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DAMODARAN TAMAN MUDALIAR
JESSIE JOSEPHINE MUDALIAR

v.

B

GRAHAME GIBSON



and

C

KALIAPPAN

[SUPREME COURT—Lautoka—Cullinan J.—10 April 1987]

Civil Jurisdiction

D

Summary Judgment Application—defendant opposing,—seeking leave to defend—inconsistencies, omissions in defence and counterclaim—counterclaim "shadowy"—leave to defend granted subject to conditions—these included paying \$12,000 into Court within one month—in default whereof plaintiffs, subject to the proviso stated to have leave to sign judgment.

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V. K. Kalyan: for the Plaintiffs
A. Singh for the Defendants

F

Plaintiffs applied for summary Judgment pursuant to Order 14 but for part only of the claim (\$15,000) against Grahame Gibson (first defendant). Plaintiffs alleged that the first defendant agreed with the plaintiffs to purchase one share in Tropic Image Home Furnishings (Fiji) Limited (Tropic Image) being 100% of the issued or allotted shares in that company, for a consideration of \$36,000 cash plus a full set of cane furniture valued at approximately \$3,000.

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First defendant by way of defence claimed the consideration was \$36,000 only, leaving a balance of \$12,000; further.

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"6. That it was a condition precedent that the sum of \$12,000 would be paid only after the plaintiff hand over to me all books of accounts, records, invoices, documents, cheque books (used and unused), Company Common Seal Air Pacific to the value of \$5,000 belonging to Tropic Image Home Furnishings (Fiji) Limited and other items and assets belonging to the said Company.

7. THAT it was an express and/or implied term of the agreement that in the event the plaintiffs failed to produce any of the above items or that should the records show that the plaintiffs failed owed any money to the said Company, the value thereof or the amount owed would be set-off against the sum of \$12,000 mentioned in paragraph 6 hereof." A
8. THE first defendant further says that it was an implied term of the agreement that the balance sum (after payment of \$20,000 as aforesaid) was payable only after the plaintiffs had handed over to the first defendant all books of accounts, records, invoices, documents, cheque books (used and unused), Company Seal, Air Pacific Bond to the value of \$5,000 and other items and assets belonging to Tropic Image Home Furnishings (Fiji) Limited. B
9. IN breach of the said agreement the plaintiffs have refused to hand over the said items. In the premises the said sum of \$12,000 is not payable. C

Defendant in an Affidavit denied he was indebted to plaintiffs for any sum and specifically that he agreed to supply cane furniture valued at \$3,000.

The learned trial Judge referred to certain correspondence between the parties which inter alia purported to set out the terms of the agreement, omitting as he noted, any reference to cane furniture. He considered there were inconsistencies between the matters put forward in the first defendant's letters and his defence. D

A counterclaim put forward by the defendant alleged that plaintiffs had "wrongfully and maliciously conspired and combined amongst themselves to injure the first defendant in his business. For reasons he gave the Judge was unimpressed and not persuaded what which was alleged to support the claim in conspiracy, could do so. The allegations any way were not "grounded" in the first defendant's affidavit. Further, he noted the plaintiffs were husband and wife, and so at Common Law incapable of conspiring together. He referred to *D.P.P. v. Blady* (1912) 2 K.B. 89 at p. 94. This he considered the first defendant's main difficulty in proving a conspiracy. There were other allegations made by the defendant upon which the learned trial Judge commented e.g. one for detention and conversion. In the light of his earlier observations, the Judge did not see how such a claim could succeed. The defendant's counterclaim, was "shadowy", to employ the phrase used by Lord Denning M.R. (*Van Lynn Developments Ltd v. Pelia Construction Co. Ltd* infra). He noted that on application to amend the counterclaim had been filed. E F

Held: The defendant was to have leave to defend in respect of the \$12,000 outstanding on the condition that a sum of \$12,000 be paid into court within one calendar month from the date of this Order. If the said sum was not paid into Court, plaintiffs, provided they have delivered to the first defendant certain items mentioned in a letter by defendant's Solicitors (1 September 1983), should then be at liberty to sign final judgment for \$12,000 plus interest at 13.5% calculated from the date of filing of the writ to the date of such judgment. G H

A The defendant was to have leave to defend with regard to the sum of \$3,000, representing the value of the cane furniture.

Cases referred to:

- (1) *D.P.P v. Blady* (1912) 2 K.B. 89
- (2) *Van Lynn Developments Ltd. v. Pelias Construction Co. Ltd* (1968) 3 All E.R. 824.

B CULLINAN J.

Order

This is an application for summary judgment under Order 14.

C Judgment is sought only in respect of part of the claim against the first defendant. It is alleged that the latter agreed with the two plaintiffs to purchase one share in Tropic Image Home Furnishings (Fiji) Limited, representing 100% issued or allotted shares in that company. The plaintiffs claim that the consideration therefor was the payment of \$36,000 cash plus a full set of cane furniture valued at approximately \$3,000. The plaintiffs paid \$20,000 as deposit and part payment and thereafter one monthly instalment of \$4,000, that is, a total of \$24,000. The claim therefore is for the outstanding \$12,000 in cash plus \$3,000 representing the value of one set of cane furniture, that is, a total of \$15,000.

D In his defence the first defendant states that the consideration for the purchase of the company was \$36,000 only, the unpaid balance being then only \$12,000. Paragraphs 8 and 9 of his defence read as follows:

- E 8. THE first defendant further says that it was an implied term of the agreement that the balance sum (after payment of \$20,000 as aforesaid) was payable only after the plaintiffs had handed over to the first defendant all books of accounts, records, invoices, documents, cheque books (used and unused), Company Seal, Air Pacific Bond to the value of \$5,000 and other items and assets belonging to Tropic Image Home Furnishings (Fiji) Limited.
- F 9. IN breach of the said agreement the plaintiffs have refused to hand over the said items. In the premises the said sum of \$12,000 is not payable.

G The defence also contains a set off and counter-claim. It proves convenient to defer consideration thereof for the moment. The defendant has filed an affidavit in opposition in which he denies that he is indebted to the plaintiffs "in the sum claimed in the Statement of Claim or any sum as therein alleged or at all". He denies that he at any time agreed to supply the plaintiffs a full set of cane furniture valued at approximately \$3,000 as part consideration for the transfer of shares. The affidavit then reads:

- H "6. That it was a condition precedent that the sum of \$12,000 would be paid only after the plaintiff hand over to me all books of accounts, records, invoices, documents, cheque books (used and unused), Company Common Seal Air Pacific to the value of \$5,000 belonging to Tropic Image Home Furnishings (Fiji) Limited and other items and assets belonging to the said Company.
7. THAT it was an express and/or implied term of the agreement that in the event the plaintiffs failed to produce any of the above items or that should

the records show that the plaintiffs failed owed any money to the said Company, the value thereof or the amount owed would be set-off against the sum of \$12,000 mentioned in paragraph 6 hereof." A

The first plaintiff in his affidavit in support has exhibited thereto correspondence between the respective firms of solicitors, the contents of which are relevant to the issues before me. On the 25th August, 1983 the solicitors for the first defendant wrote to the solicitors for the plaintiffs. The letter in part reads as follows:

"RE: *TROPIC IMAGE HOME FURNISHINGS (FIJI) LIMITED* B

We refer to our telephone conversation of 23rd August 1983 regarding the above-named company and Mr and Mrs Mudaliar.

On 4th August 1983 Mr and Mrs Mudaliar transferred their \$1.00 shares in the above-named company respectively. The total consideration for the transfer of the two shares is \$36,000. A sum of \$20,000 (being \$10,000 for each share) is to be paid to the transferors when the transfers are duly stamped and lodged for registration. The said transfers will be held by the Writer in trust until the Mudaliars are paid the said sum of \$20,000. The balance sum of \$16,000 is to be paid by four (4) equal monthly instalments, with the first payment of \$4,000 on 31st August 1983. C Lu

Mr and Mrs Mudaliar have resigned as directors of the company. The Bank of New Zealand has agreed to release the Mudaliars as guarantors in respect of all advances made to the company. We should have the written guarantees with the Bank's discharge duly noted in due course. D

.....

We hope that the particulars of the transaction given in this letter is clear to you. Should you need any further details please do not hesitate to contact the Writer." E

The Solicitors for the plaintiffs replied on 31st August as follows:

"We refer to your letter dated 25th instant which we received on 29th instant.

We note that you have not forwarded the Agreement for sale of shares which you had mentioned in the telephone discussion you had with the writer on 25th instant. The telephone discussion took place on 25th instant and not 23rd instant as you have stated in your letter. F

Before we reply your aforesaid letter, could you please let our client have a copy of the Agreement for sale of the shares. We have asked our client to deliver this letter so that he could also collect the Agreement at the same time." G

The following day, the 1st of September, the Solicitors for the first defendant replied as follows:

"We refer to our telephone of this morning and enclose herewith our trust account cheques in the total sum of \$24,000. This sum represents the initial payment of \$20,000 and the first instalment of \$4,000 due on 31st August 1983. The sum of \$20,000 is paid notwithstanding the agreement that payment was due upon registration of the transfer. It should be noted that the trust referred in our letter of 25th August 1983 is hereby wholly discharged. H

A Your client, the (sic) Mudaliar, had agreed with the Writer yesterday that he would authorise the Bank of New Zealand to release the Bank Statements of Tik Tok Furniture & Joinery Limited Account No. 2 of Tropic Image Home Furnishings (Fiji) Limited. We enclose herewith an authority for your client to execute and return to us. Your client had also agreed to release the Common Seal and all other rubber stamps of the Company. Please let us have these together with the Tik Tok Account No. 2 cheque book."

B No doubt the reference in the latter paragraph is to Mr Mudaliar, as indicated by a letter from the Solicitors for the plaintiffs addressed to the Solicitors for the first defendant on 1st September. On the 12th October the former Solicitors wrote again, to advise that the payment of \$4,000 due on the 30th September had not been received and that unless the said sum was paid into their office within two days they would proceed to take further action for the whole sum outstanding. They wrote again to the Solicitors for the first defendant on the 7th November 1983 pointing out
C that instalments in the total amount of \$8,000 due at the end of September and October had not been received, and that unless paid by 4 p.m. that day, they would proceed to take further action in the matter.

It will be seen at once that there are contradictions between the first defendant's defence and his affidavit in opposition. In his defence he states at paragraph 7 thereof "that only a sum of \$12,000 is payable to the plaintiffs". In his affidavit
D however he states he is "not indebted to the plaintiffs at all". That statement is perhaps based on another statement in the affidavit, that the amount of counter-claim will greatly exceed the amount of the plaintiffs claim, but that as I see it is a matter for the Court to determine, and if there is any admitted specific liability on the plaintiffs' claim, as is admitted by the defence, then it should be stated in the affidavit in opposition.

E The defence states in paragraph 8 thereof that it was "an implied term" of the agreement that the balance, of \$16,000, was payable only after the plaintiffs' had handed over the items mentioned therein. In paragraph 6 of his affidavit however the first defendant refers to such "implied term" as a "condition precedent".

It will be seen that paragraph 7 of the first defendant's affidavit is contradictory
F in itself, in its reference to "an express and/or implied term". A term cannot be express and implied; again it is for the first defendant to state whether the term was express or implied; he cannot have his cake and eat it. Further, there is no mention whatever in the defence of any debt by the plaintiffs' to the company being set off against the balance of \$12,000.

The first defendant in his defence alleges that the balance sum of \$16,000 (after
G payment of \$20,000) was payable only after the delivery of the items mentioned, yet in his affidavit he states that the balance of \$12,000 (after payment of \$24,000) was payable after such delivery. I observe, as the learned Counsel for the plaintiffs Mr Kalyan submits, that contrary to paragraph 8 of the defence, the first monthly instalment of \$4,000 was effected on the 31st August before delivery of any of the items mentioned.

H Again, both the defence and the affidavit in opposition are vague in their reference to "other items and assets belonging to Tropic Image Home Furnishings (Fiji) Limited". The question is, what items and what assets in what amount are involved?

As I see it, the contract is contained in the correspondence in the matter. The letter of the first defendant's Solicitors of the 25th August 1983 indicates that the plaintiffs transferred their shares in the company as early as 4th August 1983, the total consideration for the transfer being \$36,000: there is no mention of any set of cane furniture and the contents of the letter were not, up to 7th November 1983, disputed. The letter clearly indicates a deposit of \$20,000 and thereafter a payment of four equal monthly instalments of \$4,000, commencing on the 31st August 1983, the first of which instalment was duly paid despite, as I have said, the non-delivery of any of the items mentioned by the first defendant. The last paragraph of the letter indicates that the letter sets out "the particulars of the transactions".

The second paragraph of the letter of the 1st September 1983, written by the Solicitors for the first defendant, indicates that the first plaintiff agreed, no earlier than 31st August 1983, to arrange for the delivery of the relevant bank statements and also the company common seal and other rubber stamps of the company, as well as the "Tik Tok Account No. 2" cheque book. There is no mention whatever of any other item or asset of the company, in contrast with the statement of defence and the affidavit in opposition. Again, the said letter of the 1st September indicates that such agreement by the first plaintiff was made subsequent to the main contract. Further, there is nothing to indicate whether it was a condition subsequent. Indeed, despite the correspondence of the 12th October and the 7th November 1983, demanding due payment of the relevant instalments, there is no correspondence on record by the first defendant, or his Solicitors, complaining of any breach of agreement by the plaintiffs in the matter.

As I see it, the first defendant's defence and affidavit are either contradictory in themselves or with one another. Further, as I have indicated, there is no support whatever for such defence in the correspondence in the matter, which contains the terms of the contract. There is however the counterclaim filed by the first defendant. He alleges that the plaintiffs have "wrongfully and maliciously conspired and combined amongst themselves to injure the first defendant in his business". I observe that the allegation contained in the counter-claim have not been grounded in the first defendant's affidavit, that is, nowhere does the first defendant state that such allegations are true, though he does ground facts contained in a subsequent affidavit supporting an application for the amendment of his counterclaim.

It is alleged that the plaintiffs on two occasions "wrongfully" claimed payment of a sum of money from Burns Philp (SS) Company Limited payable to the "first named defendant's company, Tropic Image Home Furnishings (Fiji) Limited". But I do not see that a dispute as to the right to such funds amounts to a conspiracy on the part of the plaintiffs.

It is alleged that a copy of the present writ was served on the first defendant's bankers, the Bank of New Zealand. I observe from the papers on the file however that the Bank of New Zealand were also the plaintiffs' bankers, and indeed that the plaintiffs acted as guarantors, presumably of the company, at one stage. In all the circumstances I do not appreciate how such action amounts to a tortious action, much less a conspiracy on the part of the plaintiffs.

There is an allegation that the plaintiffs wrongfully informed the Permanent Secretary for Labour and Immigration that the first defendant's services were not required by the company, and that he should not be granted a work permit. Much

A depends of course upon the surrounding circumstances of the supplying of such information. It would seem however that the first defendant's main difficulty in proving a conspiracy with regard to any of the allegations made in the counterclaim, is that the plaintiffs are husband and wife: at common law husband and wife, being deemed to be one person, have been held to be incapable of conspiring together: see the case of *D.P.P. v. Blady* (1) at p.92 per Lush J., and see Clerk & Lindsell on Torts 14 Ed. at para. 811.

B The first defendant has filed an application to amend the counterclaim. Such application has not been heard. It is supported however by an affidavit deposing to further facts in support of the alleged conspiracy. They must meet with the same difficulty, that is, that the alleged conspirators are husband and wife.

C As I see it, the fresh allegations all concern competitive acts of trade, which the first defendant alleges are contrary to "an express term of the sale and purchase of the said shares". But as I have indicated earlier, the contract between the parties is set out in the correspondence between the Solicitors. There is no indication in such correspondence of any such express term in restraint of trade. Further, as with all of the allegations, they seem to confuse alleged damage to the first defendant with damage to the company.

D There is also again contained in the counter-claim a further claim for detention and conversion, in respect of the items which the first defendant alleges were to have been delivered by the plaintiffs before payment of the balance of \$16,000. In the light of my earlier observations, I do not see how such claims can succeed.

In all the circumstances I consider that the defendant's counterclaim in the matter is "shadowy", as Lord Denning M.R. put it in the case of *Van Lynn Developments Ltd. v. Pelias Construction Co. Ltd.* (2) at p.827.

E In all the circumstances I consider that leave to defend with regard to the outstanding sum of \$12,000 should be conditional. I grant the first defendant leave to defend with regard to the sum of \$3,000 representing the value of a set of cane furniture. As to the outstanding balance of \$12,000, I grant him leave to defend, on condition that he pay the sum of \$12,000 into Court within the period of one calendar month from the date of this Order. If the said sum is not paid into Court at the end of such period, the plaintiffs, provided they have first caused to be delivered to the first defendant or his Solicitors the items mentioned in the second paragraph of the letter of the first defendant's Solicitors dated 1st September 1983, repeated above, shall then be at liberty to sign final judgment in the amount of \$12,000 plus interest at the rate of 13.5% per annum calculated from the date of the filing of the writ to the date of such judgment.

G *Conditional leave to defend.*