

IN THE SUPREME COURT OF SEYCHELLES

Louis Bedier

Of Cote D'Or, Praslin

Plaintiff

Vs

Classic Glass (Pty) Ltd

Represented by Dennis Ward Honner of

Providence, Mahé

Defendant

Civil Side No. 231 of 1999

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Mr. Derjacques for the plaintiff

Mr. P. Pardiwalla for the defendant

D. Karunakaran, J.

JUDGMENT

The plaintiff has brought this action against the defendant claiming loss and damages in the sum of Rs 982,415.09/- resulting from an alleged breach of contract by the defendant, a company incorporated in Seychelles. On the other side, the defendant, in its statement of defence, having completely denied the plaintiff's claim, not only seeks dismissal of the plaint but also makes a counterclaim against the plaintiff in the sum of Rs 24, 892.00 contending that the plaintiff owes the said sum to the defendant towards the purchase-price in respect of certain spare parts the defendant had imported and supplied to the plaintiff upon his request.

It is not in dispute that the plaintiff Mr. Louis Bedier was at all material times, and is a businessman of Praslin. The Defendant is a Company registered in Seychelles, and engaged in the business of building, manufacturing, supplying and selling boats and engines to the public. It is also not in dispute that by an agreement in writing, dated the 17th July 1998, and through verbal agreement, the plaintiff agreed to purchase and the defendant agreed to sell to the plaintiff a new vessel, named 'Sailfish', for the sum of Rs652, 000.00/- The said vessel was to be utilised by the plaintiff as a hire-craft for fishing, diving cruises and generally to be hired out for tourism related businesses. Admittedly, the plaintiff paid the said sum in the total of Rs652, 000.00/- to the defendant. According to the plaintiff it was inter alia, an express and/or implied term of the said agreement that the vessel would be:-

(a) Seaworthy

(b) Fit for its purpose

(c) Professionally constructed in a workmanlike manner; and

(d) The engine would be new.

On the 17th July 1998, the defendant delivered the said vessel to the plaintiff in Praslin. It is the case of the plaintiff that in breach of the terms of said agreement, the hull of the said vessel was defective, improperly constructed and the works were incomplete. Furthermore, the engines were defective, the steering mechanisms damaged, fittings and pipes were loose and not fitted. Generally the age of the engines was suspect. The vessel was not seaworthy and not fit for its purpose and wholly unusable. Moreover, according to the plaintiff, the defendant, subsequent to the delivery of the said vessel to Plaintiff, sent a mechanic to attempt a rectification of the problems in one of the engines, for which the plaintiff paid a further sum of Rs12, 000.00/- to defendant. Subsequently, the plaintiff returned the said defective engine to the defendant who accepted

the same. By reason of all the foregoing, the plaintiff claims that he suffered loss and damages as follows:-

(a) Cost for repairs to hull and vessel including parking charges, materials, and labour for Shipping and Engineering Co. Ltd.Rs 250,000.00

(b) Cost of new Engine £33,441.04 at Rs322,41 5.09cts rates (22.01.01)..... Rs322, 41 5.09

(c) Moral damages for depression, anguish distress.....Rs 200,000.00

(d) Economic loss for lost of charters of Hire-craft at Rs3 5,000.00/- monthly, for six months (Rs35,000.00/- x 6).....Rs210,000.00

TOTAL Rs 982,415.09

In the circumstances, the plaintiff prays for a judgment ordering the defendant to pay to the plaintiff the sum of Rs982 415.09/- with interests at the commercial rate and costs.

However, the defendant claims in his defence that the vessel he delivered to the plaintiff met all the implied and/or expressed terms of the agreement and had also obtained the necessary seaworthiness certificate. According to the defendant the Plaintiff carried out a pre delivery inspection and upon which the plaintiff admitted that the vessel met all

the expressed and implied terms of the agreement as to its seaworthiness, workmanship and fitness. Furthermore, there were other inspections carried out by independent inspectors, they too certified as its seaworthiness. Upon complaints from the Plaintiff the defendant requested an engineer from Marine Power Europe, the manufacturer of the engine installed on the boat to verify the complaints. There were no defects. According to the defendant, after the vessel was delivered, the plaintiff carried out a number of charter trips and also used the vessel for transporting merchandise to Praslin. The Defendant further averred that the plaintiff removed the engine to replace it by what he considered to be a more powerful one and requested the defendant to find a buyer for the one that had been removed from the vessel. That particular engine was subsequently sold by the plaintiff. There was no defect in the vessel when sold to the plaintiff. Therefore, the defendant averred that he was not in breach of any terms of the agreement with the plaintiff. In the circumstances, the defendant denied liability for any loss or damage the plaintiff claimed to have suffered.

Besides, it is the case of the defendant that after the vessel was delivered in July 1998, the Plaintiff carried out a number of charter-trips for nearly a year thereafter. During the period the vessel was in operation, by an oral agreement the Plaintiff requested the Defendant to import for him a number of spare parts and that he would pay for the same. Hence, the defendant imported those spares worth Rs 24,892.00 from overseas and delivered them to the plaintiff. According to the defendant, the Plaintiff has so far failed, refused and neglected to pay the said price for those spare parts and so indebted to the defendant in the sum of Rs 24,892.00. Thus, the defendant makes a counterclaim against the plaintiff in the sum Rs 24,892.00 and moved the Court for judgment being entered against the plaintiff accordingly.

The plaintiff Mr. Louis Bedier, a businessman of Praslin testified in essence that on 17th July 1998 he entered into the agreement (in exhibit P1) with the defendant-company, whereby the defendant would design, build, sell and deliver a 40 feet boat with all facilities including cabin with two compartments, toilet etc. The boat was intended to be suitable for the plaintiff's business of chartering out for tourists. It was also part of the agreement that the defendant should provide the boat with brand new 7.3 Mercruiser Diesel Engines. The defendant also gave plaintiff 1 year warranty on the said **engines** with the following exceptions, which reads in exhibit P1 in verbatim thus:

- 1. The warranty does not apply to normal worn parts, adjustments, tune-ups or damaged caused by neglect, lack of maintenance, accident, abnormal operation or improper installation or service*
- 2. All incidental and /or consequential damages are excluded from this warranty.*
- 3. Using fuels, oils or lubricants which are not suitable for use on the engines.*

In respect of **any structural defects on the boat**, the defendant also gave plaintiff 3-months warranty on the boat, with the following exceptions, which reads in exhibit P1 in verbatim thus:

- (i) Since the warranty applies to defects in material and workmanship, it does not apply to neglect, lack of maintenance and accident.
- (ii) All incidental and/or consequential damages are excluded from this warranty.

As per the agreement, the defendant started building the boat in his workshop at Providence, Mahé. It took several months for him to complete the work. When the work was in progress, the plaintiff also made several

visits to the defendant's workshop to check on the progress of the work. At the same time, he also started paying the price by several instalments. By July 1998, the plaintiff had paid the entire price R 652,000 to the defendant and the work was also complete.

On the 17th July, 1998 upon signing exhibit P1, the defendant delivered the boat to the plaintiff. The boat had been fitted with two engines. The plaintiff with the assistance of one Sydney Payet took the boat to Praslin. En route one of the engines got damaged and stopped functioning. However, they continued the journey with one engine as they were nearer to Praslin. Upon reaching Praslin, the plaintiff called the defendant and informed him about the engine problem. The defendant did not take any action for about two months. The boat remained anchored at Cote D'Or, Praslin. During that period the plaintiff was not doing any job. He suffered loss of business. However, after two months, the defendant went to collect the boat from the plaintiff in Praslin. Having brought the boat back to Mahé for repairs, the defendant removed the rear part of the defective engine and replaced it with some spares and straightened the tail part of the engine and returned the boat to the plaintiff. The plaintiff tested the boat at the defendant's premises, while half of the boat was under water. There was some problem again with the starter. The defendant again fixed the starting problem and returned the boat to the plaintiff.

With the assistance of his workers the plaintiff took the boat back to Praslin. The plaintiff started to use the boat for his regular business. After three months, the engine again broke. The plaintiff phoned the defendant and told him about the engine problem. The defendant sent one of his mechanics to Praslin. The mechanic removed the broken engine. The plaintiff told him to take back that engine and refund the price for the engine. The mechanic removed the engine and took it with him. The defendant then told the plaintiff that he would sell the engine and refund the price. However, the plaintiff did not agree to that proposal as he

needed the boat for his day-to-day business activities. After that last episode, the defendant neither repaired that engine nor refunded its price to the plaintiff. As the workmanship of the boat was bad and defective, the plaintiff engaged one Alva G. Lawen (PW6), a marine Engineer/Surveyor to examine the boat and give a report on its condition. Mr. Lawen on the 18th July 1998 inspected the boat and checked on its seaworthiness and workmanship. According to the Surveyor Mr. Lawen (vide exhibit P8), the job the defendant had done on the vessel was a very unprofessional. As regards the engines, he found that the casing on both engines was defective. They were dirty and the engines did not look new as one of them ran only 45 minutes and broke. After the necessary repairs were allegedly carried out by the defendant, the same surveyor inspected the boat second time in July 1999 The Surveyor's report dated 12th April 1999 (in exhibit P9) following his second inspection inter alia reads thus:-

"I visited the boatyard on the 8th April 1999 and the following were discovered:

1. Both engines are on the floor in the yard
2. The broken tail shaft alongside the engine can be seen from the picture.
3. Rusted bolts that attached the tail and the engine (should be galvanised or stainless) It was mentioned before that the engine does not look new.

The deck of the vessel had to be cut to remove the engine:

1. All separation of the vessel was constructed with ordinary Plywood
2. Ordinary steel wall nails were used instead of copper
3. Most wood that was used are not protected/coated with GRP
4. Foxhole is full of water
5. Fly deck has been constructed with ordinary plywood."

One Georges Bijoux (PW5), a Marine Engineer and an ex-employee of the defendant also testified for the plaintiff. In brief, he testified he was the one in charge of the defendant's workshop while the plaintiff's vessel "Sail Fish" was built at the defendant's boatyard. He stated that only ordinary plywood was used to build the boat. The fibreglass coat above waterline was below standard. The transom of the boat was not straight. The Engine was not aligned properly. Alterations were made outside the engine to fit in..The engine had starting problem. Since rain water had gone into the engine it affected the functioning of the engines. The boat also exhibited steering problem. All floors were made of ordinary plywood instead of marine plywood. PW2 Gerald Rose, a skipper cum boat-builder, who was working with the plaintiff at the material time testified that being the skipper, he found that the boat had been built with bad workmanship. Engines had been wrongly installed in a twisted position. He removed the engines and sent them to the defendant for repairs or replacement. According to him, the defendant had used cheap and improper material to build the boat. The plywood used to build the boat was ordinary unsuitable for building boats. The nails were ordinary nails, which should not be used in the construction of boats, which requires special copper nails.

PW4 Maurice De Commarmond, a Marine Mechanic also testified that the engines had been exposed to fibreglass dust and rainwater prior to installation, which had affected the internal parts and functioning of the engines. Moreover, he stated that alignment of the engines was crooked and the casings of the engines were not proper. The plaintiff also produced a number of photographs as exhibits showing the condition and the structure of the boat, while under repairs. They were all admitted in evidence. The surveyor's reports and the correspondence between the

parties exchanged through their respective attorneys were also produced, admitted and marked as exhibits. In view of all the above, the plaintiff seeks judgment as prayed for in the plaint.

On the other side, the defendant testified in essence that the boat was a twin hull catamaran, which was imported from South Africa. It was a long boat - 40 feet - but he had to cut the tail part and shortened it to suit the specific needs of the plaintiff. The engines were also supplied by an overseas company Mercury. According to him, the engines were not defective. Because of overloading, the rubber around the engines got heated up and caused some problem. The engines did not break but only its brackets broke. He also stated that there was a possibility the boat might have sat on the shallow waters and consequently, the engines and the rubber might have been damaged due to hit against a reef or rocks. The sea water might also have gone into the hull. He also stated that the plaintiff was happy to take delivery of the boat and had no complaints on any bad workmanship or seaworthiness. Further, the defendant stated that he fitted the engine on the boat as per the template provided by its manufacturer. He also produced a number of photographs (exhibit D2 (a) to (g) in evidence showing the condition, the structure and the appearance of the boat at the time of delivery. It was the plaintiff, who cut the boat and changed configuration. According to the defendant, Mr. Rose - PW2 - was not an expert in fibreglass boat, only in timber boat. Furthermore, the defendant stated that he used only marine plywood, which he bought from SMB for the boat. Therefore, the defendant stated that the boat was built with good quality and suitable materials and with good workmanship. According to him, it was seaworthy. Hence, he was not in breach of contract and was not liable to compensate the plaintiff for any loss or damage. As regards the counterclaim the defendant testified that the Plaintiff requested to import for him a number of spare parts and that he would pay for the same. Hence, the defendant imported those spares worth Rs 24,892.00 from overseas and delivered them to the

plaintiff. According to the defendant, the Plaintiff failed, refused and neglected to pay the said price for those spare parts and so indebted to the defendant in the sum of Rs 24,892.00. Thus, the defendant makes a counterclaim against the plaintiff in the sum Rs 24,892.00 and moved the Court for judgment being entered against the plaintiff accordingly.

I meticulously perused the evidence on record, including the documents adduced by both parties. I diligently examined the submissions made by counsel on both sides. Obviously, the following questions arise for determination:

- 1. Was the defendant in breach of any express and/or implied term of the contract of sale in respect of the boat "Sail Fish", which he supplied to the plaintiff in that (a) were there any patent or latent defects in it ; and (b) was it seaworthy and fit for its purpose? Were its engines defective and improperly installed?*
- 2. If so, did the defects occur due to bad workmanship by the defendant or due to any other cause or fault or negligence through any act or omission by the plaintiff in using or maintaining the boat?*
- 3. What is the quantum of loss and damages if any, the plaintiff suffered as a result of the breach of contract by the defendant?*
- 4. Is the plaintiff indebted to the defendant in the sum of Rs 24,892.00 for the spares the latter supplied to the former?*

As regards the first question, the expert witnesses (PW2) Mr. Gerald Rose (an experienced skipper cum boat-builder), (PW4) Mr. Maurice de Commarmond (a Marine Mechanic), (PW5) Mr. Georges Bijoux (a Marine Engineer) and (PW6) Alva G. Lawen (a marine Engineer/Surveyor) all testified and corroborated the material fact that the boat had a number of latent and patent defects due to bad workmanship, use of improper materials in building the boat, bad structural designing and wrong alignment of the transom. The engines had been also exposed to

rainwater and fibreglass dust over a period of time before installation. They did not have proper casing. They did not look new and such exposure was not good for the proper functioning of the engines. The engines were also wrongly installed and fitted in a twisted position. Due to wrong alignment, improper casing, installation and configuration engines got damaged. The inspection-report in exhibit P9 submitted by the expert in this matter also corroborates the fact that there were several defects in the material used and workmanship. The boat had patent or latent defects; it was not reasonably seaworthy and did not serve the purpose for which it was built. The engines were improperly installed and so I find.

I do not believe the defendant in his evidence that the boat and the engines had no defects. I reject his self-serving evidence in toto in this respect. In any event, in respect of **any structural defects on the boat**, the defendant had given plaintiff 3-months warranty on the boat, which in my view now binds the defendant and makes him liable for the cost of replacement. *The warranty though has exceptions such as that it does not apply to normal worn parts, adjustments, tune-ups or damages caused by neglect, lack of maintenance, accident, and abnormal operation of the boat etc. there is no evidence on record to show that the instant case falls under any of those exceptions.* Therefore, the answer to the first question is in the affirmative. The defendant was in breach of the express and implied terms of the contract of sale in respect of the boat "Sail Fish", which he supplied to the plaintiff. The boat and the engines were defective. The defendant is therefore, liable to compensate the plaintiff for the loss and damages he suffered as a result of the said breach, de hors and/or in addition to his liability under the warranty.

I will now turn to the second question as to the alleged cause for the defect. It is clear from the evidence of the expert-witnesses that the defects occurred solely due to bad workmanship by the defendant, who built unprofessionally and supplied the boat to the plaintiff. The defendant's theory to the effect that the engines might have broken due to negligent operation of the boat as it might have hit against the rocks or

other objects underneath the shallow waters is obviously, the defendant's guesswork. It is simply based on his own speculation. Indeed, there is not even one iota of evidence on record to support this theory. Therefore, I find that the defects found in the boat and the engines were not caused by any fault or negligence or through any act or omission by the plaintiff in using or operating or maintaining the boat in question and so I find. I will now turn to the third question (supra). It relates to the quantum of loss and damage, the plaintiff suffered because of the entire episode that culminated in breach of contract by the defendant. The evidence on record and the surrounding circumstances clearly show that the *primary cause* for the defects was the defendant's bad workmanship in breach of contract. However, the amount claimed by the plaintiff's for economic loss and moral damages appears to be on the higher side and unreasonable. The plaintiff as a prudent businessman should have taken reasonable steps to minimise the economic loss. Hence, I award loss of earning at Rs20, 000/- per month only for four months. Also I reduce the plaintiff's claim for moral damages to Rs 50,000.00. After taking all relevant factors into account, I award the following sums to the plaintiff.

(a) Cost for repairs to hull and vessel including
parking charges, materials, and labour
for Shipping and Engineering Co. Ltd.Rs
200,000.00

(b) Cost of new Engine £33,441.04
At Rs322,41 5.09cts rates (22.01.01)..... Rs322, 415.09

(c) Moral damages for depression,
Anguish distress.....Rs 50,000.00

(d) Economic loss due to loss of charters of Hire-craft

at Rs20,000.00/- per month for four months

(Rs20, 000.00/- x 4).....Rs80, 000.00

TOTAL Rs 652,415.09

As regards the counterclaim, I find that the plaintiff is indebted to the defendant in the sum of Rs 24,892.00 for the spares the latter supplied to the former. Hence, I enter judgment in the sum Rs 24,892.00 in favour of the defendant and against the plaintiff. Hence, after discounting the counterclaim-amount **Rs 24,892.00** payable by the plaintiff to the defendant from the total amount **Rs 652,415.09** payable by the plaintiff to the defendant under the judgment given herein I find that the defendant is eventually liable to pay the balance in the sum of **Rs 627,523.09** to the plaintiff.

In the final analysis, for the reasons stated hereinbefore, I enter judgment for the plaintiff in the sum of **Rs 627,523.09** and with costs of this action.

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D. Karunakaran

Judge

Dated this 15th day of March 2013