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IN THE SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA
CIVIL JURISDICTION

No. W.S. 32 (N.G.) of 1953.

AT PORT MORESBY. CORAM: OLLERENSHAW, A.J.

NEW GUINEA COMPANY LIMITED

Plaintiff

- and -

LORIMER PEARSON

Defendant

FRIDAY, the TWENTY-THIRD day of APRIL, 1954, at 8.30.a.m.

J U D G M E N T.

This action was heard by me at Rabaul on the 13th and 14th instant and I reserved judgment to be given at Port Moresby.

The Plaintiff sues for £1,824.18.11. for the price of goods sold and delivered and for moneys paid.

The Defendant paid into Court £125.18.11., with admission of liability, in respect of the claim for moneys paid, and the action has been fought with respect to the balance of £1,699, claimed as the price of a Dodge truck, with cab and chassis, alleged to have been sold and delivered by the Plaintiff to the Defendant in pursuance of a parol agreement.

In his defence, as filed, the Defendant admitted that the vehicle had been delivered to him and that he had received an account from the Plaintiff for £1,699, and he pleaded two defences, as follows:-

(1) That the agreement between the parties provided that the Plaintiff should deliver the vehicle to the Defendant on sale or return,

> "..... that is to say that the Defendant should have possession of the said truck for a reasonable period in order to ascertain whether it was in satisfactory condition and that the Defendant should be at liberty to return the said truck to the Plaintiff should he not wish to buy it."

The Defendant further pleaded, for the purpose of this defence, that the vehicle was not in a satisfactory condition, that he notified the Plaintiff that he did not wish

to buy it, and returned it to the Plaintiff.

At the hearing the Defendant set up, without formal amendment and without objection, that the "trial period" was three months, not because it was "reasonable," but because it was expressly fixed at three months by the agreement. The issue joined upon this defence was contested on that basis.

(2) The second defence, as pleaded and fought, was that it was a term of the agreement between the parties that the Plaintiff would sell the vehicle to the Defendant under the terms of a hire-purchase agreement.

The point of this defence, as strongly contended on behalf of the Defendant, was that, if I found for the Plaintiff upon the first defence, the Plaintiff's only action was for damages for breach of the Defendant's agreement to enter into a hire-purchase agreement.

(3) Although not pleaded, a third defence was pressed in argument before me, namely, that the transaction itself was or amounted to a verbal hire-purchase agreement, and that the Plaintiff's only rights were those prescribed in Section 6 of the Hire-Purchase Agreements Ordinance No. 53 of 1951, which the Defendant's Counsel urged excluded any right to sue for the price or any instalments thereof.

The Plaintiff's Manager at Kavieng, who represented the Plaintiff in the transaction, and its employee in charge of its Merchandise Department and the Defendant, gave evidence before me. A number of Exhibits are in evidence, the most important being Exhibit "4," the duplicate of the docket or invoice dated 9th January, 1953 and delivered to the Defendant at XXXXXXXX the time the vehicle was delivered to him, and Exhibit "1" containing five letters.

I have no hesitation in finding for the Plaintiff upon the issue raised by the first defence. Apart from the sworn testimony of the Plaintiff's witnesses, which I accept, the documents and probabilities are strongly against the Defendant's contention that he had a three months' trial period, as he alleges.

As was known to the Plaintiff's Manager, one of the purposes for which the vehicle was required by the Defendant was to carry out the mail contract between Kavieng and Namatanai, towns about 168 miles apart and connected by a road described by the Defendant as bad to average for these parts, over which road the vehicle would be driven by a native driver. The Defendant had obtained this contract for one year from 1st January, 1953. It is not improbable, in all the circumstances disclosed by the evidence, that the Plaintiff would have agreed to a "sale or return" for a three months' period, during which the Defendant would have had the use of the vehicle without charge, and at the expiry of which he would

have been liable, according to his own story, if he elected to purchase the vehicle, to pay only half the price as a deposit and the balance by instalments.

The Defendant alleges that he returned the vehicle, which had been delivered to him at the Plaintiff's store at Kavieng, to the Plaintiff, by leaving it at Kaf Kaf Plantation of the Plaintiff, situated some 68 miles from Kavieng, where it happened to break down from engine seizure approximately two and a half months after delivery of the vehicle to him.

It was then being driven, as it usually was, by a native driver, who was the only person on the vehicle. He had delivered mail to the Plantation on the courier run from Kavieng to Namatanai, and, resuming his journey to Namatanai, had travelled only forty yards on level road when the engine seized.

It also happened that the Defendant, who had spent the previous night at Lamassong, some 90 miles from Kaf Kaf in the Namatanai direction, arrived at the scene of the breakdown twenty minutes later. Having, as he says, checked the water and oil to exclude their absence as the cause of the engine seizing, he left the vehicle at Kaf Kaf. No expert evidence was called as to the condition of the vehicle, and I am far from satisfied that the breakdown was caused by any defect in its condition for which the Plaintiff was responsible. Such evidence as there is strongly suggests that the circumstances, in which it was driven from the date of its delivery, were responsible, and suggests, also, that there may have been more than coincidence in the happenings on the day on which it did break down at Kaf Kaf.

Upon an earlier occasion the bearings had burnt out and the Defendant replaced them at his expense.

However, these matters arose only incidentally and as part of the defence that the Defendant had the trial period of three months and returned the vehicle within such period because it was not satisfactory.

The Defendant did inform the Plaintiff's Manager of the breakdown, and requested the Plaintiff to have the engine sent to Australia for overhaul and repairs at the Plaintiff's expense, because he claimed that he had a "warranty" entitling him to this. The Manager replied that the Defendant had no such warranty, and I find, on the evidence, that the Defendant did not have the warranty he claimed. He did not set up that he was relieved from his agreement to purchase because of any other breach of fundamental condition - (if it were set up I would be bound to hold upon the evidence that there was no such breach, and in any event the Defendant would have waived it) - nor did he claim damages for breach of warranty, but he gave evidence that when the existence of the warranty was denied, he said:

"In that case I am handing the truck back to you, as it is most unsatisfactory. It is on New Guinea Company's property at Kaf Kaf Plantation and you can make arrangements to have it looked after."

When the Plaintiff's Manager replied: "We will summons you for the full amount," the Defendant walked away.

I am satisfied that the Defendant had no such right, as he alleged, to return the vehicle, and if it were necessary, I would find that he did not return it. It is not suggested that the Plaintiff ever accepted it back. I will not refer to all the evidence bearing upon this defence. I do regard it as important and supporting the oral testimony for the Plaintiff, that, when the Plaintiff wrote to the Defendant its first letter of the 1st March, 1953 in these terms:

"We would draw your attention to your accounts with this Company VIZ. your general account £977.3.11. and your Truck account £1,699. 0.0.

. . . . . .

"Truck Account:

"This account has become due and your attention to it would be appreciated."

and the Defendant replied on the 15th March, questioning only the price:

"Reference Dodge Truck, charged for on your Debit Note in January of this year. This Debit note states it as being a 30 cwt. Dodge truck. I have already mentioned to you that in my opinion it is only a 3/4 ton Dodge, and that no doubt after you had checked with Rabaul office there would be a reduction in price. I have not yet received your advice on this matter.

"I can only state that it is my intention to pay my debt with your Company as soon as possible, and as some of my Vehicles are again in commission it should not be long before payment is made."

This correspondence is quite inconsistent with any such trial period, as the Defendant alleges as are also the Plaintiff's letters of 23rd March and 12th May to which the Defendant did not reply. I may also refer, in this connection, to the fact that according to his own evidence of an interview between the Plaintiff's internal auditor and himself (referred to in the Plaintiff's letter of 15th June, 1953), the Defendant did not then claim that he had the truck on sale or return, or that he had a trial period of three months, although he was again informed of the Plaintiff's intention to take action for the price. He did not reply to the Plaintiff's said letter of 15th June referring to this interview and requesting payment.

I come now to the second defence, which disputes the Plaintiff's right to sue for the price of the vehicle as distinct from damages for breach of an agreement to enter into a hire-purchase agreement.

Upon the oral testimony of the Plaintiff's witnesses, which I accept, supported in part by the Defendant's evidence, and upon the testimony of the documents and the inferences properly to be drawn from the evidence, and the probabilities, I find for the Plaintiff upon this issue also.

It is admitted that the vehicle was delivered by the Plaintiff to the Defendant, and I find that this delivery took place on 9th January, 1953. I find that it was a term of the agreement, in pursuance of which this delivery took place, that, if the Defendant so desired, he could purchase the vehicle under a hire-purchase agreement in the form of Exhibit "2", provided that he paid the sum of £850 within one month of delivery and within the same time executed the hire-purchase agreement. I find that it was also a term of the agreement that if the Defendant did not pay such deposit and execute such agreement within the said period, he was to pay the whole price at the expiry thereof.

That the agreement was, as I have found, not an agreement merely that the Defendant would pay the deposit and enter into the hire-purchase agreement within the said period of a month, is born out by the Plaintiff's oral testimony, the docket or invoice, Exhibit "4," the original of which was handed by the Plaintiff's employee to the Defendant at the time of delivery, and the correspondence.

Even if the evidence and inferences did not establish that the Defendant was to become liable for the whole purchase price at the expiry of one month from delivery if he did not pay the deposit and sign the hire-purchase agreement within that period, I would think that, upon the Defendant failing to pay the deposit and enter into the hire-purchase agreement, as he undoubtedly did fail, he would have become liable, by implication from the circumstances and his conduct, to pay the whole price at the expiry of the month allowed.

It was strongly urged before me by Counsel for the Defendant that the passing of property depends upon the intention of the parties, and, as it was, as he contended, their original intention to embody the transaction in the hire-purchase agreement in the form of Exhibit "2," there can now be no claim for the price of the vehicle because the property in it never passed to the Defendant.

There is, however, a principle, as I pointed out in the course of his address, that runs through the law, and it is that a person is bound by the implications of his intention reasonably arising from his conduct.

I certainly agree that the Plaintiff offered hire-

purchase terms in the form of Exhibit "2," but the Plaintiff's Manager said:

> "It was intended to have the hire purchase agreement signed when the Defendant paid the 50% deposit in 30 days."

and I have no hesitation in finding that the Defendant's right to hire-purchase terms depended upon his payment of the deposit and execution of the agreement within the time allowed.

Meanwhile, the vehicle was delivered to the Defendant and invoiced to him at the price of £1,699 on 9th January, and he acted as if he were the owner thereof. [illegible] Also, from the time the vehicle was delivered to him, he acted inconsistently with Clause 10 of Exhibit "2," inasmuch as he elected to have the vehicle serviced and repaired by an engineer of his own choice.

Exhibit "4" is a duplicate of the original invoice or docket which was handed to the Defendant at the time the vehicle was delivered to him.

The evidence with respect to this docket is quite against the Defendant's contention. The Plaintiff's Manager said of it:

> "The docket showed the straight out purchase price without terms, a docket for £1,699."

and Exhibit "4," the duplicate, speaks for itself.

The other witness for the Plaintiff, who delivered the invoice to the Defendant, speaking of his instructions from the Manager, said:

> "He told me to charge the Dodge truck out to Mr. Pearson at the price of £1,699 as a truck account."

I have already referred to the Plaintiff's letter to the Defendant of 1st March, and cited from his reply of 15th March, in which he referred to the "debit note," Exhibit "4," and the other correspondence which show clearly, to my mind, that the Defendant accepted the position that he had been debited with and regarded himself as liable to pay the full price.

Exhibit"5"is the copy of the proposed hire-purchase agreement, which was delivered to the Defendant, as I find, at or about the 9th January, 1953. The proposed hire-purchase agreement was a form already prepared, with blanks for the date, name of the purchaser and description of the vehicle. These particulars were filled in before the copy was handed to the Defendant at or about the time, as I find, that the vehicle was delivered to him, and he said, on this

occasion, that he would study its contents and advise the Manager at a later date.

It is undisputed that he did not pay the deposit at the time arranged and that he did not execute the hire-purchase agreement, although requested so to do.

Coming to the third defence, I need say no more than that my findings upon the issue raised by the second defence cover and exclude the third defence argued before me.

I order that judgment be entered for the Plaintiff for the sum of £1,824.18.11. together with costs of the action.

I also order that the sum of £125.18.11. be paid out of Court to the Plaintiff in part satisfaction of this judgment.

I also order that the name "Lorimer" be substituted for the letter "L" in the name of the Defendant in all documents filed.

The Exhibits must remain in Court until further order or until the parties file a consent, executed by them or their Solicitors, to their being handed out respectively to the party respectively entitled thereto.

Robert O. Hammond

A.J.