IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION
CIVIL ACTION NO. HBC 01 OF 2019

BETWEEN: **TAIYAB ALI**

PLAINTIFF

AND: **SALADOKA SERU CAKABOU aka RATU SALADOKA SERU CAKABOU**

1ST DEFENDANT

AND: **ORANGE COAST INVESTMENT LIMITED**

2ND DEFENDANT

Appearance: Plaintiff - Mrs. Raj A.
2nd Defendant - Mr. Ram A.

Date of Hearing : 20th January, 2020
Date of Judgment : 14th February, 2020

JUDGMENT

Introduction

[1] Plaintiff's vehicle was met with an accident with another rented vehicle driven by first Defendant. After personal service of the writ of summons and statement of claim to first

Defendant, an affidavit of service was filed on 31.1.2019. There was no acknowledgment of service by first Defendant, within the time period stipulated in Order 12 rule 4 of the High Court Rules of 1988, and interlocutory judgment was entered on 6.5.2019 in terms of Order 13 rule 5 of the High Court Rules of 1988. (This judgment is indicated as "judgment by default" in case record). The Plaintiff is also seeking damages against the rental company, second Defendant, on "vicarious liability"[1]. Second Defendant had denied vicarious liability in the statement of defence, and states that first Defendant was neither servant nor an agent of second Defendant. In order to obtain judgment against second Defendant, vicarious liability needs to be proved. It is an admitted fact that second Defendant was registered owner of the vehicle LR 1323 which collided with Plaintiff's vehicle and at all material time it was rented to first Defendant. ***Bans v Jan's Rental Cars (Fiji) Ltd*** [1992] FJ Law Rp 20; [1992] 38 FLR 158, it was held that rental company of the vehicle given on hire, is neither an employer nor principal of the hirer, hence claim based on vicarious liability is struck off.

Analysis

[2] It is an admitted fact that second Defendant was a legal entity that owns and operates a vehicle rental service under the name and style 'Vanua Rental' and was the registered owner of vehicle registration no LR 1323. There is no dispute as to renting said vehicle to first Defendant on 24.12.2016.

[3] At all times material to this case vehicle registration no LR1323 was rented to first Defendant and it was under the control of first Defendant when it collided with the Plaintiff's vehicle.

[4] At the hearing Plaintiff gave evidence regarding damage to the vehicle. Apart from him driver of Plaintiff's vehicle and the Police Officer who had drawn the initial sketch of the accident scene also gave evidence.

[5] Second Defendant's manager gave evidence and said vehicle registration no LR 1323 was rented to first Defendant and after accident he had neither reported the accident nor returned the vehicle. Both parties filed written submissions.

[1] See paragraph 3 of the Statement of Claim

[6] In terms of statement of claim second Defendant was named as a party to the action on the basis of 'vicarious liability' due to the actions of the first Defendant, but has not specified whether vicarious liability was due to the actions of the first Defendant as an agent or an employee. It is also not in dispute first Defendant was only a hirer of vehicle hired by second Defendant.

[7] In ***Bans v Jan's Rental Cars (Fiji) Ltd*** [1992] FJ Law Rp 20; [1992] 38 FLR 158 it was held that a hirer of a vehicle cannot be considered as agent or an employee of the entity whose business is to hire vehicles for a fee. This decision was applied in a recent judgment of Kumar J (as his lordship then was) in the case of ***Jan's Rental Cars (Fiji) Ltd v Nand*** [2016] FJHC 73 (decided on 27 January 2016).

[8] Plaintiff or witnesses called for Plaintiff, in evidence did not state anything regarding second Defendant. It is an admitted fact that second Defendant had rented vehicle registration number LR 1323 to the first Defendant on the date of accident for a fee.

[9] In the statement of claim Plaintiff did not claim direct liability, that second Defendant was negligent in its actions as a vehicle renting entity (eg. LR 1323 was not properly maintained and or vehicle was rented to a person who did not have a driving licence, and the accident was due to the negligence of second Defendant). The liability of the second Defendant was pleaded on the basis of **vicarious liability**.

[10] Second Defendant in the statement of defence had denied vicarious liability and stated the first Defendant was neither an employee nor an agent of theirs.

[11] In order to prove vicarious liability there should be a relationship between two Defendants. This is not pleaded in the statement of claim.

[12] Court of Appeal in ***Ali v Patterson Brothers Shipping Co. Ltd*** [2015] FJCA 138 (decide on 2 October 2015) emphasised the importance of pleadings and held,

'[38] ***The purpose of a Statement of Claim is to inform the other party of the case against him. This imposes an obligation to inform the defendant in the simplest terms of the case the defendant has to meet and for the court to be able to see what the issues are.*** *In the case of* ***The New India Assurance Company Limited v Fiji Development Bank & Brigtspot Fashions Limited*** *(2008) ABU 75/07 (apf HBC 299/03S) it was held that "Pleadings in civil cases are no mere technicality. They are fundamental to the administration of justice in civil causes. They set out the position of the parties. They define the scope of the litigation .Pleadings identify with precision who is making the claim and who is said to be liable." In* ***Rajeshwar Dayal & Others v Watisoni Vunivi & Others*** *FCA Civil Appeal Nos. 46 of 1991, 25 of 1992 and 66 0f 1991 this Court held that when a pleading does not adequately direct attention to an issue, the issue will not be entertained by the Court. In that case negligence in providing seating arrangements had not been specifically pleaded and was not allowed. In* ***S. L. Shankar v Fiji Foods Ltd****, Court of Appeal No. 113 of 1985 this Court held: "The misleading state of the respondent's pleadings in the present case resulted in the Appellant being left to face Court with a defence which it could not have anticipated or been expected to meet, resulting in substantial miscarriage of justice...." In* ***Clarke v Marlborough Fine Art (London) Ltd*** *(2002) 1 WLR 1731 it was held a claim with contradictory facts should not be permitted. I am of the view that the Statement of Claim in this case contained contradictory facts as stated at paragraph 7 above and did not inform 'Faiyaz, the case he had to meet and was misleading. 'Faiyaz' in his Statement of Defence had averred that there is no cause of action pleaded against him. Although Counsel for 'Zahid' argued before us that 'Faiyaz' had failed to testify at the trial, in my view it was not necessary for him to give evidence at the trial in view of the pleadings."*(emphasis added)

[13] In ***Pal v Ise Lun trading as Wing Fat Bakery*** [1971] 17 FLR 8 (19 February 1971) held that onus rested with the Plaintiff to prove that vehicle was driven by a servant or agent of Defendant to impute vicarious liability.

[14] Second Defendant cannot be imputed vicarious liability being the registered owner of the vehicle registration number LR 1323. It is an admitted fact that second Defendant is a vehicle

renting entity and during all times material to the motor accident vehicle was with the hirer, who was the first Defendant. He had not informed about the accident to the second Defendant and had not returned the vehicle as per the agreement.

[15] There is no evidence that the hired vehicle was used for a purpose required by second Defendant. First Defendant is neither an agent nor an employee of the second Defendant. The relationship between two defendants are hirer and hiree.

[16] Pleadings lack this important aspect as to the relationship between the parties to plead vicarious liability. It is not every owner of a vehicle, vicariously liable for accidents happening from the vehicle. There is no liability imputed to ownership of a vehicle. Plaintiff must state the relationship of the person who was negligent to another person to claim vicarious liability. This is vital for the defence of the person who was alleged to be vicariously liable.

[17] In this case second Defendant should know why it should be vicariously liable for.

[18] There is no dispute that second Defendant had not employed first Defendant. So there is no employer and employee relationship to impute vicarious liability.

[19] ***Mohamud v WM Morrison Supermarkets Plc*** (Rev 1) [2016] UKSC 11 (2 March 2016) [2016] AC 677 UK Supreme Court dealt with the issue of vicarious liability. After discussing several authorities formulated the present law on vicarious liability as follows;

> "*the present law*
>
> > *44. In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly; see in particular the passage in Diplock LJ's judgment in* ***Ilkiw v Samuels*** *[1963] 1 WLR 991, 1004 included in the citation from* ***Rose v Plenty*** *at para 38 above, and cited also in Lister by Lord Steyn at para 20, Lord Clyde at para 42, Lord Hobhouse at para 58 and Lord Millett at para 77.*

45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. ***Lloyd v Grace, Smith & Co, Peterson and Lister*** *were all cases in which the employee misused his position in a way which injured the claimant, and that is the reason why it was just that the employer who selected him and put him in that position should be held responsible. By contrast, in* ***Warren v Henlys Ltd*** *any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant."*

[20] In ***Mohamud v WM Morrison Supermarkets Plc*** (supra) Lord Dyson in concurring decision held,

"In ***Various Claimants v Catholic Child Welfare Society*** *[2012] UKSC 56; [2013] 2 AC 1 Lord Phillips said at para 19 "****the law of vicarious liability is on the move****". It is true that there have been developments in the law as to the type of relationship that has to exist between an individual and a defendant for vicarious liability to be imposed on the defendant in respect of a tort committed by that individual. These developments have been a response to changes in the legal relationships between enterprises and* ***members of their workforces*** *and the increasing complexity and sophistication of the organisation of enterprises in the modern world. A good example is provided by the facts of the Catholic Child Welfare Society case itself."* (emphasis added)

[21] Instead of selling a thing where buyer gets ownership, there are various instruments created to provide usage without transferring ownership. Renting, leasing, hire purchase, sale-lease back, are some. Depending on the purpose, time period, availability of cash, convenience are some of the reasons to opt for such arrangements without purchasing outright. In this instance first

Defendant had rented a vehicle owned by second Defendant for a fee. Once the vehicle is released it should be returned back to them after expiration of time period. Rental is paid for the time period. It is the responsibility of the hirer to use the vehicle carefully. Second Defendant is only a provider of vehicle for a time period and it cannot direct how hirers use or drive it once it had passed their premises. The fact that some conditions are contained in the rental agreement are not sufficient to impute vicarious liability. Those are minimum conditions for which hirer agrees but cannot be considered as directions to hirer to impute vicarious liability. So no vicarious liability can be imputed to the owner.

[22] So, it is clear that a person who drove a vehicle after acquiring it on rent is not an agent or a servant of the hirer. Second Defendant is in the business of providing vehicles on hire for a fee. It is an admitted fact that first Defendant was never an employee of second Defendant, and he cannot be considered as an agent, too. In the circumstances there is no reasonable cause of action proved against second Defendant.

[23] In the reply to statement of defence of the second Defendant Plaintiff had admitted that vehicle LR 1323 was rented to the first defendant, but state that terms of the hire was to indemnify first Defendant against any loss provided that he abided by the terms of the hire and paid excess.

[24] This again fall short of explaining as to the liability of second Defendant for the damages from the accident. Plaintiff never adduced such evidence at the hearing and had not referred to any clause of the rental agreement. In the written submissions filed there is no reference to any clause in the rental agreement or how it becomes relevant to the Plaintiff's action based solely on vicarious liability in terms of the statement of claim.

[25] Plaintiff had not complied with Order 37 rule 1 High Court Rules 1988, in order to assess damages against first Defendant. Plaintiff had failed to serve the interlocutory judgment to the first Defendant in terms of Order 42 rule 8 of the High Court Rules 1988. So, there are two irregularities, to deal with interlocutory judgment and proceed to assessment.

[26] Order 35 rule 1 (2) of high Court Rules allow court to proceed with trial in absence of a party. Irrespective of irregularity as to interlocutory judgment not being served within stipulated time, court can proceed against party in default disregarding interlocutory judgment, as entering interlocutory judgment in terms of Order 13 rule 5 of High Court Rules 1988 was an optional remedy available to save cost and time of all parties. Once this is done it is mandatory to serve it in terms of Order 42 rule 8 of the High Court Rules 1988. This is to notify any party that there is a judgment entered through default, allowing such party to make appropriate application to court to set it aside. If this is not done purpose of entering a interlocutory judgment is lost.

[27] Again Plaintiff is required to serve a notice of assessment of damages to defaulting party in terms of Order 37 rule 1(1) of High Court Rules 1988. This is notify that there will be further sum that will be reassessed and judgment entered accordingly.

[28] Plaintiff had neither complied with Order 42 rule 8 of High Court Rules 1988 nor with Order 37 rule 1(1) of High Court Rules 1988. In the circumstances I proceeded with Order 35 rule 1(2) of High Court Rules 1988 as a party who is absent against first Defendant.

[29] Imran Ali in his evidence proved that accident was due to 1st Defendant's negligence. He explained the manner in which accident happened and he was cross examined by Second Defendant. His credibility is not shaken by cross examination.

[30] Imran Ali explained the manner in which first Defendant drove the vehicle and also how behaviour of the First Defendant after accident. He had seen the dangerous manner of incoming vehicle and he had stopped his vehicle and taken it to side of the road to prevent collision.

[31] The Police officer who arrived to the scene after accident also confirmed unruly behaviour of the first Defendant who has gone from the scene without making a statement to police. He said first Defendant was not controllable at that time and he had left the scene after he arrived.

[32] I admit Imran Ali's evidence as the manner in which accident happened. Accident happened due to excessive speed of vehicle LR 1323. The accident happened after vehicle driven by Imran Ali

was stopped. He said that he stopped after he saw the manner in which LR 1323 was driven. So accident happened due to negligence of First Defendant.

[33] Plaintiff's vehicle was severely damaged and extensive repairs were carried out. Plaintiff produced receipt for repairs amounting to $19,650.00. A quotation for said amount was produced and payment receipts were also produced.

[34] After accident vehicle was towed to police station and then to home and this $950 payment and receipt produced.

[35] Due to extensive damage to the vehicle value of the vehicle had deprecated. Plaintiff said that he repaired it despite advice that it was written off from a reported garage. He said that he did it because he needed that vehicle as it was used to provide transport for a hotel. Plaintiff said that they would earn about $80 for a day from such hiring.

[36] Though the vehicle was repaired without writing off, it is clear that its value had depreciated due to defects that could not be repaired. For an example, he said that transmission oil could be changed due to changes in the internal parts that were permanent in nature. This will significantly devalue vehicle.

[37] Plaintiff had produced quotation for value of his vehicle before and after accident difference is $16,000.

[38] Plaintiff is also granted a cost of $3,000 to be paid by first Defendant, assessed summarily. Plaintiff has not sought interest in the statement of claim, so no interest is granted for the damages.

Assessment of Damages

[39]

Hire for tow truck	-	950
Loss of income for 6 months	-	14, 400

(180 x 80)		
Depreciation in value due to Accident	-	16, 000
Cost of Repairs	-	19, 650
	-	51, 000

a. Action against second Defendant is struck off.

b. Plaintiff is awarded damage against first Defendant for a sum of $51,000.

c. Plaintiff is also granted a cost of $3,000 to be paid by first Defendant within 21 days.

Deepthi Amaratunga

Judge