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IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Civil Appeal No. 12 of 1984

Between:

RAJESH RAM of Carpenters Motors, Suva. — APPELLANT

- and -

SOHAN RAM s/o Jagrup — RESPONDENT

Mr. J.N. Singh for the appellant
Mr. R. Chandra for the respondent

J U D G M E N T

The appellant who was the defendant in the Court below appeals against the judgment of the first class Magistrate's Court Suva delivered on the 25th May, 1984.

There are 6 grounds of appeal as under :

"1. THAT the Learned Magistrate erred in law and in fact in awarding the sum of $250.50 (TWO HUNDRED FIFTY DOLLARS AND FIFTY CENTS) for labour and parts to the Plaintiff when in fact the Plaintiff did not call the Repairer of his said Motor Vehicle No. AC611 to give evidence and prove that in fact he had carried out the alleged repairs on the Plaintiff's said Motor Vehicle which had cost the Plaintiff the said sum of $250.50 (TWO HUNDRED FIFTY DOLLARS AND FIFTY CENTS).

2. THAT the Learned Magistrate erred in law and in fact in awarding to the Plaintiff the sum of $250.50 for labour and parts when in fact according to paragraph 4 of the Plaintiff's pleadings his case was based on an alleged written contract between the 1st Defendant and the Plaintiff and no such alleged contract was produced or proved before the Court at the trial and accordingly the Court had erred in entering judgment in the sum of $250.50 for labour and parts.

3. THAT the Learned Magisgrate erred in rejecting and not giving due consideration to the evidence of the 1st Defendant who said that he had hired his taxi to one taxi driver Sunil Kumar at the monthly payment of $60.00 (SIXTY DOLLARS) with instructions not to give his said taxi to anyone else to drive and the said evidence rebuts the presumption that the 2nd Defendant, whom the 1st Defendant had not known, drove the said taxi as a servant or agent of the 1st Defendant.

4. THAT the Learned Magistrate had erred in allowing $10.00 for taxi fares when no claim had been made by the Plaintiff in his pleadings for taxi fare.

5. THAT the findings and the decision of the Learned Magistrate cannot reasonably be supported having regard to the Pleadings of the Plaintiff and evidence adduced in the case.

6. THAT the Learned Magistrate erred by not giving any weight or due consideration to the evidence of the Appellant."

The Statement of Claim was very brief. It was alleged that the plaintiff was at all material times the owner of vehicle AC611, the second defendant was owner of vehicle AC912 and that the second defendant was the servant and/or agent of the first defendant.

It was further alleged that the two vehicles were involved in an accident on the 29th July, 1983, near the junction to Velau Drive and that the accident was solely due to the negligence of the second defendant. Particulars of negligence were given.

Instead of pleading damage to his vehicle and claiming special and/or general damages, the claim of the plaintiff was for payment of an agreed sum of $300. Paragraph 4 of the Statement of Claim states :

"THAT the first and second defendant after the collision agreed in writing to pay the sum of $300.00 for the damages but to date has not paid."

The plaintiff then claimed judgment for $300.00 and costs. There was no claim for damages.

The first defendant filed a Defence admitting he was at all material times the owner of vehicle AC912 but denied the second defendant was his servant or agent. He denied all the allegations regarding the accident except that he admitted he later learnt that his vehicle had been involved in an accident near the junction to Velau Drive. He denied the allegations in paragraph 4 of the Statement of Claim.

The learned Magistrate on the first call ordered that the two defendants file Defences within 14 days. The Record shows that Mr. Singh appeared for both defendants.

No Defence was filed by the second defendant but he appeared in person on the adjourned date and admitted liability for $200 and costs. Mr. Chandra did not accept this.

Notwithstanding this non acceptance, the Record shows that the Magistrate gave judgment for the plaintiff against the second defendant for $200 and costs.

Both counsel and the Magistrate then appear to have completely ignored the pleadings and the issues to be tried.

Mr. Chandra called only the plaintiff who gave very brief details of the accident and that his vehicle was damaged. The plaintiff endeavoured to produce a receipt for parts alleged to have been purchased for $147.

Mr. Singh's objection to tendering of the receipt was upheld but plaintiff was permitted to state that he spent $147 for parts. He stated he paid Michael Motors $103.50 for labour.

When cross-examined he said he had receipts for payments and two receipts including the one objected

to earlier were tendered and admitted by the Magistrate. The receipt for $103.50 was given not by Michael Motors but by one Simadri Sami. Counsel did not comment on this.

Plaintiff made no attempt to prove that the first defendant signed the alleged agreement to pay him $300.

The first defendant's evidence also was very brief. He denied that he had agreed to pay $300 to the plaintiff. He said he did not know the second defendant who was not his servant or agent.

He said that on 1st July, 1983, he had handed over his vehicle which was a taxi to one Sunil Kumar to drive and look after. Sunil Kumar was to pay him $60 a month. At the time Sunil Kumar was working for a B. Kumar.

The Magistrate in his judgment ignored the claim based on an alleged agreement to pay the sum of $300 and commences his judgment in the following manner:

> "The plaintiff's claim is for $300 based on negligent driving of the second defendant".

The learned Magistrate erred in describing the plaintiff's claim which while alleging negligence was based on contract - an alleged agreement by the two defendants to pay $300.

No such agreement was produced and the plaintiff did not testify that any such agreement had been entered into.

There was not in any event any claim for special damages.

Despite the pleadings the Magistrate treated the action as a claim for special damages for negligence.

Neither counsel took any objection to this course of action.

Order IX Rule 1 of the Magistrates' Courts Rule permits a plaintiff to state his claim in the writ of summons briefly in a general form. Order XVI Rule 1 refers to the fact that such shall ordinarily be heard and determined in a summary manner without pleadings but pleadings may be ordered. Where they are ordered Order XVI Rule 3 applies. No Statement of Claim was ordered in the instant case but a Defence was ordered. The rule applied therefor to the Defence only.

Notwithstanding the many defects in the Statement of Claim, the first defendant can have been under no mis-apprehension as to what the plaintiff was claiming namely $300 to compensate him for damage caused to his car by the negligent driving of the second defendant whom he alleged was the servant or agent of the first defendant.

The Magistrate was correct in holding that the main issue is whether the second defendant was at the material time the servant or agent of the first defendant.

In considering this issue, the Magistrate referred to the case of Samuel Subhas Chandra v. Dhurup Singh & Another C.A. 18 of 1982. That case referred to Barnard v. Sully (1931)47 T.L.R. 557 where it was held that :

> "Wherea 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."

The Magistrate stated that the first defendant "claimed that he knew nothing about the second defendant but that he had given the taxi to one Sunil Kumar".

That was not what the first defendant "claimed" he gave evidence on oath to that effect.

The record of the cross-examination does not indicate that the first defendant's statement that he did not know the second defendant and had only seen him in Court on that day for the first time was challenged.

The cross-examination recordedindicates that the first defendant was questioned about transfer of taxi permit and his relationship to Sunil Kumar. It was established that Sunil Kumar was not related to the first defendant and was at the material time employed by a B. Kumar.

Despite the fact that the first defendant was not shaken in his testimony, the Magistrate did not make any finding as to his credibility. He took the unusual step of deciding the matter on the balance of probabilities. Having remarked that Sunil Kumar was not called he stated he was "left with the evidence of the first defendant alone".

On the balance of probabilities, the Magistrate held that the first defendant had failed to rebut the presumption that the second defendant was his servant or agent when the accident occurred.

The Magistrate stated he had considered the case of Ganesh & Ram Asre v. Mahmood Ali & Ors. F.C.A. 47 of 1978.

It appears to me that the Magistrate did not properly consider Ganesh's case where the Fiji Court of Appeal fully considered the law of vicarious liability as regards the owner of a vehicle.

In Ram Barran v. Gurrucharran (1970) 1 All E.R. 749 a case that went to the Privy Council Lord Donovan at p.751 stated :

> "Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but

not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence."

The Magistrate did not weigh the available evidence on the issue of vicarious liabilities. It was not an issue to be decided on the balance of probabilities.

The Fiji Court of Appeal referred Hemns v. Wheeler [1948]2 K.B. 61 at page 65 :

"Whether there is any evidence to support the county court judge's findings of fact is always a question of law.....it is for the county court judge to find the facts and to draw the inferences from those facts, but that it is always a question of law, which will warrant the interference of this court, whether there was any evidence to support his findings of fact and whether the inferences he has drawn are possible inferences from the facts as found."

The Magistrate did not hold as a fact that the second defendant was at the material time the servant or agent of the first defendant. What he held was that the first defendant had failed to rebut the presumption that that was the situation.

It is open to this Court to consider the evidence before the Magistrate to see whether there was any evidence to support his finding that the first defendant had failed to rebut the presumption.

It would appear that the Magistrate did not properly consider who carried the burden of establishing the issue or the nature of the presumption.

The fact of ownership of a motor car is only prima facie evidence that the car if not being driven by the owner was being driven by his servant or agent. In the instant case the driver was known and was made a party to the action.

Lord Donovan in Gurrucharran's case at p.752 said:

> ".....The onus of proof of agency rests on the party who alleges it. An inference can be drawn from ownership that the driver was the servant or agent of the owner, or in other words,that this fact is some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it. It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns."

The plaintiff merely established that the first defendant owned the car and that it was being driven by the second defendant. There was other evidence rebutting the prima facie presumption which I have already indicated was not challenged in cross-examination. No rebuttal evidence was called by the plaintiff. On the authority of Browne v. Dunn (1893) 6 R.67 the failure by Mr. Chandra to cross-examine the first defendant on his story that the second defendant was not known to him and was not his servant or agent must be deemed to imply acceptance of that evidence.

The Magistrate did not reject the first defendant's evidence, he merely held the evidence was not sufficient to rebut the presumption.

There was in my view evidence that the second defendant was not the agent or servant of the first defendant to rebut the presumption and on a proper consideration of the evidence the Magistrate should have held that the plaintiff had failed to establish that the second defendant was at the material time the agent or servant of the first defendant.

The appeal is allowed.

The judgment against the first defendant is set

aside. The claim against the first defendant is dismissed with costs to him of this appeal and in the Court below.

R G Kermode

(R.G. KERMODE)

S U V A,

28th JANUARY, 1985.