

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

ACTION NO. 95 OF 1981

Between:

NAUSORI DAILY TRANSPORT LTD.

PLAINTIFF

- and -

SHIU NARAYAN s/o Augustine

DEFENDANT

Mr. V. Parmanandam for the Plaintiff.

Mr. R.I. Kapadia for the Defendant.

J U D G M E N T

In this action the defendant seeks a declaration that a Bill of Sale dated the 30th May, 1978, given by the plaintiff to the defendant over the chattels therein referred to is void and unenforceable and seeks an order setting it aside. The plaintiff also seeks an order that an attempted seizure was invalid or alternatively an order that the defendant is only entitled to the instalments provided in the Bill of Sale.

The relief sought could have been more clearly stated and, as I will be stating later, a proper or better basis should have been laid in the Statement of Claim.

This action arose out of a demand by the defendant, the mortgagee named in the Bill of Sale No. 3048 Folio No. 1 for payment of the sum of \$32,881.80 alleged to be owing by the plaintiff to the defendant and the contemplated seizure of certain vehicles owned by the plaintiff and covered by the said Bill of Sale if such demand was not met. These facts were not pleaded but are gleaned from the evidence given at the hearing.

The Writ and Statement of Claim were amended at the hearing and the Statement of Claim was further amended after the defendant had closed his case.

While there is a short legal answer to the plaintiff's claims for relief I propose to set out the facts and discuss the plaintiff's claim.

On the 1st June, 1977, the defendant as vendor entered into a written agreement with Vijay Brij Lal and Vidya Lal both sons of Brij Lal and both described in the written agreement as company directors as purchasers as trustees for the plaintiff company which was then in course of incorporation.

The subject matter of the sale was a road service licence and a number of vehicles.

I must assume that the plaintiff company when it was incorporated adopted the said sale and purchase agreement as it executed the Bill of Sale under consideration the recitals of which clearly indicate that the Bill of Sale was given pursuant to and in compliance with the provisions of that agreement. The Bill of Sale is dated 30th May, 1978, almost a year after the agreement was entered into.

Counsel for the parties did not appreciate the significance of an incorporated company giving a Bill of Sale over property owned by it, a matter I will be referring to later. Since counsel's attention was not drawn to this matter by the Court at the hearing I will, as I have already stated, consider the merits of the plaintiff's claim. The end result is the same.

There is very little dispute as to the facts except as to whether the plaintiff had made payments in advance of those required under the Bill of Sale or was in arrears as alleged by the defendant. This issue was not raised by the pleadings and would in any event relate to a claim for relief which is not maintainable namely an order that an attempted seizure was invalid.

The plaintiff's claims are covered by paragraphs in its Statement of Claim as under :

- "7. IN the said Bill of Sale number 3048 vehicle numbers AM685 and AI889 were listed as being part of the sale when in fact the Bill of Sale in favour of Shree Dhar Motors was not discharged nor was Bill of Sale number 3048 registered as a second Bill of Sale.
8. SUCH error misdescription or falsity as to the subject matter of the Bill of Sale numbered 3048 caused a consequent false statement as to the consideration as stated in the said Bill of Sale.
9. THAT the consideration stated "and in consideration of the said sum of \$44,498.50c. now due and owing" is false as the same was not due but may have been owing.
10. The Bill of Sale is not in accordance with section 10 of the Bill of Sales Act in that it fails to describe the subject matter of the Bill of Sale in a schedule."

I will deal with paragraph 10 first which is entirely without merit. Mr. Parmanandam acting for the plaintiff has not appreciated that there is no schedule or inventory referred to in the Bill of Sale. The subject matter of the Bill of Sale is a number of passenger service vehicles. As described in the recitals in the Bill of Sale the registered numbers and chassis and engine numbers are all stated and the Bill of Sale extends to cover tools, tyres, spare parts and accessories thereto appertaining or belonging. No schedule or inventory was annexed or referred to in the Bill of Sale and reference to that matter in section 10 has no application so far as the present Bill of Sale is concerned.

Mr. Parmanandam also does not appreciate that section 10 provides for the form in which a Bill of Sale must be registered. If a Bill of Sale given by an incorporated company is not registerable under the Act, section 10 can have no application to the Bill of Sale under consideration. This matter, I will discuss later.

Paragraphs 6 and 7 of the Statement of Claim can be taken together. There is likewise no merit in the argument that the facts therein disclose that there were errors misdescription or falsity in the Bill of Sale.

The sale and purchase agreement discloses there were three vehicles AM865, AI889 and AH234 which at the time were under Bill of Sale and the sum of \$11,501.50 was owing by the defendant thereunder to Shareedhar Motors Ltd. The agreement specifies at one place that this sum of \$11,501.50 is separate and distinct from the sale price of \$68,498.50 the agreed price for the service and the vehicle. The purchasers under the agreement contracted to take over this liability.

It is not in dispute that the plaintiff entered into a deed of covenant to pay this sum of \$11,501.50.

The three vehicles referred to were covered by the Bill of Sale under consideration. While the agreement does, as stated, specify that the sum of \$11,501.50 is separate from the sum of \$68,498.50 (the two sumtotal \$80,000) the covenants for payment in the agreement indicate the total indebtedness namely the sum of \$80,000. This sum is referred to in the Bill of Sale.

There is reference to the Shreedhar Motors Ltd. debt in the Bill of Sale. The plaintiff having executed a deed of covenant the sum of \$11,501.50 is not a sum which the plaintiff is required to pay to the defendant. There is no objection in law to a person giving as many Bills of Sale as he likes over a chattel and he is not obliged to discharge any existing Bills of Sale before he executes a fresh one.

It is usual in such an event to qualify the mortgagor's statement or declaration in the Bill of Sale "that it now has good right and absolute authority to grant and assign the same chattels unto the mortgagee as aforesaid free from all charges....." (clause 6 of Bill of Sale) and to disclose the prior Bill of Sale by prefacing the clause by: Subject to prior Bill of Sale No..... that it now....."

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Such a qualification is missing from the Bill of Sale under consideration and clause 6 is not factual but this is the fault of the plaintiff and it can hardly take objection to that false statement it made even if it had raised the matter in its pleadings which it has not. In any event a misstatement or false statement not referring to the prior Bill of Sale would not invalidate the Bill of Sale.

The Bill of Sale was executed almost a year after the agreement was entered into and the recitals adequately relate the then nature of the transaction and the moneys then owing to the defendant.

Paragraph 9 of the Statement of Claim is also without merit. As pleaded there is no denial that the figure of \$44,498.50 is not correct. In fact there is a somewhat hesitant admission that it "may be owing". The plaintiff alleges that the consideration stated is false because it is stated it is 'now due' when it is not now due.

Quite apart from the fact that the plaintiff executed a solemn deed which admits the debt is "due and owing", it has not satisfied me it was not then "due and owing". That however, is quite immaterial. Although the Bill of Sale purports to state "and in consideration of said sum of \$44,498.50 (fortyfour thousand four hundred and ninety-eight dollars and fifty cents) now due and owing by the mortgagor to the mortgagee.....". This past debt was not and could not be any part of the consideration for granting the Bill of Sale.

A recital that "in consideration of the mortgagee agreeing to accept payment of the sum of \$44,498.50 at the times and in the manner hereinafter provided" is a proper statement of consideration. This is clearly what the parties intended. This is only another example of somewhat sloppy drafting.

The recitals in the Bill of Sale do correctly set

out the transaction between the parties and as regards the said sum of \$44,498.50, states in reference to the agreement of 1st June, 1977 that "it was a condition precedent by agreement dated 1st June, 1977 that the mortgagor enter into these presents to secure the mortgagee the payment of the balance or sum of \$44,498.50....." The Bill of Sale then goes on to state "now therefore this indenture witnesseth that in pursuance of the premises"

In Burns Philp (South Sea) Co. Ltd. v. Shell Company (Pacific Islands) Ltd. v. Munsami Naidu F.L.R. Vol. 9, 102, Knox-Mawer Ag. P.J. considered a similar statement in a Bill of Sale. He held that where the true consideration is set forth in a recital which is incorporated in the statement of consideration by the words "as heretobefore mentioned and in pursuance of the premises" there is a sufficient compliance with section 7 of the Bills of Sale Act. The matter I have just finished discussing was raised by Mr. Parmanandam in his address but the plaintiff's Statement of Claim pleads and relies only on the alleged falsity of the debt being "now due" when it was not now due.

I am not in any event persuaded that a statement that the debt is "now" due, when it is owing but not payable until some time later, is of any significance. The plaintiff did not seek to establish that the whole debt was not due at the date of execution of the Bill of Sale.

The plaintiff seeks an order "that the attempted seizure is invalid". There is no mention of any attempted seizure in the allegations in the Statement of Claim and no basis has been laid for such an order which is refused.

As an alternative claim the plaintiff seeks "an order that the defendant is entitled to such amounts as due by instalments only". No basis has been laid for seeking such an order. This is a plea to the Court to exercise its inherent jurisdiction to grant relief. Where parties enter into a solemn deed and record their agreement and no basis has been laid for such an order the plaintiff cannot expect this Court to interfere. If I had to consider this matter

the evidence is clear that the plaintiff is at least five instalments in arrears. There is a clear admission in Mr. Parmanandam's letter to Mr. Kapadia of 12th February, 1981, when he forwarded his cheque for \$2,000 that plaintiff was in default. I decline to make such an order.

I do not consider the Bill of Sale is void and unenforceable and decline to accede to a request for a declaration that it is and therefore the plaintiff is not entitled to any order setting aside the Bill of Sale.

I stated earlier that there was a short legal answer to the plaintiff's claim.

A Bill of Sale given by an incorporated company over its property is not a bill of sale to which the provisions of the Bills of Sale Act apply. It is registered as a charge under the Companies Act.

Clause 2 of the Bills of Sale Act states :

"This Ordinance shall apply to every bill of sale whereby the holder or grantee has power, either with or without notice, at any time to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

"Personal chattels" is defined in clause 3 at some length. Ignoring the irrelevant portions of the definition : "personal chattels" means - goodsbut does not include chattels, interests in.....the capital or property of incorporated or joint stock companies....."

The legislature has expressly excluded a Bill of Sale over chattels owned by an incorporated company from the operation of the Act by the definition of "personal chattels." While the plaintiff's Bill of Sale does confer power on the defendant to seize or take possession of the plaintiff's personal chattels referred to in the Bill of Sale, they are not "personal chattels" as defined by the Act.

The fact that the Bill of Sale in question was not registered under the Bills of Sale Act should have alerted Counsel. If the Bills of Sale Act had application, by virtue of section 7 the Bill of Sale would have been deemed "fraudulent and void" for want of registration and the defendant would have had no defence to a claim that the Bill of Sale was not a charge on the chattels.

There is no merit in any of the plaintiff's claims and I decline to grant any of the relief sought.

The plaintiff's claim is dismissed with costs to the defendant.

R.G. Kermod

(R.G. KERMODE)

ACTING CHIEF JUSTICE

SUVA,

27 MAY, 1981.