level was not there between the customer (Chandar Sen) and the bank at that point in time.

Q: And he (Rakesh) said to you very clearly that this (document) relates to the side lifter, correct?

A: The other items which had documentation were released. This claim was of an equipment which looked like a side lifter, mutilated or wrecked piece of item in the yard and specifically under my responsibility, I was supposed to ask for documentation, they have to produce it and when the documentation matched with that particular item, I would have released those assets of course which would have attracted some storage charge etc.

Q: Mr Naidu I need to still put it to you that Rakesh Kumar did come with a Bill of Lading to you but you refuse to see it and you said to him, it's too late?

A: No, he did not visit me in the bank or with any documentation in respect of this side lifter.

Q: I will also have to put it to you that some weeks earlier after he had given you the Bill of Lading for the containers, you refused to accept the envelope which he gave to you from the bank from Anish Kumar?

A: No.

Q: So what happened with this unregistered side lifter which Rakesh Kumar wanted it but you didn't give it to him because he never brought the documents, what happened to it?

A: It was still lying in the yard till we were involved in the transactions, meaning until the bank sold everything to Autocare.

[22] When Anish Kumar giving evidence on behalf of the plaintiff states:

- i. He told Sailesh Naidu of Bank of Baroda (DW1) the side loader belongs to Kalabo (plaintiff). He (DW1) said: *'Not to worry. It's not your problem.'*
- ii. He said he has issued proceedings against Bank of Baroda and it is still pending.
- iii. He said Rakesh (PW1) came to get a letter for his container and side loader for the bank that Kalabo's side loader and container were on the yard. He said: *'I gave the letter. He (PW1) told me that he (PW1) gave the letter to the bank. The container was released.'*

[23] Under cross-examination Anish Kumar states that: *'I did give the letter. I don't have a copy. It was typed by an internet shop. One of our boys dictated it. I signed the letter. I gave the letter in the first week of February (2013). I gave it in a sealed envelope.'*

Submissions on the ownership of the side loader

- [24] Mr Patel, counsel appearing for the plaintiff submits that Sales Naidu (DW1) was aware of the plaintiff's claim to the side lifter. Sales Naidu was also aware that Rakesh Kumar (PW1) was trying to retrieve the Bill of Lading for the side lifter and that it would take some time. Sales Naidu knew that the side lifter did not belong to Chandar Sen Bros or the defendant.
- [25] Mr Naidu, counsel for the defendant on the other hand submits that: The evidence by PW 2 (Salendra Prasad) the customs agent who cleared the item clearly shows that it was not the plaintiff who had imported the item but rather Lami Investments Ltd (LIL). Regardless of both being sister companies yet there is no evidence adduced by the plaintiff in the form of tax returns that this particular items was declared as its property on its books from the time it allegedly acquired ownership to date of alleged seizure by the defendant Bank. In its claim under tort of conversion the plaintiff needs to prove ownership and that the plaintiff has to prove this as both the plaintiff and LIL are incorporated companies as they have the use of the word 'Limited' as in the customs documents tendered by PW 2, therefore it is crucial to the plaintiff's case to establish ownership and it has failed to do so.
- [26] It is true that the side loader was imported by LIL and not the plaintiff company. The Bill of Lading clearly confirms this.
- [27] Kalabo's container and side loader was parked in the Chandar Sen Bros' yard at the time when the defendant bank take over possession of the yard including properties thereon under mortgagee sale. The defendant bank asked documents from Kalabo in order to release the container and the side loader. The plaintiff was able to produce documents in respect of the container and it was released to the plaintiff. This clearly demonstrates *bona fide* intention of the defendant bank.
- [28] The plaintiff did not provide proper document establishing that the side loader belongs to the plaintiff. The plaintiff was struggling to furnish the document for the side loader. The whole problem with the side loader was that it was imported by LIL and it was never registered with the LTA for road use until the Chandar Sen Bros' yard seized under mortgagee sale on 26 January 2013. The side loader had been parked in the Chandar Sen's yard since its importation in 2002.

- [29] DW1 said in his evidence that Rakesh (PW1) never brought any document relating to the side loader while he was in the yard assisting the bailiff in execution of the mortgagee sale and that he only brought the documents relating to the container and it was released. DW1 was consistent and he gave straightforward evidence and answered cross-examination questions clearly and swiftly. For these reasons, I find his evidence credible.
- [30] PW 1 in his evidence that he obtained a letter from Anish Kumar (PW3), one of the directors of Chandar Sen Bros that the side loader belongs to Kalabo, he put it in an envelope, took it to Sailesh Naidu (DW1) and he refused to accept it saying that it was too late. In evidence PW1 said Anish Kumar (PW3) gave the letter and he (PW1) put it in an envelope and took it to Sailesh Naidu. Later, in his evidence, he changed this position and said Anish Kumar gave a sealed envelope. PW1's evidence was inconsistent and he contradicted himself.
- [31] PW3 (Anish Kumar) was one of the directors of Chandar Sen Bros against which the defendant bank executed the mortgage sale. He clearly stated in cross-examination that he was not happy with the defendant and issued proceedings against the defendant bank which is still pending in court. PW3 appears not to be an independent witness. I would place little reliance on his evidence.

Conclusion

- [32] On the evidence, I would find the defendant bank was exercising its rights under mortgagee sale over Chandar Sen Bros' properties on 26 January 2013. The unregistered side loader was parked in the Chandar Sen Bros' yard. It was seized under mortgagee sale on the basis that it was Chandar Sen Bros' property. If the plaintiff claims the side lifter to be theirs, the burden was on them to prove that they are the owners of it. I conclude that the plaintiff was failed to discharge this burden. This translates that the defendant had failed to establish their ownership of the side loader before the mortgagee sale proceeded. Presumably, even if we accept that PW1 gave the letter given by Anish Kumar (PW3), one of the directors of Chandar Sen Bros that the side loader does not belong to them (Chandar Sen) to Sailesh Naidu (DW1), the defendant could not have acted upon that letter because the mortgagee sale was against Chandar Sen Bros.

[33] I would, on the evidence, find that there was no conversion of the property on the part of the defendant bank. As a result of my finding, the claim of conversion of the property advanced by the plaintiff fails and should be dismissed with costs which I summarily assess at \$2,500.00. I have assessed the costs having taken all into my consideration.

[34] In view of my conclusion and finding, I think I need not consider other issues relating to assessment of damages.

The outcome

1. Plaintiff's claim dismissed.
2. Plaintiff shall pay summarily assessed costs of \$2,500.00 to the defendant.

M. H. Mohamed Ajmeer
13/3/19

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M. H. Mohamed Ajmeer

JUDGE



At Lautoka

13 March 2019

Solicitors:

For the plaintiff: Messrs Young & Associates, Solicitors

For the defendant: Messrs Pillai Naidu & Associates, Barristers & Solicitors