

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 168 OF 2012

BETWEEN : **FIFA HOLDINGS LIMITED** a limited liability company having
its registered office at Rarawai Road – Ba.

PLAINTIFF

A N D : **PREM ISHWAR CHAND** trading as PREM GRADING & HIRE
SERVICES of Votualevu, Nadi.

DEFENDANT

Before : A.M. Mohamed Mackie- J

Appearance : Ms. P. Mataika for the Plaintiff
Mr. J. Sharma for the Defendant

Dates of Hearing : 28th and 29th August 2018

Date of Judgment : 20th November 2018

J U D G M E N T

A. BACKGROUND

1. Pursuant to the Statutory Demand dated 29th June 2012 (marked as “DE-4”) received by the plaintiff company from the defendant’s Solicitors for the recovery of \$ 25,000.00, claiming to be the balance due on account of the sale of a **Rock Breaker** by the defendant to the plaintiff company , and after the plaintiff’s reply thereto dated 23 July 2012 (marked as “DE-5”) this action was commenced by the plaintiff by an Ex-parte Notice of Motion filed on 30th July 2012 , praying for an injunction restraining the defendant PREM ISHWAR CHAND either by himself and/or his servants and /or his employees and/or his agents and/or whosoever presenting or proceeding with the winding up petition or advertising the same against the plaintiff until further orders of the court.

2. The above injunction being granted on 1st August 2012 as prayed for, by Hon. Yohan Fernando -J , the plaintiff filed its initial Statement of Claim (SOC) on 14th August 2012 praying for the same injunctive orders, sans any substantial reliefs, though, the plaintiff by the said reply letter dated 23 July 2012 (DE-5) had claimed that the defendant owed the plaintiff company a sum of \$ 20,720.00, being a debt owed by the defendant to the plaintiff's sister company, **Excavator Parts and Machinery (Fiji) Ltd**, ("Excavator Parts") which had ,purportedly, been assigned to the plaintiff company. The paragraph 10 of the amended SOC states the alleged debt as \$ 21,252.98.
3. The defendant, having filed the acknowledgement of service of the writ on 31st August 2012, filed the Statement of Defence on 18th October 2012 and moved for the dismissal of the plaintiff's action.
4. Subsequently, the plaintiff filed its Amended Statement of Claim (ASOC) on 29th October 2012 moving for a judgment in the sum of \$ 21,252.98, damages for breach of contract, interest and cost. After the inter-parte hearing into the injunction application, Hon. A. Tuilevuka-J, by ruling dated 9th September 2014 dismissed the defendant's application for the dissolution of the injunction order issued by Hon. Y. Fernando-J.
5. Thereafter, leave being granted to the defendant to amend the Statement of Defence to include a Counter Claim in a sum of \$25,000.00, being the alleged balance sum due on the sale of the Rock Breaker as aforesaid, the Amended Statement of Defence & Counter Claim (ASOD+ CC) was filed on 07th March 2017, for which the plaintiff filed reply on 16th March 2017 and the defendant filed his reply to the defence to counter claim on 31st March 2017.

B. AGREED FACTS AND ISSUES :-

6. At the pre-trial conference parties agreed upon the following Agreed Facts, Disputed Facts and Issues to be tried.

AGREED FACTS

1. On or about 12th January, 2012, the Plaintiff Company agreed to buy and the Defendant Company agreed to sell and deliver a Rock Breaker at an agreed price of \$45,000.00.

2. The Rock Breaker less with attachment tools was delivered to the Plaintiff upon payment of \$20,000.00.
3. That the Plaintiff on 12th January, 2012 issued a "Not Negotiable" Bank of Baroda Cheque No. 383961 dated 29th February, 2012 to the Defendant.
4. On 16th January, 2012, the Plaintiff stopped payment on Cheque No. 383961.
5. The Plaintiff has retained possession of the Rock Breaker and has been using it.

DISPUTED FACTS

1. Whether the said Rock Breaker was bought by the Plaintiff for any particular purpose or was sold to the Plaintiff by the Defendant on a "as is where is" basis.
2. Whether the Defendant and/or his agent warranted that the Rock Breaker was reasonably fit for the Plaintiff's purpose.
3. The reason for not delivering attachment tools of the Rock Breaker by the Defendant.
4. Whether the Defendant knew about the alleged Assignment of Debt dated 2nd January, 2012 assigned to the Plaintiff by the Excavator Parts and Machinery (Fiji) Limited at the sale of Rock Breaker.
5. Whether the Defendant was required to make payment to the Plaintiff under the alleged Assignment of Debt dated 2nd January, 2012 assigned to the Plaintiff by the Excavator Parts and Machinery (Fiji) Limited.
6. Whether the dated cheque for the sum of \$25,000.00 was released to the Defendant on the understanding that the Defendant will pay the sum of \$21, 252.98 under the Assignment of Debt and will provide attachment tools of the Rock Breaker within three (3) days from 13th January, 2012.
7. Whether the Defendant knew that the postdated cheque issued by the Plaintiff was not supposed to be deposited.
8. Whether the Plaintiff fixed the said Rock Breaker in a smaller excavator machine to remedy the damages.

AGREED ISSUES

1. Whether the Defendant breached the agreement that was entered into between the parties.

2. Whether the Rock Breaker was of good and merchantable quality and was fit for the purposes that it was bought for by the Plaintiff from the Defendant.
3. Whether the Defendant had refused to pay the Plaintiff the sum of \$21, 252.98 and whether the Defendant owed any money to Excavator Parts & Machinery (Fiji) Limited?
4. Whether the Plaintiff is entitled to claim the sum of \$21, 252.98 from the Defendant under Assignment of Debt.
5. Whether the Defendant is entitled to claim the sum of \$25, 000.00 from the Plaintiff for the Rock Breaker.
6. Whether the Plaintiff was entitled to stop payment of the said postdated cheque issued by the Plaintiff.
7. Whether the Plaintiff is entitled for any damages for breach of agreement from the Defendant.
8. Whether the Defendant is entitled for any general damages and exemplary and punitive damages as pleaded in the prayer of the counter-claim.
9. Whether either party is entitled for interest on any amount awarded by this Honourable Court.
10. Whether either party is entitled for costs.

C. TRIAL

7. At the trial held before me for two days, one of the Directors of the plaintiff company, namely, Mr. Feroz Mohamed (PW-1) and one Mr. Mukhtar Altaf Ali (PW-2) gave evidence, marking documents from "PE-1" to "PE-3", which were allowed to be marked subject to objection on the question of admissibility. On behalf of the defendant, the defendant himself as DW-1 gave evidence marking documents from "DE-1" to "DE-7".
8. I will not endeavor to reproduce the entirety of the evidence adduced by the parties, instead, the salient parts of it will be referred to and/or highlighted, if needed, during the analysis.

D. ANALYSIS ON THE PLAINTIFF'S CLAIM

9. The pivotal issues that beg adjudication as far as the plaintiff's claim is concerned, are whether any amount of money was well and truly payable by

the defendant unto the plaintiff's Sister Company "Excavator Parts" and whether such a debt had in fact been assigned to the Plaintiff Company as averred by the plaintiff in its Amended Statement of Claim, for the plaintiff to claim it from the defendant.

10. The defendant has vehemently denied the claim of the plaintiff on the, purported, assignment and took up the position that he did not have any sort of transaction with the plaintiff's sister company, the said "Excavator Parts" and pleaded total ignorance of any such assignment.
11. On the other hand, the counter claim of the defendant based on the, admitted, purchase of a Rock Breaker by the plaintiff company from the defendant, does not warrant deep scrutiny by this court in the light of the clear admissions recorded at the PTC Minutes and in the evidence of PW-1, a Director of the plaintiff company. This aspect of the defendant's counter claim will further be discussed later in this judgment after deciding on the plaintiff's claim against the defendant on the purported assignment of debt.
12. The final determination has to be arrived at on the preponderance of evidence /balance of probabilities, wherein the court will delve into the credibility of the witnesses, that of the oral and documentary evidence adduced and particularly after considering what weight (if any) has to be given to the documentary evidence adduced by the plaintiff.
13. The plaintiff, apart from the oral evidence of PW-1, namely, Mr. Feroz Jan Mohammed, entirely relied on the following documents to prove its case against the defendant.
 - a. The Deed of Assignment of Debt dated 2nd January, 2012 – "PE-1".
 - b. Invoice No. 0062 dated 25th February, 2008, purportedly, issued by Excavator Parts & Machinery (pvt) Ltd – "PE-2".
 - c. Invoice No. 002 dated 15th February, 2008, purportedly, issued by Excavator Parts & Machinery (pvt) Ltd- "PE-3".
14. The above documents had not been agreed upon between the parties and what was produced at the trial were mere photo copies of them and the production and marking of same were vehemently objected by the learned defence counsel. However, in the interest of justice, the court permitted them to be

produced and marked subject to consideration of evidential value, if any, attached to them, at the final analysis.

15. It is on this "PE-1", the, purported, Deed of Assignment of Debt, the plaintiff claims that the defendant PREM ISHWAR CHAND owed the Assigner, **Excavator Part & Machinery (PVT) Ltd**, a sum of 21, 252.98 and the said debt was assigned unto the plaintiff company, namely, **Fifa Holdings (FIJI) Ltd** by the "Excavator Parts" on 2nd January 2012.
16. The documents (invoices) relied upon by the plaintiff to substantiate the above debt, purportedly , owed by the defendant unto the Excavator Parts are, "PE-2" dated 25th February 2008 for a sum of \$3,000.00 and "PE-3" dated 15th February 2008 for a sum of \$11,000.00 respectively .
17. There was no acceptable explanation given by the plaintiff as to why the originals were not produced at the trial. The attempt made by the plaintiff through PW-2, Mr. Mukhtar Ali, to establish that these documents were destroyed during the Cyclone Winston, did not support the plaintiff's stance. The report made by PW-2 to the Police on 23rd February 2016 in this regard, admittedly, did not refer to any building belongs to the Plaintiff Company or particular documents allegedly destroyed. The evidence of the PW-2 has to be totally disregarded.
18. It is to be noted the copy of the said Deed of Assignment dated 2nd January 2012 (PE-1) has not been stamped, complying with the sections 40 and 41 of the Stamp Duties Act. Thus, this document or contents of it cannot be given any weight and should be disregarded.

Section 41 of the Stamp Duties Act provides that :

"except as aforesaid no instrument executed in Fiji or relating (whosoever executed) to any property or to any matter or thing done or to be done in any part of Fiji shall except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed"

The Exception is provided in Section 40 of the Stamp Duties Act as follows.

1. *If an instrument chargeable with duty and which may legally be stamped after execution is lost before the same is stamped, secondary evidence may be given of such instrument and of the contents thereof in any court, but the person adducing such evidence shall first pay to the officer of court whose duty it would be to read such instrument in court if the same had not been lost such unpaid duty and fine as the judge or magistrate assesses to be the duty and fine that would be payable such instrument had such instrument itself been tendered in evidence.*
 2. *If such duty and fine are not paid on assessment being made as aforesaid, the evidence shall be rejected.*
19. However, despite the above position and without prejudice to it, this court will subject this document to scrutiny to determine whether the plaintiff's evidence is credible and it adds any weight to the plaintiff's case.
20. The evidence of PW-1, Mr. Feroz Jan Mohammed, on the purported Assignment of Debt "PE-1" cannot be believed, accepted and acted upon. He, throughout his evidence, displayed that his evidence is totally untrustworthy. He was mostly evasive and contradicting on vital points.
21. His evidence was, that the assignment of debt took place after his agent Mr. Gulzar Ali took delivery of the Rock Breaker from the defendant on 13th January 2012. The pleadings, PTC minutes and the defendant's invoice bearing No. 3530 marked as "DE-1A" show that the sale and delivery of the Rock Breaker took place only on 13th January 2012. But the plaintiff's very Deed of Assignment of Debt "PE-1" shows the date of execution as 2nd of January 2012.
22. Then, several pertinent questions arise as to why the purported Assignment of Debt dated 2nd January 2012 (marked as PE-1) did not come forth when the sale of the Rock Breaker took place on 13th of January 2012 and what made the plaintiff's agent Gulzar Ali to hand over a cheque dated 29th February 2012 for the balance sum of \$ 25,000.00. If there was a debt owed by the defendant, there should have been an arrangement for the setting off of such a debt and no need would have arisen to hand over a postdated cheque or at least there should have been some firm communication preferably in writing to substantiate that position.
23. The plaintiff's unsupported evidence that everything took place verbally cannot be accepted at all. At least plaintiff should have adduced the evidence of his agent (Gulzar Ali), who did the purchasing of the Rock Breaker on 13th

January 2012 and handed over the consideration partly in cash and the balance by way of a cheque dated 29th February 2012.

24. Had this purported assignment been notified to the defendant, in my view, this sale of the Rock Breaker, probably, would not have taken place. It was like a **'bolt from the blue'** to the defendant to be informed about it for the first time by the letter dated 23rd July 2012, marked as DE-5 after about four and half years from the date of purported purchasing of parts by the defendant from the plaintiff's Sister Company Excavator Part and after a period more than 6 months from the date of sale and purchase of the Rock Breaker on January 2012.
25. Interestingly, the defendant was not a party to the purported Deed of Assignment of Debt and nor he was duly informed about such a debt or assignment of it.
26. The plaintiff's Director PW-1 in his affidavit dated 30th July 2012 had refused to disclose a copy of the so called Deed of Assignment of Debt dated 2nd January 2012(PE-1) stating that it was a confidential document and subject to privilege. In his cross examination he was unable to justify the claim of confidentiality and privilege.
27. It appears that he has deliberately suppressed the above self-serving Deed of Assignment of Debt in order to avoid same being boomeranged on him during the period of his adversity, when he was tried before the High Court of Suva for several counts of forgery on which he has been convicted and presently serving jail term. Vide judgment by Madigan-J in *Fiji Independent Commission Against Corruption (FICAC) –v- Feroz Jam Mohammed & Others [2015] FJHC 457; HAC 349.2013 (22 June, 2015)*
28. His conviction is for various Criminal offences, one of such offence being obtaining Financial Advance of approximately \$ 3.13 million. Section 17 of the Civil Evidence Act Provides:
 1. *In any Civil Proceedings the fact that a person has been convicted of an offence by or before any court in the Fiji Islands or elsewhere is, subject to subsection (3), admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that the person committed the offence, whether the person was so convicted*

upon a plea of guilty or otherwise and whether or not the person is a party to the civil proceedings.

29. The conviction of the PW-1, who was a director of the plaintiff Company during the time material and on whose instance the purchase of the Rock Breaker, admittedly, took place, is relevant in deciding his credibility. In making determination as to the credibility, this court can consider that there is a finding by a Criminal Court that forged documents have been executed in the plaintiff's office where PW-1 was in command.
30. PW-1 has deliberately and clearly lied to the court. He, having got him-self produced in this court by a production order of this court, when he was sworn in, attempted to hide the fact to the defence that he is a serving prisoner, by not giving his present correct address and the occupation.
31. The plaintiff did not call any witness from its Sister Company "Excavator parts" to prove the sale of any goods from Excavator Parts to the defendant and to speak about that the defendant did owe money to Excavator Parts Ltd nor he called any witness to speak on the purported Deed of Assignment. Feroz Mohammed, PW-1, admitted that he did not prepare the Excavator parts Invoices No. 002 and 062. These documents PE-2 & PE-3 should have been proved by calling direct evidence to the effect that the items mentioned therein were in fact sold by the Excavator Parts to the defendant on the dates mentioned therein and money was well and truly due from the defendant. The plaintiff failed to do it.
32. The plaintiff's invoice Nos 002 & 062 marked as PE-2 & PE-3 for the alleged sale by the Excavator Parts to the defendant was respectively for \$3,000.00 and \$ 11, 000.00 totaling only to \$14,000.00. But the Deed of Assignment was for \$ 21,252.98. The letter sent by plaintiff's Solicitors, which was marked as "DE-5" shows the outstanding payable by the defendant unto Excavator Parts as \$ 20,720.00. These material discrepancies have not been explained by the plaintiff by calling relevant oral and adducing documentary evidence.
33. The above invoices were mere photocopies and were not supported by any other records maintained by the plaintiff or it's Sister Company.

34. The plaintiff was duty-bound to prove that the defendant in fact purchased goods for the value of \$ 21,252.98 , he owed Excavator Parts the said sum of \$ 21,252.98, the said debt was assigned to the plaintiff by the Excavator Parts and it was duly notified to the defendant prior to or at the time or after the assignment.
35. Moreover, the plaintiff has not proved that any demand was made by the plaintiff company or the excavator parts from the defendant and same was disputed by the defendant for the cause of action to accrue to the plaintiff. After the date of the alleged transaction i.e 25th February 2008 , it was only by the letter dated 23rd July 2012 marked (DE-5) sent by the plaintiff's Solicitors as a reply to the Statutory Demand Notice sent by the defendant's Solicitor 29th June 2012 (DE-4) , the plaintiff informs about the alleged debt. Other than the above there was no any form of written demand sent to the defendant by the plaintiff or Excavator Parts.
36. In view of the above, the only reasonable conclusion that can be safely arrived at is that the alleged debt, purportedly, owed by the defendant to Excavator parts was a calculated afterthought. The stop payment request made by the plaintiff on the very next working day i.e. 16th January 2012, as evidenced by DE-1 letter from the Bank of Baroda, shows the intention of the plaintiff not to honor the cheque dated 29th February 2015 for \$25,000.00 which was given by the plaintiff, admittedly, for the balance purchase price of the Rock Breaker.
37. Hence, this court has no alternative but to arrive at the decision that the plaintiff has not proved on preponderance of evidence that the defendant owed a debt in a sum of \$21, 252.98 unto the Excavator Parts Machinery Ltd or to the plaintiff on same debt being assigned by Excavator Parts & Machinery Ltd to the Plaintiff Company.
38. Accordingly, on the evidence adduced before this court, I decide that the Disputed Facts 4, 5 & 6 and the Agreed Issues No 3 and 4 are answered negatively.

E. ANALYSIS ON THE COUNTER CLAIM BY THE DEFENDANT :

39. Most of the facts needed for the resolution of the counter claim, made by the defendant for a sum of \$25,000.00, being the balance sale price of the Rock

Breaker unto the plaintiff company, are found to have been admitted by and between the parties in the Agreed Facts. **Vide PTC minutes dated 17th May 2017.**

40. The fact that on or about 12th January 2012, the plaintiff company agreed to buy and the defendant agreed to sell the Rock Breaker in question for a sum of \$ 45,000.00, the Rock Breaker was delivered to the plaintiff on 13th January 2012 without the attachment tools on payment of \$20,000.00 in cash , the balance payment of \$ 25,000.00 was secured by a cheque No. 383961 dated 29th February 2012 , the plaintiff stopped the payment for the said cheque on 16th January 2012 and the plaintiff has retained the Rock Breaker and using it are in admission.
41. Apart from the above, PW-1 too in evidence has admitted the above facts. It has also been proved by the defendant that, apart from the said postdated cheque, what was retained by the defendant to ensure the balance payment on the following Monday 16th January 2012, as assured by Mr. Gulzar Ali , was the tool box of the Rock Breaker produced in court by the defendant.
42. The defendant has also given evidence that the plaintiff could very well have operated the Rock Breaker without the very tool box, as similar tool box could have been purchased at the market for a nominal price of \$300.00.
43. The plaintiff, although claims damages for breach of contract, does not plead any contract. Rules of evidence require a contract or agreement to be properly pleaded with the details as to the parties to the contract, date of the contract, whether written or oral, expressed or implied, terms of the contract and consideration etc.
44. No evidence was adduced by the plaintiff by calling relevant technical officers/ workers / operators of it about the alleged unsuitability of the Rock Breaker for the purpose it was meant for. Plaintiff has continued to use it without returning it or complaining about it. No evidence was given of such complaint to the defendant or expenditures incurred on fixing relevant parts needed for the operation of it or non-usage of it.
45. More importantly, the plaintiff has not given any evidence that the balance sum of \$25,000.00 was paid and settled.

46. The evidence led by the defendant disputing the claim of the plaintiff and substantiating his counter claim against the plaintiff for a sum of \$25,000.00, being the balance sale price of the Rock Breaker, found to be trustworthy and without any contradictions. His evidence was convincing. The evidential value has not been debilitated, though he was subjected to cross examination by the learned plaintiff's counsel.
47. PW-1, in his evidence, has admitted that the Rock Breaker was sold "as is where basis is". Thus, the disputed fact No. 1 attracts affirmative answer. The plaintiff has purchased it on being satisfied that it was reasonably fit for the plaintiff's purpose and the tool box, which is not necessarily a substantial part for the operation of the Rock Breaker, was retained to ensure the balance payment.
48. The defendant knew that he was not supposed to deposit the postdated cheque, but he was required to do so to proceed for recovery on becoming aware that the payment for same had been immediately stopped by the plaintiff. The contention of the plaintiff that it had to fix the Rock Breaker in a smaller excavator to remedy the damages has not been proved and no damages whatsoever have been proved by the plaintiff.
49. On the evidence adduced, the plaintiff has not proved that the defendant breached any agreement. The claim of the plaintiff that the Rock Breaker was not good, not merchantable and unfit for the purpose it was bought for have also not been proved. Thus, the agreed issues No. 1 is answered negatively and the issue No 2 is answered affirmatively.
50. Since the plaintiff has not proved the payment of balance sale price unto the defendant, the defendant is entitled for the recovery of \$25,000.00 from the plaintiff. The issue No.5 answered affirmatively and the issue No. 6 is answered negatively while the issue No.7 does not warrant an answer, since the breach of agreement on the part of the defendant has not been proved by the plaintiff.
51. I find that the defendant has been made to suffer substantial loss and damages due to nonpayment of the balance sale price and due to the injunction obtained by the plaintiff. The defendant was also made to incur a considerable amount of cost for the recovery of the balance sale price. I find it is justifiable

to order a reasonable amounts as general and or punitive damages against the plaintiff. An order for the payment of reasonable interest and summarily assessed cost also warranted.

F. CONCLUSION

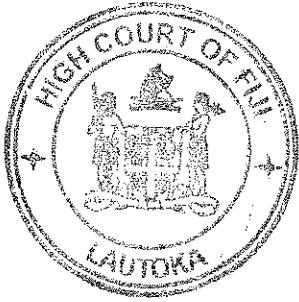
52. The plaintiff has failed to prove its claim and same should be dismissed. Since the defendant has proved the counter claim, the plaintiff should be ordered to pay unto the defendant the balance sale price of \$25,000.00 together with the interest at 3% from 1st March 2012 till the total amount is fully paid and settled.

The plaintiff has given undertaking for damages suffered by the defendant on account of the injunction order obtained restraining winding up proceedings. Accordingly, I am satisfied that a reasonable amounts should be ordered as damages, interest and cost.

G. FINAL ORDERS

- a. The plaintiff's Amended Statement of Claim struck out and the plaintiff's action stands dismissed.
- b. The counter claim of the defendant succeeds.
- c. The plaintiff ordered to pay unto the defendant \$25,000.00 being the balance sale price of the Rock Breaker.
- d. The injunction issued on the defendant restraining him from presenting or proceeding with a Winding Up petition against the plaintiff is hereby dissolved.
- e. The defendant shall be entitled for \$ 4,500.00 as summarily assessed general and 1,500.00 as punitive damages totaling to \$6,000.00.
- f. The defendant shall be entitled for interest at the rate of 3% on \$25,000.00 balance sale price, calculated from 1st March 2012 till the full amount is fully paid and settled.

- g. The plaintiff shall pay unto the defendant \$ 4,000.00 being the summarily assessed cost.
- h. The tool box produced by the defendant at the trial shall be released to the plaintiff and if not uplifted by the plaintiff within 6 months from today, same shall be confiscated and auctioned by the Registry.



A.M.Mohammed Mackie

Judge

At Lautoka
20th November, 2018