IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 14245

BETWEEN OPETAIA ENE of Mulifanua Planter

PLAINTIFF

A N D JOE TEOFILO MOE of Apia, businessman

DEFENDANT

Counsel : Fepulea'i for Plaintiff
Enari for Defendant

Hearing : 16 October 1992

Decision : 26 February 1993

DECISION OF SAPOLU, C.J.

This is an action by the plaintiff claiming from the defendant the sum of $8,170 plus interest and costs. This action really arises out of a contract of sale of goods. As such the provisions of the Sale of Goods Act 1975 are applicable to this case.

The plaintiff says that he met the defendant, who is a car dealer, at Tafuna, American Samoa, in 1989 and told the defendant that he wanted to buy a Toyota Corolla from the defendant. The defendant had only a 1985 Nissan Sentra station-wagon sedan which he offered the plaintiff and was accepted by the plaintiff. The price of the car was US$4,000 plus a sales tax of US$80 making a total of US$4080. In Western Samoan currency that was about $8160. In October 1989 the plaintiff paid to the defendant at the Tusitala Hotel in Apia the sum of $6,000 as a deposit and as part payment of the price of the car leaving a balance of $2160 for the price. The car was shipped to Apia in November 1989 and the plaintiff paid $1,020 for customs duty and $350 towards freight. The plaintiff also paid $160 to the Ministry

of Transport for a taxi licence and $100 to the Inland Revenue Department for a business licence as he wanted to operate the car as a taxi. The car was also registered at the Ministry of Transport under the name of the plaintiff and the taxi licence was issued in the name of the plaintiff. The car was then driven and operated by the plaintiff as a taxi. At that time the defendant was operating a business as a car dealer in American Samoa but was also doing business in Western Samoa. Thus he made regular visits to Apia from American Samoa. On those visits the plaintiff made to the defendant further payments totalling $300 from the income earned by the plaintiff from running the car as a taxi. No receipts were issued for those payments or for the deposit of $6,000 that was paid. However, the defendant does not deny that those payments were made to him.

The windscreen of the car was then damaged and the plaintiff asked the defendant about the price of a windscreen. He was told by the defendant that the price was US$200 or $400. That money was subsequently paid by the plaintiff to the defendant for otaining a replacement windscreen. During the Christmas of 1989, the gearbox of the car was also damaged by the plaintiff's uncle from New Zealand. The car was then kept at the plaintiff's home at Mulifanua for some time and was later brought to a motor mechanic at Lepea for repairs to the windscreen and gearox. According to the plaintiff, at that time, the defendant came and asked him and his mother to let the plaintiff repair the car. I accept that evidence by the plaintiff. The car was then towed to the defendant's premises where several repairs were carried out by the defendant. In this respect, the plaintiff says that he did not request all the repairs the defendant claims to have done to the car He wanted only the windscreen and gearbox to be repaired but it appears that the defendant had carried out other repairs to the car which he did not request. A bill of costs of

$6,325 for repairs was received by the plaintiff from the defendant. A letter dated 18 February 1991 was then received by the plaintiff from the solicitor for the defendant advising the plaintiff that the defendant was to retain possession of the car until the balance of the purchase price and the costs of repairs had been paid in full or satisfactory arrangements for repayment had been made. The plaintiff was given until the end of the second week of March to comply with either of the two alternatives given by the solicitor for the defendant. The plaintiff did not come to see the defendant about that letter as he felt it was too late for him to do so when he received the letter. The car was subsequently sold by the defendant to a different buyer for $2,000.

The defendant says that the $400 given to him by the plaintiff for the replacement windscreen was used to reduce the balance of the purchase price so that the plaintiff was still owing $1771 for the purchase price. He also spent $350 on the gearbox and $60 on the axle. The defendant now counter-claims against the plaintiff for the sum of $1,771 plus his costs of labour and materials used in repairing the car.

As stated earlier on in this judgment the present action really arises out of a contract of sale of goods and the provisions of the Sale of Goods Act 1975 apply to such a contract. The 1985 Nissan Sentra station wagon car in this case falls within the definition of goods in section 2(1). When the defendant, a car dealer, offered the car to the plaintiff in American Samoa and the plaintiff accepted the offer and they agreed that the price was US$4,000 or $8,000 plus the sales tax of US$80 or $160 a contract of sale of goods between the plaintiff and the defendant came into existence at that time. It is immaterial that the full purchase price was not paid at that time and that some days later the defendant paid a deposit of $6,000 towards the purchase price with the balance to be payable over a subsequent period of time. Given that there was a contract of sale of goods the next question that arises is whether under the provisions of the Sale of Goods Act 1975 property in the car had passed

from the defendnt to the plaintiff. Section 18(1) provides that where there is a contract for the sale of specific or ascertained goods the property in the goods passes to the buyer at the time the parties intend the property to pass. And section 18(2) provides that the intention of the parties may be ascertained from the terms of the contract, the conduct of the parties and all the circumstances of the case. However, where the intention of the parties as to when property in the goods is to pass to the buyer is not clear, section 19 provides the rules for ascertaining the time when the property in goods under a contract of sale of goods is to pass to the buyer. Rule 1 of the said rules is the relevant rule and it provides:

> "Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both, is postponed."

In this case it is not really clear when the plaintiff and the defendant intended the property in the car to pass to the plaintiff as buyer. It does not appear that the plaintiff and the defendant actually brought their minds to bear on that question. I am therefore of the view that rule 1 in section 19 applies. The reasons are that the contract in this case is an unconditional contract for the sale of specific goods in a deliverable state. The car was specific goods in terms of section 2(1) as it was identified and agreed on at the time the contract was made. The car was also in a deliverable state at that time. Although payment of the full purchase price and delivery of the car were to occur at a subsequent date that is immaterial as to passing of property under rule 1 in section 19. I am of the view that rule 1 in section 19 applies in this case and that the property in the car passed to the plaintiff buyer from the defendant seller at the time that the offer to sell by the defendant

was accepted by the plaintiff. This means that the ownership of or property in the car belonged to the buyer at the time the contract was made. Possession of the car was delivered to the plaintiff in November 1989 so at that time possession of and property in the car were both with the plaintiff.

In such a situation where both possession of and property in the car had passed from the seller to the buyer under a contract of sale of goods, the seller cannot lawfully retake the car and resell it to a different buyer simply because the original buyer has not paid the full purchase price. For the seller to so act, means he runs the real risk of an action in conversion being brought against him by the buyer. In Ward Ltd v Bignall [1967] 1 Q.B. 534, 550 which is a case concerning the sale of cars under the English Sale of Goods Act 1893, Diplock LJ stated :

> "If the unpaid seller resold the goods before or after the property had passed to the original buyer, he would remain liable to the original buyer for damages for non-delivery if the original buyer tendered the purchase price after the resale, and if the property had already passed to the original buyer at the time of the resale he would be liable to an alternative action by the original buyer for damages for conversion."

In Chitty on Contracts 24th ed., vol. 2 in para. 4605 it is stated : "It is submitted that the seller cannot lawfully retake (or obtain an order for specific restitution of) the goods, where, following the contract of sale, the buyer has both possession of, and the property in, the goods; any retaking of the goods by the seller in these circumstances would (except in cases of fraud or misrepresentation) be a conversion against the buyer."

In this case where possession and property in the car had both passed from the defendant seller to the plaintiff buyer, the proper action for the defendant to have taken as he is an "unpaid seller" in terms of section 38 was to sue the plaintiff buyer for the outstanding balance of the purchase price of the car instead of retaking the car and reselling it to a different buyer. In such a case the unpaid seller's remedy in my view is not against

the goods but against the buyer for the balance of the purchase price. In appropriate circumstances, the unpaid seller may also claim interest on the unpaid balance of the purchase price.

Perhaps to complete the picture, I must point out that an unpaid seller in terms of section 38 does have a right to resell the goods. That right of resale is provided under section 39. But the right of resale under section 39 is limited to circumstances permitted under the Act. And the circumstances permitted under the Act where a seller may exercise his right of resale are provided in section 47(3) and (4). However I need not set out section 47 in this judgment or dwell on this point any longer as, on the facts of this case, section 47 does not arise to assist the defendant.

From what has been said, I have come to the view that the action by the defendant of retaking and reselling the car to a subsequent buyer amounts to conversion since possession of and property in the car had already passed to the plaintiff. The proper basis for the action by the plaintiff therefore lies in the tort of conversion notwithstanding that its origin lies in a contract of sale of goods.

Conversion being the correct basis of the action by the plaintiff, the proper measure of damages for compensating the plaintiff on the present facts should be the value of the car at the time of the conversion as there was no evidence adduced at the hearing of the market value for this kind of car. To ascertain the value at the time of the conversion the Court in this case takes into account the value of the car when it was sold by the defendant to the plaintiff. That was $8,160. Add on to that amount the sums $1020 and $350 paid by the plaintiff for customs duty and freightage and the total comes to $9,530. Less from that amount the sum of $1,860 which is the unpaid balance of the purchase price of the car and we are left with the amount of $7670. The windscreen and gearbox of the car were damaged and the cost of the windscreen of $400 and the

cost of the gearbox of $350 should be deducted from the sum of $7,670 and that leaves a figure of $6,920. Given that the car was used for 2 months and then had an accident where the gearbox was damaged and was lying idle for a period of over 12 months and was also affected with seawater during cyclone Ofa I will allow general depreciation of 10%. That reduces the figure of $6,920 to $6,228 which in my view was the value of the car to the plaintiff at the time it was converted. I would also allow the claim by the plaintiff for the $400 which he paid to the defendant for a replacement windscreen but was not used for that purpose by the defendant. Thus the total amount of the claim allowed to the plaintiff is $6,628.

The claim by the defendant for the balance of the purchase price of the car has already been taken into account in assessing the value of the car at the time of the conversion. As to the claim by the defendant for the cost of other repairs he carried out, I am not prepared to allow that claim. My reasons are these. Firstly, I am not satisfied on the evidence that those repairs were necessary. I accept the evidence of the plaintiff that all that which required repairing were the windscreen and the gearbox and the costs of those necessary repairs have been deducted from the value of the car at the time it was converted. Secondly, those other repairs were not requested by the plaintiff. It would not be right to lump the plaintiff with the cost of repairs he did not request. To do so would mean that the plaintiff will be burdened with expenses he did not request or wanted to incur. That cannot be right in my view. Thirdly, the plaintiff derives no benefit from the non-requested repairs done by the defendant to the car as it has been resold. Accordingly the claim by the defendant for those repairs apart from the windscreen and the gearbox is disallowed.

I should also mention that I do not accept the sum of $2,000 for which the defendant resold the car as representing the true value of the car at the time of the conversion. The defendant claims $2,744 for his costs of the repairs done to the car. That does not include the value of the rest of the car that required no repairs. If the defendant's costs of repairs of $2,744 is added together with the value of the rest of the car which required no repairs, there is no doubt that the total amount would far exceed $2,000. Thus I do not accept that $2,000 is the correct value of the car at the time of the conversion. There is also no evidence that the market value for this kind of car was $2,000 at the date of the conversion.

Finally, I do not allow the claim by the plaintiff for interest in the circumstances of this case. This does not mean that the Court has not the jurisdiction to award interest where appropriate in a case of conversion. As for an unpaid seller in a contract of sale of goods case, he may in an action against the buyer for the price of the goods also claim for interest on the unpaid balance of the goods. And the Court may award interest in an appropriate case.

In all, judgment is given for the plaintiff in the sum of $6,628 plus costs which I fix at $500.00.

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CHIEF JUSTICE