

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
Civil Action No. 204 of 1979

Between:

NARAIN CONSTRUCTION COMPANY
LIMITED

Plaintiff

and

MARLOWS LIMITED

Defendant

Mr. F.S. Lateef for the Plaintiff
Mr. D.C. Maharaj for the Defendant

JUDGMENT

The plaintiff and the defendant are both companies registered in Fiji and based at Suva.

From April to December 1977, the plaintiff Company's affairs were managed by Mumtaz Ali, a chartered accountant. The plaintiff Company had liquidity problem and in September Mumtaz Ali advertised for sale some machinery among which was a D6C tractor. South Seas Construction Company of Pago Pago, American Samoa showed interest in it and sent one Keener to negotiate the purchase. South Seas wanted the tractor at Pago Pago free of all encumbrance. Mumtaz Ali agreed provided payment could be guaranteed by the defendant who had some interest in South Seas Company.

On 7th October 1977, Keener, accompanied by Eric Marlow and Ah Sam, met Mumtaz Ali in latter's office. Eric Marlow and Ah Sam, both engineers, had gone to inspect the tractor and took no part in the negotiations. The price was agreed at \$40,000. The initial payment was to be \$4,000(U.S.) to be followed by monthly instalments of \$2,000(U.S.). Nothing was said about the currency in

which the price of \$40,000 was to be paid. Mumtaz Ali, in his evidence said:

" No one mentioned if \$40,000 was to be in U.S. dollars. Neither they nor I. I was thinking in terms of \$40,000(Fiji)."

Later again:

" \$4,000 was to be in U.S. dollars. So were all the subsequent payments. Keener said that would be easier for them. I agreed as remittances were to be from Pago."

Listening to the conversation Eric Marlow gathered the impression that the American dollar was to be the currency for the whole transaction - though no one specifically stated so.

I find that Mumtaz Ali and Keener were thinking of different currencies when the price of \$40,000 was agreed upon. This is borne out by the correspondence that followed between the plaintiff and the defendant.

On 7th October 1977, Mumtaz Ali wrote to Keith Marlow of the defendant Company in following terms:

"7th October 1977

Mr K E Marlow
Marlows Limited
PO Box 3
SUVA

Dear Sir

re: Our Cat D6C Tractor

We confirm our discussion with your Messrs W J Keener, Wric Marlow and Henry Ah Sam wherein we agreed to sell to your associates in Pago Pago the above equipment for a total price of F\$40,000.00 (Forty thousand dollars) on the following terms and conditions:-

- (1) Narain's to render a pro-forma invoice to your company for the full purchase price.

- (2) Your associates will remit to Narain's not less than US\$4,000.00 on shipment of the machine to American Samoa. We understand that the initial deposit could even be raised to US\$20,000.00.
- (3) The balance monies shall be payable at the rate of US\$2,000.00 per month together with 10% interest on reducing balance.
- (4) The machine has been inspected by you and no warranty is given or implied.
- (5) Marlows Limited in Fiji will underwrite the entire purchase price and guarantee payment thereof to Narain.

We attach the pro-forma invoice herein and shall be pleased if you will confirm our agreement above.

Yours faithfully
NARAIN CONSTRUCTION CO LTD

(MUMTAZ F. ALI)
DIRECTOR.

To this letter Keith Marlow, on behalf of the defendant, sent the following reply on 11th October 1977:

"The Director,
Narain Construction Co. Ltd.,
Walu Bay,
SUVA.

Dear Sir:

Re: Cat. D6C Tractor

We acknowledge receipt of your letter of 7th October in which you set out terms of sale. Whilst the transaction took place with Mr. Keener, we are of the knowledge that the quotation was in U.S. dollars.

It has been noticed that several important parts will require replacing very shortly; it is understood that the magnitude of a reduction will be dependent on the US\$20,000 dollar first payment, US\$3,500 maximum or US\$2,500 if the

original payment procedure is reverted to.

For our part, we guarantee that South Seas Construction Company, Inc. to whom the machine is to be consigned, keeps to their payment terms.

Yours faithfully,
MARLOWS LIMITED

K.A.B. Marlow
Director.

c.c. South Seas Construction Company, Inc."

To this letter the plaintiff never made any reply.

The defendant has paid several instalments of \$2,000 each in Fiji currency. On 19th September 1979, according to the defendant he offered to pay off the balance treating the price of \$40,000 as being in U.S. dollars. The plaintiff refused to accept it insisting that the price of \$40,000 be treated as being in Fiji dollars. That is the basis of the claim in this action. Both counsel agree that the only issue for the Court's determination is: whether the defendant's liability to pay \$40,000 is to be calculated in U.S. or Fiji dollars.

The plaintiff's claim is not under the contract of sale and purchase. He specifically bases it on "the defendant's written guarantee dated 11th day of October 1977". This is the defendant's letter appearing above in this judgment to which plaintiff never made any reply. He did not dispute its contents and did not at any time ask for any formal written guarantee. That is the letter on which he now relies to establish his claim.

The defendant also relies upon the same letter to show that the guarantee, such as it was, was for the payment of the purchase price in U.S. dollars. He does not, otherwise, deny the guarantee.

The Court's task, therefore, is to construe this letter and determine what the defendant guaranteed to pay.

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The plaintiff's letter of 7th October 1977 confirms the sale and gives the price as "F\$40,000.00 and sets out terms and conditions.

The defendant's letter of 11th October 1977 states -

" We acknowledge receipt of your letter of 7th October in which you set out terms of sale. Whilst the transaction took place with Mr. Keener, we are of the knowledge that the quotation was in U.S. dollars.

.....

For our part, we guarantee that South Seas Construction Company Inc. to whom the machine is to be consigned, keeps to their payment terms."

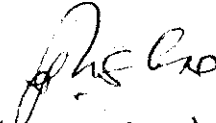
The parts underlined show clearly that (a) the defendant knew the price to be in U.S. dollars, and (b) that the machine was still with the plaintiff.

The plaintiff must be taken to have accepted the defendant's assertion and consigned the machine to the South Seas Company. No other guarantee was sought from the defendant.

As far as the construction of this letter is concerned, no help can be derived from the fact that the defendant paid several instalments of \$4,000 in Fiji currency. The plaintiff accepts that this sum was payable in U.S., not Fiji, currency. The defendant, who was based at Suva, found it easier to pay these smaller sums in local currency and go into account before final payment. No special significance can be attached to such payments.

The defendant's letter of 11th October 1977 cannot, therefore, be so read as to mean that the defendant was guaranteeing payment of the purchase price in Fiji dollars.

The plaintiff's claim is dismissed with costs which will be taxed in default of agreement.


(G. Mishra)
JUDGE

Suva,

23rd May 1980