

In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 238 of 2006

Sultan Mohammed Khan

Plaintiff

v

The Official Receiver

First Defendant

Fiji Islands Maritime Safety Administration

Second Defendant

Counsel: Mr Devanesh Sharma for the plaintiff
Ms P. Prasad with Ms O. Solimailagi for the first defendant
Ms A. Waqanivalu for the second defendant
Date of hearing: 7th October, 2020
Date of Judgment: 2nd September, 2022

Judgment

1. The plaintiff states that he is engaged in the business of shipping. Khan Shipping Co Ltd.(KSC) tendered on his behalf to Colonial National Bank for the purchase of motor vessel "Neha" in a sum of \$20,000.00 VIP on an as is where is basis. The tender was accepted. KSC paid the price. On 27 July, 2005, KSC lodged two Bills of Sale, (BoS) with the second defendant for the transfer of the vessel from the Bank to itself and then to the plaintiff. KSC also applied to have its name changed to "Temauri". On 18th October, 2005, the second defendant issued a Certificate of Fiji Registry,(CFR) to KSC.

2. The amended statement of claim continues to state that on 13th December, 2005, the second defendant endorsed the plaintiff as the sole registered owner of the vessel on the back of the CFR. On 23rd December, 2005, it issued a Coasting Trade License confirming his ownership. On 20 December, 2005, and 21 February, 2006, it issued survey certificates showing that KSC was the owner. On 17 March, 2006, it advised the plaintiff that the vessel was transferred to him on 27 October, 2005. In April, 2006, when his crew was getting ready to make a trip to Lomaiviti, a Bailiff showed him an Order of Court and seized the keys of the vessel. The Order provided that the vessel was vested in the first defendant. The first defendant invited tenders and sold the vessel. The plaintiff states that he had the sole temporary franchise for routes in Lomaiviti and Southern Lau and was in the process of signing a contract with Fiji Shipping Corporation Limited to cover these routes for a period of three years. He has suffered loss of daily cargo charges and passenger fares on the temporary franchise. He claims special damages of loss of the vessel in a sum of \$285,000.00 and \$720,000.00, as loss of a franchise contract for 3 years @ \$20,000.00 per month.
3. The amended statement of defence of the first defendant states that KSC did not have a right to transfer any of its assets six months prior to the petition to wind it up was filed. Any purchase becomes an asset of the company, in terms of section 313(1)(2) of the Companies Act. The transfer and subsequent transaction to the plaintiff is void and fraudulent, as it was done when there was a petition and subsequent winding up order against KSC.
4. The second defendant, in its statement of defence disputes that the vessel was transferred from KSC to the plaintiff on 27th July, 2005, as the transfer from the Bank to KSC had not been completed. The law firm representing KSC and the Bank were advised that a transfer of ownership must be completed on a BoS, in terms of the Marine Act. The CFR of 18th October, 2005, provides that KSC was owner of the vessel. The fees for the transfer of ownership from KSC to the plaintiff were not paid until 12th December, 2005. The transactions carried out by KSC were fraudulent and void, as there was a winding up case against KSC, which prohibited KSC from dealing with its assets. The second defendant could not entertain the plaintiff's request to rectify its record after the decision to wind up was made.

The hearing

The plaintiff, (PW1)

5. PW1 in evidence in chief produced the two BoS and the CFR referred to in his claim . He said that at the back of the CFR in his possession, it was stamped that he was the owner. He received a receipt in his name for the change of ownership. Next, he produced a receipt dated 12th December,2005, of payment to the Registry, which he said was to show his name on the vessel. On 13th December,2005, he was issued a change of ownership document stating that he was the owner. On 23 December, 2005, the second defendant issued a Coasting Trade License confirming his ownership. The second defendant, in its letter of 17th March, 2006, informed him that KSC was wound up on 12th October,2005, the vessel was transferred to him on 27th October, 2005, and registered in his name on 13th December,2005. PW1 said that was incorrect, as it was transferred to him on 27th July,2005.

6. He filed an official complaint that the documents at the Registry of Ships had been tampered with. Singh J in his Order stated that the winding up petition was filed on 25thMarch,2004, judgment was delivered on 7th February,2005, and once judgment was delivered, KSC could not deal with its property. The Order of the Court vested the vessel with the first defendant, not the ownership. His vessel was unlawfully seized and advertised for sale. The plaintiff said that he bought the vessel, as Fiji Shipping Corporation Ltd was offering two franchises. He lost the sum of \$20,000.00 he spent on the vessel. He upgraded the vessel to a standard acceptable by the franchise committee. The vessel was valued at \$285,000.00. His loss was \$285,000.00. The vessel was unlawfully taken from him and sold. He lost his franchise. He claims special damages.

7. In cross examination by Ms Solimailagi, counsel for the first defendant, the plaintiff agreed that the first defendant would have authority to seize and sell the vessel, as Singh J in Winding up case no.39 of 2004 ordered the vessel to be vested with the first defendant. He made an application with respect to the vesting order in that case, as he wanted his vessel back. The vesting order was not set aside. He agreed that on the basis that KSC was wound up on 7th February,2005, KSC should not have transferred the vessel to him.

8. In cross examination by Ms Waqanivalu, counsel for the second defendant, the plaintiff disagreed that the change of ownership occurred on 27th October, 2005. KSC made payment to have the vessel transferred to him, discharge of mortgage and change of name. He agreed that KSC had the right to transfer the vessel from 18th October, 2005, in terms of the CFR, which provides that the ship belonged to KSC. The second defendant would only facilitate the request to have the vehicle registered only on payment of the necessary fees. It was put to the plaintiff that he only paid for ownership in his name on 12th December, 2005, and that the endorsement on the CFR provides that he is the sole registered owner of the vessel from 13th December, 2005. He did not agree. It transpired that he did not report to the Police that the CFR was tampered with. He said that he reported it to the Registrar of Ships. He was given the Coasting Trade License of 23 December, 2005, as the vessel was transferred to him on 13th December, 2005. He agreed that the ship was not in a good condition when he bought it and required major repair works. He was not awarded the franchise contract. He had a temporary trial run franchise.. He denied that he did not have insurance cover for the vessel.
9. In re-examination, the plaintiff said that from December, 2005, the second defendant recognized him as owner. The vesting order was made without notice to him. The Ship Register does not state that a BoS of July, 2005, was received transferring the vessel to him. In answer to Mr Sharma, he agreed that he was charged a set of fees not to transfer the vessel, but to record a change of ownership and for that reason his name appears in December. He lost the opportunity to trade when the vessel was seized. He was performing a temporary franchise when the vessel was seized. He bought a second hand engine. Repairs took him 5 months.
10. DW1, (*Shelwyn Prasad, Official Receiver*) in evidence in chief said that KSC was wound up on 7th February, 2005. Singh J set aside the order for stay of the winding up of KSC. His office informed the second defendant that KSC was wound up. The CFR provides that as at 18th October, 2005, KSC was the owner of the vessel. The first defendant informed the second defendant that the High Court made order that the vessel was vested with the Official Receiver. The vessel was seized from KSC. The vesting order was not set aside.

11. In cross examination, he said that the CFR did not reflect a transfer by KSC to the plaintiff on 27th July, 2005. In December, 2005, the Ship Registry recorded that the plaintiff was the owner of the vessel. It was put to him that the CFR is a registration document, not a document of ownership. The plaintiff was not consulted before the vesting order was made, as they were only concerned with the wound up company. He was unaware whether a valuation was made before the vessel was sold.

12. DW1 was re-examined on the effect of the Order made for winding up of 7th February, 2005, the Order of 23rd September, 2005, and section 313(1)(2) of the Companies Act.

DW2, (Sekonia Takavesi, Ship Registration Officer of the second defendant)

13. DW2 in evidence in chief explained the requirements for the transfer from the Bank to KSC and KSC to the plaintiff. She referred to the receipt dated 12th December, 2005, (as produced by the plaintiff) for payment for change of ownership of the vessel, discharge of mortgage and change of name. The CFR provides that the vessel was transferred to KSC on 18th October, 2005. It was transferred and registered to the plaintiff on 13th December, 2005. A change of the name is endorsed on the back of the CFR. A survey certificate determines the seaworthiness of the vessel, while the CFR confirms the registered owner of the vessel.

14. Mr Sharma put it to this witness that the CFR states that it is not a document of title. It transpired that the second defendant did not have a record of any response to the plaintiff's letter of March, 2006, stating that the documents have been tampered with.

15. In cross examination by Ms Solimailagi, DW2 was referred to the letter from the first to the second defendant of 20th April, 2006, stating that the High Court has vested the vessel with the first defendant and attached the Order.

16. In re-examination, the witness reiterated that KSC was the initial owner of the vessel in terms of the CFR.

The determination

17. Agreed facts

- i. *The Plaintiff with the First Defendant*
 - a) On 12th April, 2006, (as corrected) the High Court in Winding up case no. 39 of 2004, ordered the vessel to be vested with the first defendant.
 - b) The first defendant advertised the vessel for sale and then sold it.

- ii. *The Plaintiff with the Second Defendant*
 - a) *..the Plaintiff is a businessman engaged in the business of shipping ...*
 - b) *..there was a winding up petition filed against (KSC) in February 2005.*
 - c) *..on 27 July 2005 (KSC) executed a Bill of Sale in favour of the Plaintiff.*
 - d) *..Transfer papers were lodged with the Second Defendant on 27 July 2005.*
 - e) *..(KSC) has a delivery docket of even date where it states that Bills of Sale were delivered to the Second Defendant and one Angela S received the docket.*
 - f) *..on 1 August 2005 (KSC) made an application to change the name of the vessel from MV Temauri to MV Neha*
 - g) *..on 1 August 2005 the Second Defendant issued an official receipt to (KSC) to change of ownership, discharge of mortgage and change of name.*
 - h) *..on 18 October 2005 the Second Defendant issued a Certificate of Registration in the name of (KSC).*
 - i) *..a Second Bill of Sale dated 27 July 2007 was prepared by (KSC) and witnessed by Solicitor .. This Bill of Sale was subsequently re-dated 27 October 2005.*
 - j) *..on 13 December 2005 Second Defendant recorded the Plaintiff as the owner of the vessel.*
 - k) *..on 23 December 2005 the Plaintiff was granted a coasting licence by the Second Defendant.*
 - l) *..on 20 December 2005 the Second Defendant issued a Survey Certificate for the vessel in the name of (KSC).*
 - m) *..on 21 February 2006 Second Defendant issued another Survey Certificate in the name of (KSC).*
 - n) *..on 17 March 2006 the Second Defendant wrote to the Plaintiff and informed him that according to their records the vessel was owned by (KSC). The said Company was wound up on 12 October 2005 and ownership of the vessel was transferred to the Plaintiff on 27 October and registered under his name on 13 December 2005.*

18. Issues to be Determined

- a) *Where there is a cause of action against the First and Second Defendants by the Plaintiff?*
- b) *Whether the Plaintiff is entitled to Special Damages as pleaded in paragraph 40 and General Damages pleaded in the Statement of Claim?*
- c) *Whether the Plaintiff's claim should be dismissed.*
- d) *Whether the court should award interest and costs and what basis.*

19. The plaintiff contends that KSC transferred the vessel to him by a BoS of 27th July, 2005. He claims his vessel was unlawfully seized. The defendants contend that KSC was wound up by an Order of Court on 7th February, 2005, and accordingly, KSC was prohibited from transferring the vessel in terms of section 313(1)(2) of the Companies Act. (Cap 247).
20. It is agreed that KSC executed a BoS in favour of the plaintiff and lodged transfer papers with the second defendant on 27 July, 2005; the second defendant issued a receipt to KSC with respect to that change of ownership on 1 August, 2005, and a CFR in its name on 18 October, 2005; and, the plaintiff was recorded as owner of the vessel on 13 December, 2005.
21. It transpired that the plaintiff only paid for "Change of ownership" to his name on 12th December, 2005, as provided in the receipt issued to him. DW2 testified that the second defendant would facilitate the request to have the vehicle registered only on payment of the necessary fees. Accordingly, the plaintiff was endorsed as "sole registered owner of the vessel with effect from 13 December, 2005", as provided in the CFR.
22. The material fact is that KSC was wound up on 7th February, 2005, before these transactions and the vessel was vested with the first defendant on 12th April, 2006.
23. I refer to the following Orders of Singh J :
- A. Civil Action No: HBE 39 of 2004: *IN THE MATTER OF KHAN'S SHIPPING COMPANY LIMITED AND IN THE MATTER OF COMPANIES ACT*
- i. On 12th April, 2006, the Court ordered the vessel to be vested with the first defendant..
- ii. On 16th June, 2006:
- The winding up petition was filed on 25th March 2004. Judgment was delivered on 7th February 2005. Once the judgment was delivered, the company could not have continued dealing with its property. In this case the alleged transfer of vessel occurred on 27th July 2005. The transferee is a director of the company. It is clear case of fraudulent preference.*
- The application is dismissed. This is second attempt by the company to obtain an order from the court that the vessel belongs to its director. I award costs summarily fixed in the sum of \$200.00. (emphasis added)*
- iii. On 16th June, 2006, upon the application of the plaintiff, (in the instant case) the Court dismissed the stay application with costs and ordered KSC to file its statement of affairs.

B. In Civil Appeal No. ABU 009 of 2005, Singh J made Order on 23rd September,2005, as follows:

- (a) *That the Order for Stay of Winding up of (KSC) of the 7th day of February 2005 is hereby set aside;*
- (b) *That it is hereby ordered that (KSC) be wound up...*
- (c) *That it is hereby ordered that (KSC) pay costs to the Respondent fixed at \$300.00*

24. KSC was wound up on 7th February,2005, which was prior to the CFR issued to KSC on 18th October,2005. Accordingly, KSC was prohibited from transferring any of its assets in terms of the Companies Act, as quite correctly held by Singh J.

25. It follows that the contention of the plaintiff that the vessel was transferred to him on 27th July,2005, fails.

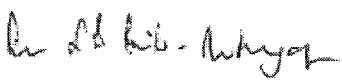
26. The vessel was vested with the first defendant by Order of Court. In my judgment, the seizure and sale by the first defendant was lawful.

27. Finally, it was contended that the first defendant had not obtained a valuation of the vessel prior to the sale. Section 242(2) of the Companies Act, as pointed out in the closing submissions gives the first defendant the power to sell and determine the terms of sale. The proceeds of sale were for the affairs of KSC.

28. In my judgment, the plaintiff has no cause of action against the first and second defendants.

29. **Orders**

- a) The plaintiff's action is dismissed.
- b) The plaintiff shall pay the first defendant a sum of \$ 2000.00 and the second defendant a sum of \$ 2000.00 as costs summarily assessed.


A.L.B. Brito-Mutunayagam
JUDGE
2nd September,2022

