LOG NADAN & CHINAIYA NADAN

v.

NATIONAL MBF FINANCE FIJI LTD

[HIGH COURT, 1998 (Pathik J) 17 August]

Appellate Jurisdiction

Magistrates' Courts- commencement and transfer of civil proceedings- principles applicable- Magistrates' Courts Rules (Cap 14 – Subs) Orders XIII Rule 1 (a).

While allowing an appeal against a Resident Magistrate's refusal to transfer proceedings to the place where the Defendants reside the High Court explained that the performance of a contract of hire purchase takes place where the acts discharging the Defendants from liability occur.

Cases cited:

Dansey v Orr (1908) 28 N.Z.L.R. 115
Fitzgerald v Kennedy (1909) 28 N.Z.L.R.335
Melbourne Chilled Butter & Produce Co. Ltd v Warrick & Others (1899) 25 V.L.R 346
Snow Rainger Limited v. Derek Van Spluntere Limited [1952] N.Z.L.R. 841

Appeal from interlocutory decision of the Magistrates' Court.

G. Prasad for the Appellants
H. Lateef for the Respondent

Pathik J:

This is the Defendants' appeal against the Ruling of the learned Resident Magistrate Ms. Aruna Prasad delivered on 1 April 1997 when she made an order that this action is properly instituted in Suva. The plaintiff is from Suva. The contract was entered into in Suva and she refused the Defendants' application for transfer of the case to Lautoka in the Western Division.

Grounds of Appeal

The Grounds of Appeal are as follows:

"1. THE learned Trial Magistrate erred in law and in fact in refusing to transfer the within action to Lautoka in view of the Affidavit evidence before the Court.

2. THE learned Trial Magistrate erred in law and in fact in failing to give any weight or consideration to the facts that: (a) the Defendants live in Lautoka and (b) the contract

between the parties was entered into at Nadi.

3. THE learned Trial Magistrate's decision not to transfer is manifestly wrong in that the learned Magistrate failed to consider the grave inconvenience and hardship the Defendants would suffer in having to conduct their defence in Suva .

4. THE learned Trial Magistrate has failed to give full and proper reasons for her refusal to transfer the case to Lautoka and/or to give any justification as to why Suva is the right and proper venue.

5. THE learned Trial Magistrate has failed to follow proper procedures laid down by the Magistrates' Courts Rules".

Background facts

On or about 27 April 1995 the parties entered into an agreement of Hire Purchase which was executed by the defendants in Nadi at the Plaintiff's Nadi Branch and by the Plaintiff at Suva where its head office is situate.

The agreement involve the purchase of a second-hand Toyota Liteace Window van registered No. CP313. The Defendant defaulted in his payment and the vehicle was repossessed and sold.

Consideration of the issue

The question for the Court's determination is whether the learned Magistrate was correct in refusing the Defendants' application to transfer this action from Suva to Lautoka.

It is Order XIII Rule l(a) of the Magistrates' Courts Act (Cap 14) (the "Order") which governs the position regarding the trial and institution of suits in the Magistrates' Court. It provides (inter alia):

> "1. Subject to the law respecting transfer, the place for the trial and institution of any suit or matter shall be regulated as follows:
>
> > "All suits arising out of the breach of any contract may be commenced and determined in the Court nearest to the place in which such contract ought to have been performed, or in which the Defendant, or one of the Defendants, resides or carries on business."

There are two limbs to this Order, namely, the action should either be commenced (1) "nearest to the place in which such contract ought to have been performed" or (2) "in which the defendant" resides or carries on business.

In this case the (2) above has been satisfied because the word 'or' has been

used in the Order which allows for the commencement and determination of action in Lautoka where the Defendants reside. Hence this action must be transferred to the Magistrates' Court, Lautoka. The learned Magistrate erred in law and fact when she stated that the action was "properly instituted in Suva" and that the "contract was entered into in Suva" in deciding on the application before her. Weight should have been given to the Defendants' residence so as to comply with the provisions of the Order.

However, Mr. Lateef laid stress on the said first limb of the Order i.e. the place in which such contract ought to have been performed. He argues that since the obligations regarding contract were carried out in Suva, the contract was performed in Suva.

The learned Counsel for the Defendants on the other hand submits that the contract was executed in Nadi and payment under the agreement was made in Nadi and the contract was performed in Nadi.

The question that now arises is what is the place in which such contract ought to have been performed in this case.

In considering this aspect it is important to know what is actually meant by the word "performed".

The *Dictionary of English Law* (Vol 2) by Jowitt defines "performance" as:

> "With reference to a contract or condition, performance is the act of doing that which is required by the contract or condition. The effect of performance, in the case of a contract is to discharge the person bound to do the act from liability ....."

According to this definition the act done in this case should be identical to that required by the parties in the particular contract they entered into.

The act required in this particular contract was that the defendants pay the deposit on the Toyota Liteace Window van to the Plaintiff and that the Plaintiff in return give possession of the van to the Defendants and the Defendants make payment of the balance of the cost of the van to the Plaintiff.

It is clearly apparent from the facts of the case that all these obligations were carried out in Nadi which are not disputed by Counsel for the Plaintiff. Because the monitoring of the business of the Plaintiff is done in Suva does not mean that "performance" is in Suva. This particular contract was carried out in Nadi according to the definition of the word "performance" which states that:

> "The effect of performance in the case of a contract is to discharge the person bound to do the act from liability .... "

This shows that in order to constitute performance the act done should be the one to discharge the person bound to do the act (the Defendants in this case) from liability.

Therefore, the reasons given by the Plaintiff stating that the contract was performed in Suva which include: monitoring of all payment which is done in Suva, notices for non-payment are issued from Suva and seizure notices are issued from Suva, etc. are not relevant in this case. What is relevant is the act done by the Defendants and the Plaintiff in order to discharge the Defendants' liability, and as discussed previously, such act was carried out in Nadi.

I have referred to the specific provision under the Order in regard to the place of trial. There is a helpful discussion of this subject in the judgment of F.B.Adams J in Snow Rainger Limited v. Derek Van Spluntere Limited [1952] N.Z.L.R., 841.

The situation in Snow Rainger was similar to the case before me. Briefly the plaintiff had its head office in Auckland, with warehouses in Wellington, Christchurch and Dunedin. The defendant had its registered office and only place of business in Dunedin. The disputed transaction was wholly entered into and carried out in Dunedin, nothing being in writing, and nothing being said or done by defendant in any place but Dunedin. Everything that was done on plaintiff's part was done by, or under the instructions of, its agent in Dunedin. Except for admitted purchases in Auckland to the total value of $465 13s 1d., the defendant alleged that all the goods in dispute were purchased and delivered from the plaintiff's office in Dunedin.

It was held, inter alia:

> "3. That, for the purposes of R.249, the action, in respect of those particular goods, could not be "conveniently or fairly tried" at Auckland, having regard to the case in all its bearings, as it would be unjust in the circumstances to impose on the defendant the inconvenience of a trial in Auckland; and, on balance, justice required that the case should be tried in Dunedin."

R 249 of the Code of Civil Procedure is slightly different from our said Order. On this Adams J at p846 said:

> "Under R. 249, all actions are to be tried at the place mentioned in the writ, unless it appears that "the action cannot be conveniently or fairly tried at that place". The convenience referred to is not the convenience of either party rather than the other, but is convenience having regard to the case in all its bearings: Fitzgerald v Kennedy (1909) 28 N.Z.L.R.335. It has also been said that the applicant must prove inconvenience which would amount to an injustice: Dansey v Orr (1908) 28 N.Z.L.R. 115. I understand this as meaning simply that there must necessarily be inconvenience such as might lead to an unjust decision of the matter in dispute. It is a matter of balancing the respective inconveniences and ofarriving at a just decision

thereon."

A Also in the case of Melbourne Chilled Butter & Produce Co. Ltd v Warrick & Others (1899) 25 V.L.R 346 it was held that:

> "..... Where no express place was named in the contract where the obligor was to perform his part of the undertaking, the Court will infer as against the obligor that the contract is to be performed in the place where it was made."

B Another viewpoint has been expressed by Adams J supra at p 844 thus:

> I find it unnecessary to decide whether the place of payment can be relied on where there is no special stipulation for payment at a particular place, and shall express no opinion about it. I would point out, however that, if this be the rule, an Aucklander who
> C goes to Dunedin and there sells and delivers goods to resident of Dunedin can, in the absence of any special stipulation as to place of payment, immediately return to Auckland and issue a writ requiring the purchaser to attend for trial at Auckland.

Further to what I have said above, according to this case, since the contract
D was made in Nadi, the Court has the right to infer that the contract was to have been performed in Nadi.

In the light of the above facts and authorities, I reject the arguments put forward by Counsel for the Plaintiff on the first limb of the Order. There will, therefore, be an order for a change of venue I order that the proceedings in
E this case should be transferred to Lautoka since the Defendants reside there and also since the "contract ought to have been performed" in Nadi in the Western Division.

The Appeal succeeds with costs to be taxed unless agreed.

(Appeal allowed.)

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