Falcon Enterprise v Essack & Ors
(2001) SLR 137

Kieran SHAH for the Plaintiff (in the main case and appearing in connection with the Motion)
Frank ELIZABETH for the Intervener & First & Second Defendants

Appeal by the Appellant allowed on 31 July 2001 in CA 20 of 2001.

Ruling delivered on 20th day of August, 2001 by:

PERERA J: By motion dated 7th August 2001, the Intervener, Eagle Auto Parts (Pty) Ltd, seeks the following orders-

(1) That the container no. DVRU 1212985 and its contents be released to the Intervener.

(2) That the Intervener give the First Defendant his personal belongings in the said container, itemised as (a) to (m) in the motion.

(3) That the remainder of the goods be sold and the proceeds of sale be paid into Court until the final determination of the case.

(4) That the Intervener be allowed to pay the rentals, penalties, import duty and/or other taxes to the Government out of the proceeds of sale of the goods in the container.

The Plaintiff instituted this action on 24 May 2000 against the First Defendant David Essack, the Second Defendant, the wine seller (Pty) Ltd and the 3rd Defendant Mahe Shipping Co. Ltd, the Shipping Agent. The case against the 3rd Defendant was subsequently withdrawn. The Plaintiff sought a declaration that the said container solely belongs to them and that it be released to them. A sum of R374,100 plus the continuing storage charges were also claimed. In the alternative, the Plaintiff claimed R574,000 if the container had already been released to the First and Second Defendants on a bill of loading, which the Plaintiff averred had been falsely and unlawfully altered and changed from the name of the Plaintiff to that of the Second Defendant.

The First and Second Defendants in their defence averred that the owner of the container was a Company called "Eagle Auto Parts (Pty) Ltd", in which the First Defendant was a director.

Eagle Auto Parts Ltd, thereupon sought Intervention under the provisions of section 117 of the Code of Civil Procedure, and leave was granted on 20 June 2000. In their statement of demand, the Intervener claimed inter alia for an order that the contents of

the said container belongs in law to them, and that the contents of the said container be released to them. It was not averred that goods in the container were paid for by the Intervener Company. It was therefore a de Jure claim based on their interest "in the event of the pending suit", as envisaged in Section 117.

The First Defendant David Essack in his defence, averred that he purchased the goods in the container and that the container and its contents belong to the Intervener Company in which he is one of the directors. He however averred that the bill of lading was changed from the Plaintiff's name to that of the Second Defendant, the Wine Seller (Pty) Ltd, in which Company also he is a director, in accordance with the laws of Dubai. In answer to a motion filed by the Plaintiff for the release of the container, he averred that there were no perishable goods in the container.

In the instant motion before Court, another director of the Intervener Company, one Ronny Barallon avers in his affidavit that "there are perishable goods in the said container namely a substantial quantity of thinner, quickfill and paint". The affidavits of David Essack and Ronny Barallon, the two directors of the Intervener Company are therefore contradictory as regards the perishable nature of the goods in the container.

In the main case, judgment was entered by this Court on 5th October 2000 ordering the release of the container to the Intervener subject to payment of 30% commission on the undisputed value of the goods as pleaded and admitted. The Court made a finding of fact as follows-

> In examination of the evidence in support of his version, it has been found that the Defendants and Intervener has failed in their attempt to adduce documentary proof that they had financed the whole container load. However they have satisfied the Court by documentary proof that they had sufficient means in Dubai to finance part of the container load.

The latter finding was based on an inference, and not on evidence. The Court further went on to hold that the statutory presumption in Section 102 of the Commercial Code operated in favour of the Plaintiff as consignee to be in possession of the disputed goods, but such presumption was rebutted by exhibits D1 and D2. These two documents had only been "itemised" at the hearing, but the trial judge had ex mero motu turned them into "exhibits", thus admitting them as evidence in the case without affording the party affected an opportunity to object.

In an application filed under Section 229 of the Code of Civil Procedure for execution of judgment pending appeal, it was submitted by Counsel for the Plaintiff that if the Court of Appeal held that those two documents were relied on to defeat the claim of the Plaintiff, then the whole basis of the judgment would fail. On a consideration of both legal and practical reasons, I granted a stay of execution of judgment until the final disposal of the appeal.

The Court of Appeal, by judgment dated 31 July 2001 agreed with both parties that the

reception of the two documents D1 and D2 in those circumstances was a "clear breach of the Rule of fair hearing" and hence quashed the entire judgment. The case therefore has to be listed for a fresh trial in due course.

It was submitted by Mr Elizabeth, Counsel for the Intervener that Mr D Lucas Attorney at Law who appeared for the Plaintiff at the hearing of the Appeal informed the Court of Appeal that by the time the rehearing and an ensuing appeal by either party were concluded, *"the goods in the container will become worthless and as a result of his motion, he was advised by the President of the Court of Appeal that perhaps one way to safeguard the contents in the container was to sell the contents and pay the proceeds to Court, pending the final determination of the case."* This is however not reflected in the judgment of the Court. Mr Elizabeth submitted that the present motion before Court was one made in the interest of all parties. He further stated thus-

> I make this motion believing honestly and sincerely that this will be the best course of action, taking into account the circumstances of this case and the stage which we have reached after one year before the Courts, to save the goods and the money spent either by the Plaintiff, or the Defendants as the case may be, we do not know that as of now, because there is no Court order as to who spent the money on those goods, but in any event, at the end of the day, it would be in the interest of not only the Defendant and the Intervener, but also the Plaintiff for such an order to be made to safeguard the goods and to ensure that the parties ultimately do not end up losing everything just because of this case which is before the Court.

The judgment of this Court in favour of the Intervener was based on the premise that the presumption in Article 102 of the Commercial Code that the consignee is entitled to the possession of the goods consigned had been rebutted by the contents of the documents D1 and D2. With the decision of the Court of Appeal, that presumption reverted back to the Plaintiff. In the motion before Court the Intervener claims 14 items as being "personal items" belonging to the First Defendant David Essack. No such claim was made in the statement of demand filed by the Intervener on 26 June 2000, nor was it averred in the defence of the First and Second Defendants. In any event, Learned Counsel for the Plaintiff informed Court that that claim is being contested. Apart from those items, it was submitted that there are motor spare parts in the container. Paragraph 5 of the affidavit of Ronny Barallon, filed with the present motion avers that the perishable goods among them are thinner, quickfill and paint. These items have been in the container since it arrived at Port Victoria on 2 May 2000. The First and Second Defendants denied that there were any perishable goods in the container. They are now estopped from joining the Intervener in stating that it is otherwise. The word "perishable" means, "subject to decay or destruction". However there is no evidence that unopened tins of items like, thinner, quickfill and paint would 'perish" to such an extent that they would have no market value. In any event, this would be only a marginal issue which can be adjusted by an order for damages against the unsuccessful party at the conclusion of the case. It is an insufficient reason to sell the

bulk to save a few. Moreover the bulk of the shipment contains non-perishables of greater value.

Mr Shah, Counsel for the Plaintiff also submitted that until the issue of ownership is resolved it would be prejudicial to the interests of the Plaintiff who claims not only the ownership of the goods but also claims damages against all the Defendants on the basis of 'faute' in respect of loss of business, loss of profits and moral damages. It was therefore submitted that releasing the container to the Intervener would deprive the Plaintiff of the fruits of a judgment that may be given in their favour.

The cause of action pleaded in the case is presently against the First and Second Defendants. The Intervener has been given leave to intervene as a person "interested in the event of the pending suit" between the Plaintiff and the First Defendants, 'in order to maintain his rights". Hence his rights are dependent on the outcome of the dispute between the Plaintiff and the First and Second Defendants.

The First and Second Defendants averred that it was the Intervener Company, a separate legal entity, that was the owner of the goods. Hence they ought to have moved under Section 112 of the Code of Civil Procedure to be struck out and that the Intervener be joined as a party. That would have enabled the Plaintiff to amend their plaint, if advised. The Intervener, in the present circumstances would therefore have only ancillary and not substantial relief. Hence they cannot in law, maintain a motion which in effect would amount to an acknowledgment of the substantial issue of ownership of goods which is being disputed by the Plaintiff and the First and Second Defendants who are the main parties in the case. Had the Intervener been added as Defendant under Section 112, they could have raised triable issues. But in the pleadings, as settled in the case they cannot raise the issue of ownership as a triable issue against the Plaintiff.

Mr Elizabeth, Counsel for the Intervener however submitted that the Intervener had no objections to the Plaintiff selling the goods, apart from the items which are claimed as personal items of the First Defendant, so that either party may have an executable judgment. From what has been submitted, the container consists of motor spare parts of which the three items, thinner, quickfill and paint, claimed to be "perishable" form only a small percentage of the load. In the motion, the Intervener moves that all rentals penalties, import duty and taxes be paid out of the proceeds of the sale of these balance items. This would amount to reducing the amount of the sale proceeds that are sought to be deposited in Court. On 14 August 2001, after the Court heard the submissions of both parties on the motion, the Court reserved the ruling for today, but gave time till 9 a.m on 16 August 2001 for the Plaintiff to consider the proposal of Counsel for the Intervener. However, Mr Elizabeth and the Defendants failed to attend Court without excuse. Mr Shah submitted that the proposal was not acceptable to the Plaintiff and that no attempt had been made by the intervener to reach any other settlement. This ruling is therefore made as indicated to both parties and their Counsel on 14 August 2001.

As regards the rents payable to the customs Warehouse where the container is presently stored, the Court made order on 10 October 2000 staying execution, pending appeal due to the inherent weaknesses of the judgment as disclosed by Counsel for the Plaintiff-appellant. The Learned Justices of Appeal were well aware of the consequences that would follow a further detention of the goods. Hence unless the parties reach a settlement which is satisfactory to both parties, this Court cannot make an order which would amount to determining the issues in the case on a piece meal basis without a proper hearing on merits. In the meantime the container shall continue to be in the customs Warehouse. As the container has been detained by a judicial order at least since 10 October 2000, and not for any of the purposes mentioned in Regulation 247 of the Trade Tax Regulations, it would be open to the Commissioner of Taxes to use his discretion and determine whether the rents should be waived. This Court cannot however make an order which would affect Government Revenue.

In the circumstances, the motion is dismissed with costs.

Record: Civil Side No 139 of 2000