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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Civil Appeal No. 8 of 1977

BETWEEN: MESSRS. V.M.S. ABDUL RAZAK & CO. of 88 High Street, Singapore 6 (a firm) — Appellants

A N D : MESSRS. MANEKLAL & SONS of Ba (a firm) — Respondents

Mr. Surendra Prasad, Counsel for the Appellants
Mr. G.P. Shankar, Counsel for the Respondents

JUDGMENT

In this case the appellants who are a firm resident in Singapore, claimed in the Magistrates' Court at Ba for payment of $439.09 the value of certain cotton goods sold by them to the defendants in March 1972 and said to have been shipped aboard the 'Tairyu Maru' about that time. The respondents filed a defence which as is not unusual in Fiji, does not plead to the Statement of Claim. It merely says that respondents have not received any goods from the appellant nor do they owe the appellant any money, and they further say that the insurance papers were taken away by the appellants' agent. The writ was issued in November 1975 and the defence filed in January 1976, but the case did not come to trial until April 1977. I am told that this appeal was not set down earlier because a similar case was pending before the Fiji Court of Appeal.

When the trial began in the Magistrates' Court copies of a contract, an invoice and a bill of lading were tendered by the appellants' witness without objection by Counsel for the respondents. For the respondents Manoklal who described himself as the proprietor of the respondent firm gave evidence that he received a letter from appellants dated 31st May 1972 and replied on 13th July 1973. He said further that a policy of insurance covering the goods was delivered to the appellants' agent, probably in 1973. The policy of insurance was not produced.

The position after the respondents had closed their case was that there was before the Court a document called a contract purporting

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to be signed by Manoklal, although he was not asked about it in evidence, an invoice and a bill of lading. The contract, the invoice and the bill of lading must I think be taken to be referable to the same goods, and the fact that respondents do not deny that a contract was made, although they do deny receipt of the goods or that they owed the money, is evidence from which it might have been reasonable for the Court to infer that a contract had been made. Moreover, the letters produced by the respondents would appear to support the appellants' contention that there was a contract. Then the appellants' solicitor sought to give evidence - what about does not appear - but his application, seeing that he was appearing in the case as counsel was quite properly refused: see R v Secretary of State for India in Council ex parte Ezekiel (1941) 2 AER 546, 556.

The learned magistrate held that the appellants had produced only an unidentified contract, an unexplained invoice and a Bill of Lading. I sympathise with the learned magistrate and quite apparently counsel for the appellants realised that his evidence was somewhat scanty, but as I have endeavoured to show, the respondents managed to fill up at least some of the gaps. It is agreed that the goods have not arrived, and that they have not been paid for. The question really is whether there is sufficient evidence here to show that this was an ordinary cost insurance freight contract. If it is, then it appears to me to follow that the legal incidents of a cost insurance freight contract apply. These are set forth in the judgment of the Fiji Court of Appeal in A.D. Sutaria & Co. v Abdul Razak & Co. Civil Appeal No. 34 of 1977. I turn then to the documents exhibited in the case, to the production of which the respondents took no objection. The contract, apparently signed by the respondents says the price is "at Sterling old pence 34.50d per yard CIF Lautoka." I would observe also that the contract number 889 is referred to in the respondents' letter to the plaintiffs of 13th July 1973 where they say the invoice number is 889 The invoice itself on its face has at least two references to the fact that the contract is c.i.f. The Bill of Lading does not help the appellants. Now the requirements of a cost insurance freight contract are set out in Clemens Horst v Biddell (1911) 1 K.B. 214, 224, and repeated in the Fiji Court of Appeal at page 7 of the judgment to which I have already referred. I set out the passage again:

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> "..... the meaning of a contract of sale upon cost freight and insurance terms is so well settled that it is unnecessary to refer to authorities on the subject. A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract, secondly to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the parties : thirdly to arrange for an insurance upon the terms current in the trade which will be available for the buyer : fourthly to make out an invoice.....: and finally a tender those documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover their loss if they are lost in the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

In this case the Bill of Lading indicates that the seller shipped the goods and procured a proper contract of affreightment. Then it is quite clear that there was an insurance policy which was available to the buyer, because he handed it over to the sellers' representative. The invoice was also duly made out. The insurance, invoice and bill of lading were duly tendered to the respondents because their letter of 13th July 1973 sends them back.

I think it must be accepted that the goods were shipped. The respondents produced a letter from the appellants dated 31st May 1972 containing this phrase "as the goods has been shipped to you under your open cover note, it is therefore unfair for you to keep our bills pending." I think that it is a proper inference from that letter that the documents in accordance with the c.i.f. contract were already tendered to the respondents.

But what the respondents rely upon is precisely the same point as the appellant in the Sutaria case failed upon, namely that the seller took the insurance documents, and I think that here, as there, there is no evidence that the appellant discharged respondent from liability in consideration of being sent the insurance documents.

Mr. Shankar sought to distinguish this case from the Sutaria case on two grounds. First he submitted that the letter from the respondents to the appellants enclosing the documents and dated

14th July 1973 was a good equitable assignment and cited Wm. Brandt & Sons v Dunlop (1905) A.C. 454. The material part of that judgment is set out at page 462 where Lord Macnaghten said "an equitable assignment may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debt has been made over by the creditor to some third person." Here the debtor is the insurance company and there is no evidence that the insurance company were told anything about this purported assignment. This was simply a communication between assignor and assignee. In my view there was here no assignment equitable or otherwise and thus nothing to show that section 51 of the Marine Insurance Act Cap. 190 can be brought into play.

Then Mr. Shankar had another point which he based upon Chao v British Traders, etc. (1954) 1 AER 779 in which Devlin J pointed out that there was a right to reject documents and quite distinctly a right to reject goods. Mr. Shankar submits that when they returned the documents on 14th July 1973 the respondents rejected the documents and the sellers must be deemed to have accepted that position because they did not start their action until November 1975. But Devlin J at page 791 expressed himself thus: "There are distinct obligations and the right to reject the documents arises when the documents are tendered, and the right to reject, or the moment for rejecting the goods arises when they are landed, and when after examination they are found to be not conformity with the contract." Here I can find no evidence that the buyers rejected the documents. On the contrary they have accepted them, and what their letter of 14th July 1973 says is that they are returning documents to the sellers so that the sellers can claim against the insurance company. They are indeed, seeking to vary their contract with the sellers in the same way as the buyers did in the Sutaria case, and they will fail for the reasons given by the Fiji Court of Appeal in their judgment.

I can see no reason why the respondents should not pay, and I would allow the appeal, and set aside the learned magistrate's judgment and enter judgment for the plaintiff appellants with costs here and below.

LAUTOKA,
1st March, 1978.

(sgd.) K.A. Stuart
JUDGE