

IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CIVIL APPEAL NO. 13 OF 1982.

000058

Between:

SAMUEL SUBHAS CHANDRA
of Berry Road, Suva,
Taxi Proprietor.

APPELLANT

- and -

1. DIHURUP SINGH s/o R.K. Singh

RESPONDENT

2. KISHORE KUMAR SINGH
s/o Bob Singh

Mr. R. Chandra for the Appellant.
Mr. H. Patel for the Respondents.

J U D G M E N T

The appellant in the Magistrate's Court obtained judgment against the second respondent, the driver of vehicle D0016, which was involved in an accident in Suva on the 21st February, 1981, with a vehicle owned by the appellant.

His claim against the first respondent, the alleged owner of the said vehicle No. D0016 was dismissed because the Magistrate was satisfied that the second respondent was not at the relevant time the servant or agent of the first respondent.

There is only one ground of appeal which is as follows :

"THAT the Learned Trial Magistrate erred in law in admitting the evidence of the 1st defendant, namely that he had given his taxi permit to one Dharmendra Singh to use, when the same had not been specifically pleaded as required under Order XIV Rule 3(f) and (g) of the Magistrates Court Rules. Hence there has been a substantial miscarriage of justice."

At the hearing of this appeal, the Court informed Mr. Chandra that the Record did not disclose that he had objected to the taxi permit being introduced.

Mr. Chandra stated he had objected strongly to the introduction of the evidence but the Magistrate did not record his objection. Mr. H. Patel when asked could not remember that particular objection but stated that there had been several objections. I accept that Mr. Chandra did object.

Rule 3(f) and (g) of Order XVI of the Magistrates' Courts Rules are as follows :

"3(f) It shall not be sufficient to deny generally the facts alleged by the statement of claim but the defendant must deal specifically therewith either admitting or denying the truth of each allegation of fact seriatim, as the truth or falsehood of each is within his knowledge, or (as the case may be) stating that he does not know whether such allegation or allegations is or are true or otherwise.

(g) When a party denies an allegation of fact, he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given."

The Magistrate had ordered a Defence to be filed and Order XVI has application.

The appellant in his statement of claim had alleged that he was at all material times the registered

proprietor of vehicle No. A0852 and that the first respondent was the owner of vehicle D0016.

The first respondent in his Defence which was prepared by his solicitors Messrs. Parshotam & Co. admitted those allegations which formed paragraph 1 of the Statement of Claim. Mr. H.C. Patel signed the Defence.

Paragraph 2 of the Statement of Claim alleged that at all material times the second respondent was the servant or agent of the first respondent. The first respondent in his Defence denied this allegation.

When the action came on for hearing the position on the pleadings was that the main issue was whether the second respondent was the servant or agent of the first respondent.

Having admitted he owned the vehicle, which was a taxi, there was prima facie evidence that the second respondent, who was driving the taxi at the relevant time, was the agent or servant of the first respondent.

Bingham's motor claim cases 3rd Edition at p.94 refers to the case of Barnard v. Sully (1931) 47 T.L.R. 557 and states :

"Where a plaintiff in an action for negligence proves that damage has been caused by defendant's motor car, the fact of ownership of the motor car is prima facie evidence that the motor car, at the material time, was being driven by the owner, or by his servant or agent."

That presumption may be rebutted by proof of the actual facts.

At the hearing Mr. Patel applied to amend paragraph 1 of the Statement of Claim. The Record indicates he did not formulate any amendment but merely stated

"we deny paragraph 1". Mr. Chandra had no objection and the amendment was allowed.

Mr. Chandra called a Licensing Officer and it was established that at the relevant time the first respondent was the registered owner of vehicle D0015. This fact should have been known to Mr. Patel or the first respondent. His last minute denial of this fact by seeking amendment of the defence can only have arisen because Mr. Patel proposed to put forward a defence of which there was no hint in the defence.

That defence which later emerged when the first respondent gave evidence was to the effect that at the relevant time he was overseas and before he left he had handed his car to his nephew and gave his taxi permit to him. He said that on the day of the accident the second respondent was working for his nephew. When Mr. Chandra objected to the evidence regarding the alleged transfer of the tax licence and it was evident that the first respondent was putting forward a defence not set up in his defence the Magistrate should have considered rule 3(k) of Order XVI which is as follows :

"The answer of a defendant shall not debar him, at the hearing, from disproving any allegation of the plaintiff not admitted by the answer, or from giving evidence in support of a defence not expressly set up by the answer, except where the defence is such as, in the opinion of the court, ought to have been expressly set up by the answer, or is inconsistent with the statements thereof, or is, in the opinion of the court, likely to take the plaintiff by surprise and to raise new issues not fairly arising out of the pleadings as they stand and such as the plaintiff ought not to be then called upon to meet."

Had he done so he may have disallowed the introduction of the taxi licence or the defence not expressly set up in the pleadings.

The appellant could have raised other grounds of appeal.

The Magistrate clearly erred in stating "Defendant 1 had unlawfully transferred to Dharmendra Singh his taxi permit.....". There was no transfer. The evidence was that the first respondent handed his taxi to his nephew with his taxi licence.

Counsel did not assist the Magistrate.

There was prima facie evidence that the first respondent being owner of the taxi and licensed to use it as such was the employer or principal of the second respondent.

The onus was on the first respondent to rebut that evidence. The Magistrate should have considered whether the fact of leaving his taxi and licence with his nephew made his nephew his agent since it was illegal for other than the licensee to operate the taxi. The nephew could have been held on the facts to be operating on behalf of his uncle. If that were the case then the nephew's employment of the second respondent would have been on behalf of the first respondent.

The conduct of the case was unsatisfactory and both counsel involved must accept some of the blame for that situation. The trial Magistrate did not appreciate the issues involved and should not have permitted the first respondent to produce the taxi licence in support of a defence he had not disclosed in his statement of defence.

The appeal is allowed.

Regrettably I have no option but to send the case back to the Magistrate's Court for rehearing. As the Magistrate who heard the action has left Fiji, the

rehearing will be before another Magistrate.

The Magistrate's judgment against the second respondent is set aside and dismissal of the claim against the first respondent is quashed. The action is to be reheard by the Magistrate's Court.

There will be no order as to costs.

R. G. Kermod

(R.G. KERMODE)

J U D G E

S. U. V. A.,

AUGUST, 1983.