

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 103 of 2016

BETWEEN : **FUSHUN FARM LIMITED** a limited liability company having its registered office at Waibau, Naitasiri.

PLAINTIFF

AND : **AUTOMART LIMITED** a limited liability company having its registered office at 27 Sautamata Street, Lautoka.

DEFENDANT

Counsel: Plaintiff: Ms Narayan. S and Mr Singh. R
Defendant: Mr Wally. S
Date of Hearing: 27th & 28th September, 2022
Date of Judgment: 09.05.2023

JUDGMENT

INTRODUCTION

1. Plaintiff bought two new Dongfeng Trucks made in and imported from China by Defendant. Defendant's General Manager said that they imported about fifty trucks of the same model which was a new model in 2014. They could not continue importing the model due to higher emission standard. Plaintiff had obtained a loan from a Bank on 23.6.2014 and they were both registered in Plaintiff's name on 26.6.2014, bearing registrations of HM 919 and HM 920. Odometer reading was zero at the time of registration. Delivery dockets were dated 27.6.2014. Plaintiff had used this Dump Trucks for his business of transportation of gravel extracted from river in wet state. There was a defect identified with Dump Truck Registration HM 919 on or around 29.10.2014 and it was repaired by Defendant. According to Defendant the Trucks were not serviced at regular intervals and they were also used to transport wet gravels which were heavier, hence overloaded. Back side of the truck was dip in water while loading. According to Plaintiff HM 919 had an issue with differential and he paid \$1,000 on 10.12.2014 for the repair and it was repaired by replacing the defective part from a new Truck as the said part was not locally available. According to Plaintiff the same issue after some time but was repaired and defect there after. It was sold to third party on 10.12.2017 and since then it

was used with each year roadworthy certificate obtained. HM 920 had an issue around February, 2015 and it was repaired and given in April, 2015 but was not satisfied according to complaint to Commerce commission , but in evidence stated that repair was done by third party as Defendant required one month to obtain parts for repair. According to Plaintiff both vehicles were not 'merchantable quality' hence seeks refund of total sum paid for the purchase and economic loss. The causes of action pleaded are misrepresentation, false or fraudulent representation, and want of merchantable quality of the Trucks. Plaintiff had used one truck for more than six months without a defect and the other was repaired at Defendant's cost after about four months. There were no written warranty given for both vehicles but the evidence was that they were repaired at Defendant's cost. Plaintiff had failed to prove that trucks were serviced on time and or used the vehicles according to service manual. Defendant's garage foreman said the defects were not common in the model and this was due to overloading and or not using correct gears as they were manual transmission trucks. He also stated that trucks were half dip in water when gravel were loaded and this can also cause issues in the long run. Both trucks were new and were in merchantable quality when they were sold to Plaintiff and used for the purpose. There were no false or fraudulent representation

FACTS AND ANALYSIS

2. Following facts were admitted at Pre Trial Conference
 - a. Defendant is a legal entity engaged in the business of motor vehicle sales.
 - b. On or around June, 2014 Plaintiff approached the Defendant to purchase two trucks.
 - c. Defendant's agents had made following representations
 - i. It had new DongFeng brand trucks for sale
 - ii. They were in store.
 - d. Plaintiff bought two trucks at the cost of \$175,000 and this was fully paid.
 - e. Plaintiff complained to Defendant on 29.10.2014 about a defect in Dump Truck bearing registration HM 919.
 - f. It was brought to the Defendant's vehicle yard on 1.11.2014.
 - g. On 10.11.2014 the defect was identified and parts were ordered and this was informed to Plaintiff.
 - h. Plaintiff paid a deposit of \$1,000 to Defendant
 - i. On 20.12.2014 truck bearing registration no HM 919, was repaired and handed over to Plaintiff. It was brought for repairs again.
3. It is not disputed that said truck bearing registration HM 919 had no issues after repair for the second time and it is still running on the road as per the history of vehicle registration marked at trial, as D1.

4. It is also proved that the transfer of the said Truck to third party was on 12.10.2017, which was more than three years from the purchase. It is not clear as to mileage or service history of the vehicle while it was with Plaintiff prior to any defect being detected.
5. Plaintiff bought two Dongfeng brand Chinese Dump Trucks bearing Registration Nos HM 919 and HM 920 for transport of gravel from the site of extraction. In order to reach said site the trucks needed travel off road in harsh conditions, and also back of truck dip in river at the time of loading.
6. It is a common thing for a Dump truck to travel off road, but the type of terrain and type of harsh condition should have limitation on warranty and also will affect its service intervals and essential maintenance and this must be done by Plaintiff as it is a special knowledge with Plaintiff.
7. Plaintiff did not produce any evidence of his Dump Trucks being serviced or the history of the service or any periodic maintenance or inspection.
8. The initial defect was with the differential and this was repaired. The cause of the defect according to the foreman of the Defendant was the overloading and or improper use of gears.
9. Both Dump Trucks were manual transmission hence the use of proper gear depending on the load and the speed was rested with the driver of the vehicle.
10. The witness for the Plaintiff had neither driven nor used any of the Dump Trucks nor had any evidence of the service history and or readings of odometer periodically recorded even at the time of detection of the faults.
11. Witness for Plaintiff was Fushu (PW1) who gave evidence and stated that he was shown the vehicles after he explained that they were to be used for transportation of gravel extracted.
12. According to PW1, he was not informed how the parts for the trucks were sourced and how long it would take. In such a situation parts needs to be obtained within reasonable time.
13. Defendant's General Manager (DW2) in his evidence stated that the Dump Trucks sold to Plaintiff, were a new model in 2014 hence long lasting components, such as differential of a vehicle were not available readily in the market globally, in 2004.

14. He said that with a new model only parts such as breaks which needs replacement periodically are released but it takes some time to obtain parts such as differential. Some time was taken to obtain the parts for the trucks.
15. Defendant had removed the part required for Plaintiff from a new vehicle and repaired it. So Defendant had done what was reasonable under the circumstances.
16. Any new brand of vehicle needs some time to get parts available worldwide, especially in a small market such as Fiji. Defendant had taken action to mitigate the delay in obtaining a part which was reasonable.
17. It is also noted that in the absence of evidence of any record as to usage of the Dump Trucks and also its service or maintenance history, Plaintiff cannot claim warranty for everything under any condition. It is unconscionable to seek such a warranty considering the extreme conditions a Dump Truck can be used. The absence of written warranty cannot extend it to overload and or misuse. Any mechanical device have limitations.
18. Plaintiff's evidence was that he was told that if the vehicle is brought it will be fixed by Defendant. This was done by Defendant hence there was no misrepresentation. The time taken to obtain the part should have been reasonably expected when a new model was purchased.
19. Plaintiff should also do his due diligence before purchase as to the availability of parts and whether Defendant was the agent of the said vehicle brand in Fiji. The fact that it was a new model indicates that parts cannot be freely available as an when needed but a reasonable time will be taken.
20. There was no written warranty given for any of the Dump Trucks. So the warranty conditions were not spelt out for each party to know the limitations of the warranties. Warranties by nature have limitations.
21. Plaintiff in the written submission relied on *Bernstein v Pamson Motors (Golders Green) Ltd.* [1987] 2 All ER 220. Plaintiff had used HM 919 Dump Truck without an issue after two repairs which were done at the cost of Defendant for more than three years without any defect and had also sold it to third party, but strangely claiming that it was not merchantable quality.
22. In my mind HM 919 was repaired by Defendant using parts of a new vehicle which was in their stock, and this was done to mitigate the delay in obtaining spare parts from China. Always spare parts to any vehicle depend on many factors such as after sales service of the particular brand, how many vehicles are sold and also how rare such an item get replaced. In evidence it was stated that when a new model of a vehicle is introduced spare

parts of easily worn parts comes to the market first. There is no dispute that the differential of a new vehicle is not a part that needs replacement easily.

23. If there was a manufacturing defect in differential of the Dump Truck, it could not be used for heavy duty work such as transportation of gravel till 29.10.2014 for respectively HM 919 and 25.2.2004 for HM 920.
24. On the balance of probability on the evidence available both Dump Trucks were neither serviced nor maintained properly as Plaintiff was not able to provide any records as to odometer readings at the time of the defect or afterwards. Similarly, no records of service or maintenance was provided. Defendant's witnesses told that loads were in wet condition as they were direct loading of wet gravel the trucks were overloaded. Though not proved there were number of 'defect notices' issued at Valalevu, where overloading of trucks monitored.
25. So, on the balance of probability the differential of a good merchantable quality vehicle can get damaged due to improper use and or maintenance, such as overloaded of wet gravel.
26. Defendant had replaced the differential of Dump Truck bearing registration MH 919 at their cost, so there was no misrepresentation and unjust enrichment and the said vehicle was in merchantable quality when it was sold.
27. Similarly Dump Truck bearing registration MH 920 was used for the same type of wet gravel extract transportation had the similar issues in February, 2015. This was also repaired by the Defendant, according to document marked P9, which was a complaint to Commerce Commission. This truck was taken for repairs on 25.2.2015. This was more than eight months from registration the said vehicle in the name of Plaintiff and delivery was of them were on 27.6.2014.
28. According to P9, Defendant was told that parts for the truck were ordered and will take till first week of April which means that it will be in garage for the month of March, 2015. The evidence of Plaintiff's witness was that he found a person who could import the same part from China, within a week, but Defendant had refused to purchase from this person. Plaintiff's witness stated that it was repaired by outsider.
29. Court of Appeal in *Kumar v Carpenters Fiji Ltd* [2012] FJCA 95; ABU0052.2008 (30 November 2012)

14. In *Bernstein v Pamson Motors (Golders Green) Ltd.* [1987] 2 All ER 220, the Plaintiff had taken delivery of a new motor car from the Defendants. When the car had done 140 miles within a period of three weeks it had broken down on a motorway. The car would not restart and had to be collected by the emergency services. The following

day the plaintiff had informed the defendants in writing that he regarded the car as not being of merchantable quality and that he was rejecting it. The car had been repaired under the manufacturer's warranty at no cost to the plaintiff. After repair the car was good as new, but the plaintiff refused to have it back. The plaintiff brought an action against the defendants, contending that the car was not of merchantable quality and that he was therefore entitled to recover damages and to rescind the contract of sale. The defendants contended that the car was of merchantable quality and that in any event the plaintiff had accepted the car within s 35(1) of the Sale of Goods Act 1979 and was therefore limited to a claim for damages alone.

15. It was held that when determining whether any particular defect or feature rendered a **new car unmerchantable**, the court had to consider (a) whether the car was capable of being driven in safety, (b) the ease or otherwise with which the defect could be remedied, (c) whether the defect was of such a kind that it was capable of being satisfactorily repaired so as to produce a result as good as new, taking into account not only the part of parts at the site of the defect but also any other potential damage, (d) whether there was a succession of minor defects to be taken into consideration and (e) in appropriate cases any cosmetic factors. On the facts, the car could not be said to have been of merchantable quality when it was delivered to the plaintiff. However, since the plaintiff had driven about **140 miles and had had the car for three weeks, he had had a reasonable time to examine and try out the car and he had therefore lost the right to reject it.**

16. In Fiji, the Fair Trading Decree 1992, S 93 refers to actions in respect of goods of unmerchantable quality as being goods not reasonably fit for the purpose which is on similar lines as the provisions in the Sale of Goods Act 1979 in England. The facts in the present case, do not bring it within the principle laid down in Bernstein's case (supra) relating to merchantable quality, especially in view of the fact that the vehicle had been used for a considerable period of time before the defect regarding the gearbox was complained of, and it had been after the expiry of the warranty period and further a successful repair had been carried out even after the vehicle had done more than 130,000 kms.”(emphasis added)

30. Dump truck bearing registration HM 920, was used by Plaintiff for transportation of wet gravel from the site of extraction for more than eight months. So he cannot refuse the said truck and claim for money, on the basis it was not merchantable quality.
31. Plaintiff had obtained finance from a leading commercial bank for the purchase of the new trucks and in his evidence admitted that the Bank had also examined the two vehicles before the purchase. So on the balance of probability it is proved that the two Dump Trucks of DengFeng brand bearing registration numbers M11 919 and M11 920 were new. This was established from the odometer readings as recorded in Vehicle Owners History marked as D1 and D2.

32. Reading of odometer of the Dump Trucks when garaged at Defendant's yard, were not adduced in evidence. It is essential to properly maintain Dump Trucks which were driven on high ways and also on gravel roads and also on rough terrains to reach the site of gravel extraction. No such records were provided and there were not evidence as to who drove the vehicle and whether what procedures were followed for proper maintenance of such heavy duty vehicle. It seems there were no such schedules or maintenance followed by Plaintiff. So there is no proof that vehicles were properly used till defects occurred. Bad and neglected maintenance can lead to defects and this was not eliminated in the evidence by Plaintiff. The proof of defect at any condition is not sufficient for Plaintiff to succeed in this action as no vehicle dealer will give provide warranty for 'all time under any condition'. There was no evidence such a representation was made.
33. The evidence was that there was a verbal warranty that if a defect happens they will repair it. DW 2 was General Manager of Defendant, admitted that they provide warranty for all new vehicles. He also said arrival of parts may take some time depending on availability of the part when requested.
34. DW2 also said since 2010 Chines new Chinese vehicles were imported by the Defendant and Plaintiff was shown range of vehicles they import and selection was left to Plaintiff.
35. In this instance it was an interior part of Sawani and the way Dump Trucks were used for loading was described as half dipped in water. This can cause defects in rear of the vehicle.
36. It was also stated that the wet gravels were heavier hence there was possibility of overload. This can be accepted on balance of probability as Plaintiff was unable to state how they weigh the load on the vehicle.
37. It should also be noted that history of the Dump Trucks contain several 'Defect Notices', but these facts were not examined to ascertain whether they were also relating to 'overloading'. Number of defect notices were also issued at Valelevu where there is weighing of trucks were done at random. As no questions were asked in examination I only used D1 and D2 in the analysis of evidence that there were number of defect notices issued indicating some violations which were admitted by Plaintiff.
38. Defendant's second witness (DW2) in his evidence stated, Mr Fushu, who was from China had a fair knowledge about the Dengfeng brand of Trucks.
39. Sections 15 and 16 of the Sale of Goods Act 1979 deals with the condition and implied conditions respectively. Section 15 reads;

“Conditions implied by description

15.-(1) Where there is a contract for the sale of goods by description, there is an implied condition that the **goods shall correspond with the description**; and, if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.” (emphasis added)

40. Plaintiff admitted that the two Dump Trucks were also examined by him and the Bank before purchase and they were both satisfied they were new and also used for heavy duty purpose for few months before one truck detected with a defect. Both trucks were examined by Land Transport Authority and odometer readings were also recorded .So the claim that both trucks were not new is rejected on the evidence. They were described by brand and model and corresponded to said specifications.

Whether there was misrepresentation or fraudulent misrepresentation.

41. Section 16 of Sale of Goods Act 1979, states,

“Implied undertakings as to quality or fitness

16.-(1) Subject to the provisions of this or any other section of this or any other Act, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition-

(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment.

(4) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

(5) The foregoing provisions of this section apply to a sale by a person who, in the course of a business, is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

(6) In the application of subsection (3) to an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, any reference to the seller shall include a reference to the person by whom any antecedent negotiations are conducted.”

42. On the evidence provided there was no breach of implied warranty in terms of Sale of Goods Act 1979.
43. Defendant also admitted they provide a limited warranty for one year or 100,000 km for parts only. He said that this was told to the customers, though there was no written warranty conditions given to Plaintiff. He also said printed manual for the Trucks were in Chinese and this was given to Mr RuFu who was conversant in Chinese. In his evidence he did not state he read the manual or followed the instructions given regarding maintenance including service of the Trucks which were exposed to harsh conditions.
44. DW2 in his evidence said that he had visited the gravel extraction site and the back side of trucks were dip in river water when they were loaded. He also said the wet gravel loads transported with water draining indicating extra weight to the vehicle.
45. Paragraph twenty of the statement of claim alleges false and misleading misrepresentation for reasons given in that. Said allegations were addressed in the judgment, but they are replied in following manner.
 - a. There is no proof that the two trucks were not merchantable quality
 - b. They were used for the purpose for months before defects were detected and upon repair HM 919 was used for more than three years by Plaintiff without a defect. HM 920 was not repaired by Defendant and by a third party due to one month time period requested by Defendant to obtain parts from China. Defendant had repaired it himself and used for the purpose.
 - c. Both trucks were new and examined by Plaintiff, Bank and Land Transport Authority and they were all satisfied at the time of delivery.
 - d. The trucks were ‘merchantable quality’ and condition and what was meant by ‘perfect condition’ not proved in evidence.

- e. Both trucks were used for its intended use. Negligence on the part of the Plaintiff and misuse of the truck by overloading or back side of the vehicle being dip in water at the time of loading are misuse.
 - f. No written warranty given but a one year limited parts replacement warranty granted and there was no warranty given as to time period and it needs to be reasonable time considering make of the vehicle and availability of the parts globally for import. Defendant had even removed a part from new vehicle and replaced to mitigate delay. One month delay in obtaining a part for MH 920 in the circumstances is not unreasonable.
 - g. Availability of the parts depend on the policy of the company and there is no rule that parts should be available immediately considering the part needed was not easily worn or replaceable, in a new model.
 - h. Defendant had provided back up services and even DW2 had visited and repaired some parts at the site, but when major repairs or inspections cannot be done in sites such as interior part near a river.
 - i. There was no evidence that Defendant was unable to repair the Trucks.
 - j. Defendant had got mechanics to repair the Trucks and they were comparable to European brand of trucks and there were no evidence of negligence or defect in repairing.
 - k. Defendant had sold new trucks to Plaintiff and they were used for months in very harsh conditions and also misused by overloading with wet gravel on the balance of probability and also no record of service or maintenance or odometer readings indicating negligent manner of Plaintiff 's vehicle maintenance.
46. There were no fraudulent misrepresentation as alleged in paragraph nineteen and accordingly the claim for unjust enrichment is also not proved and it is not a remedy for a claim for 'fraudulent misrepresentation' under common law as pleaded in paragraph twenty.
47. Plaintiff could seek for an account for profits or damages for fraudulent misrepresentation in common law but not for unjust enrichment which is a separate claim.
48. Halsbury's Laws of England ¹Remedies for fraudulent misrepresentation.

“Where a representor has, by way of fraudulent misrepresentation, induced a representee to alter his position, other than by entering into a contract or other binding transaction with the representor, the representee will be able to bring a claim for damages at common law or for an account of profits in equity, but he will not be entitled to any other form of relief.” (foot note deleted)

¹ Misrepresentation (Volume 76 (2019)) 780. Remedies for fraudulent misrepresentation

CONCLUSION

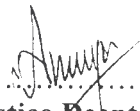
49. Plaintiff who is conversant in Chinese had bought two Chinese made Dump Trucks upon examining the models imported by Defendant. Plaintiff, Land Transport Authority and the Bank were satisfied that the two Trucks sold by Defendant were new and the Bank had also provided full value of the two trucks as a loan. These trucks were used for transportation of wet gravel extracts from river. There were no defects detected till first detection in end of October, 2014 in one vehicle. It was repaired for the second time with replacement of differential, and was used by Plaintiff without any defect and was sold after three years to third party. In February, 2015 similar defect was detected in MH 920 but Defendant had sought time till early April, 2015 to obtain the parts from abroad and Plaintiff had repaired it himself as he could not wait one month. Both vehicles were merchantable quality and they were used by Plaintiff. There were no misrepresentation or fraudulent misrepresentation by Defendant. There was no written warranty provided. Plaintiff had failed to prove that he maintained the two trucks in reasonable condition in terms of the instructions contained in the vehicle manual and or even serviced according to service schedule. Plaintiff's action is dismissed and the writ of summons struck off. Considering circumstances of the case no cost ordered.

FINAL ORDERS

- a. Plaintiff's statement of claim and writ of summons struck off.
- b. No order as to costs.

DATED this 9th day May, 2023.




Justice Deepthi Amaratunga
Judge High Court, Suva