

IN THE SUPREME COURT OF FIJI
AT SUVA
[APPELLATE CIVIL JURISDICTION]

CIVIL PETITION NO. CBV 0006 of 2014

(On Appeal from Court of Appeal No.
ABU 0038 of 2012; High Court Civil
Action No. HBC 238 of 2006L)

BETWEEN : JUBILEE JUICE DISTRIBUTORS

Petitioner

AND : JAI DHIR SINGH

Respondent

CORAM : The Hon Mr. Justice Saleem Marsoof, Justice of the Supreme Court
The Hon Mr. Justice Suresh Chandra, Justice of the Supreme Court
The Hon Mr. Justice Almeida Guneratne, Justice of the Supreme Court

Counsel : Mr. D. S. Naidu for the Petitioner
Ms V. Patel for the Respondent

Date of Hearing: 3 November 2014

Date of Judgment: 14 November 2014

JUDGMENT

Justice Saleem Marsoof

- [1] I have had the advantage of perusing the judgment of my brother Almeida Guneratne, JA, in draft, and I am respectfully inclined to agree with his reasoning and conclusions. This case was not without its difficulties, and hence, I agree that there shall be no order for costs of this appeal.

Justice Suresh Chandra

- [2] I too agree with the conclusions and reasons in this judgment of Almeida Guneratne, JA.

Justice Almeida Guneratne

Background to this Petition

- [3] Subsequent to a sale-purchase agreement parties entered into, a settlement was arrived at in Court and a Consent order made. Thereafter the proposed vendee (sometimes hereinafter referred to as the petitioner) instituted action pursuant to Order 45 Rules 4 and 7 of the High Court Rules (1988) alleging non-compliance with the said Consent order.
- [4] After trial the High Court by its Judgment dated 20th June, 2012 held that, the proposed vendor (sometimes hereinafter referred to as the Respondent) was in breach of the Consent order and ordered interalia specific performance against him.
- [5] The Respondent having appealed, the Court of Appeal reversed the judgment of the High Court upholding the Respondent's argument that, certain terms of the initial sale agreement had not been changed by that consent order but rather remained as part of the same and furthermore, that, it was the Petitioner who had failed to act in accordance with it.
- [6] The petitioner seeks special leave to appeal against the judgment of the Court of Appeal dated 5th March, 2014.

Motion to Amend Petition Seeking Special Leave to Appeal

- [7] Before we proceed to consider the main application, we will briefly refer to a procedural matter that had to be dealt with at the inception.
- [8] The application for special leave to appeal had been fixed for hearing on a call over date for 31st October, 2014.

- [9] By a motion dated 22nd October, 2014 the petitioner (with notice to the Respondent) sought to move this Court to have its Petition for special leave to appeal amended pursuant to Section 8(1) 2(b) of the Administration of Justice Decree No.09 of 2009.
- [10] When the matter came up for hearing on 31st October, 2014 upon Counsel for the Respondent objecting to the acceptance of the proposed amended petition we called upon counsel for the petitioner to show us what the proposed amendments were whilst indicating to him that under no circumstances would the Court be inclined to grant an adjournment, having regard to a delay of over six (6) months since the filing of the original petition for special leave to appeal.
- [11] Having heard Counsel's submissions and on a comparison of the original petition for special leave and the proposed amended petition, the Court was convinced that, by the proposed amended petition what was sought to be done was to particularize the general and broad grounds urged in the original petition and not to enlarge the scope and content thereof.

Circumstances an Amendment would be permitted Notwithstanding delay

- [12] Accordingly, we made order accepting the amended petition and would venture to lay down as a proposition that:
- 'Notwithstanding any delay in seeking to have an application for special leave to appeal amended, the same would be allowed unless prejudice would be caused to the Respondent and the object of the amendment was to enlarge the scope and content of the original petition.'*

- [13] We now proceed to deal with the main application.

The Sale-Purchase Agreement in question

- [14] The said agreement is contained at pages 78 to 87 of the Court of Appeal Record the material parts of which may be reproduced as follows:-

2. Covenant to Sell and Purchase

- 2.1 *The Vendor will sell and the Purchaser will purchase the said property as the said property will stand on the Date of execution of the Sale and Purchase Agreement herein for the price and upon and subject to the terms and conditions hereinafter appearing.*

3. Purchase Price

- 3.1 *The agreed price for the purchase for the said property is \$236,000.00 (Two Hundred and Thirty Six Thousand Dollars) VAT Exclusive price. The purchaser to pay VAT if applicable. The full purchase price shall be paid and satisfied by the Purchaser to the Vendor as follows:-*
- (a) *\$236,000.00 (Two Hundred and Thirty Six Thousand Dollars) to be paid into the Trust Account of Messrs Babu Singh & Associates, Nadi and to be released to the Vendor upon settlement.*
- (b) *\$212,400.00 (Two Hundred and Twelve Thousand Four Hundred dollars) as being balance of purchase price to be paid into the Trust Account of Messrs Babu Singh & Associates, Nadi.*

4. Settlement

- 4.1 *The Date of Settlement shall within 90 days from the execution hereof and/or such other date as is mutually agreed by the parties in writing.*

6. Transactions and Settlement

- 6.1 *On the Date of Settlement (or if such day is public holiday then the next business day) or such other date as may be mutually agreed to in writing between the parties at the Registrar of Titles Office, Suva the following, inter-alia, shall take place:*
- (a) *The Vendor will hand over a registrable instrument of Transfer of the said property in favour of the Purchaser and the relative title deed of the said property to the Purchaser in exchange for a Bank cheque for the Purchase Price.*

12. Time

- 12.1 *Time shall be of the essence of this Agreement.*

13. Purchaser's Default

- 13.1 *If the Purchaser shall make default in payment of any moneys when due or in the performance or observance of any stipulation or agreement on the Purchaser's part herein contained and if such default shall continue for the space of fourteen (14) working days from the due date then and in any such case the Vendor without prejudice to any other remedies*

available to it may at its option exercise all or any of the following remedies namely:-

- (a) May enforce this present contract in which case the whole of the purchase monies then unpaid shall become due and at once payable; or
- (b) May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be forfeited to the vendor as liquidated damages; or
- (c) May sue for specific performance of this Agreement; or
- (d) May without first tendering any transfer to the Purchaser resell the said property either by public auction or private contract for cash or on credit and on such other terms conditions and stipulations as the Vendor may think proper with power to vary any contract of sale buy in at any auction and resell and any deficiency in price which may result on an all expenses of attending to a resale or attempted shall be recoverable by the Vendor as liquidated damages, the Purchaser receiving credit for any payment made or applied in reduction of the purchase money. Any excess in price after deduction of expenses shall belong to the Vendor.
- (e) May re-enter upon and take possession of the said property without the necessity of giving any notice or making any formal demand.

14. Vendor's Default

14.1 If the Vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor's part therein contained and if such default shall continue for the space of fourteen (14) working days from the due date then and in any such case the Purchasers without prejudice to any other remedies available to it may at its option exercise all or any of the following remedies namely:

- (a) May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be refunded to the Purchaser without deduction.
- (b) May sue for specific performance of this Agreement.
- (c) May claim damages in addition to seeking specific performance of this Agreement.

16. Co-operation

- 16.1 *The parties covenant with each other to do all such acts matters and things and take all necessary steps as may be necessary and/or requisite for the purpose of carrying into effect the matters set out herein.*

17. Notices

- 17.1 *A Notice to be given under this Agreement shall be in writing and delivered or transmitted to the Vendor's Solicitors as follows:-*

Messrs Babu Singh & Associates

Barristers & Solicitors

NADI

Phone: (679) (6703499)

Fax: (679) (6703330)

And to Purchaser's solicitor:

Jubilee Juice Distributors (Fiji) Ltd

10 Salala Place

Lautoka

Phone: (679) (6666615)

Or to such other address as any party shall notify to the other.

- 17.2 *A Notice to be given under this Agreement shall be deemed to have been duly given:*

(a) When delivery by hand; or

(b) Seven(7) days after being posted by registered mail postage pre-paid; or

(c) By facsimile to the numbers specified herein (if any).

The Consent Order dated 20th October 2008, filed on 28th November, 2008

- [16] This is found at page 33 of the Court of Appeal record. (page 33 of FCA record) viz:

- (1) *That the Defendant shall transfer the property known as Certificate of Title No. 23700, Lot 4 Deposited Plan No. 5954 for the consideration sum of \$270,000.00 (TWO HUNDRED AND SEVENTY THOUSAND DOLLARS) with all improvement thereon.*
- (2) *That the terms and conditions of the sale and purchase Agreement dated 5th September 2005 to remain the same except for the consideration sum stated in (1) above and the settlement date as stated in (3) below.*
- (3) *That settlement takes place on or before the 15th day of March 2009 or such other date as mutually agreed between the parties.*
- (4) *Each party to bear own costs of this action and of the dealing.*

The Judgment of the High Court

- [17] In order to analyse the Judgment of the High Court, it is necessary to recount the findings of fact and the inferences drawn therefore relevant to the determination of this application.

Findings of Fact

- [18] Taking first the findings of fact, the same may be recapped as follows:

- (1) *Pillai Naidu & Associates on 4th March 2009 handed over the transfer of payment to Neel Shivam Lawyers, who acted as the Solicitors for the defendant when the consent order was signed on the 28th November, 2008." (Paragraph 21 of the Judgment).*
- (2) *Neil Shivam Lawyers had forwarded the documents to the defendant on 24th March, 2009 as envisaged in affidavit x 3 RN7 (Supra).*
- (3) *Messrs Neil Shivam were the defendant's lawyers until 10th December, 2010. (Paragraph 23 of the Judgment)*
- (4) *That, Pillai Naidu & Associates disregarded the instructions of the defendant in relation to the change of Solicitors and submitted the transfer documents to Neel Shivam for forward transmission cannot be accepted. (paragraph 24 of the Judgment)*
- (5) *Until 1st April 2009, Pillai Naidu & Associates were unaware of the change of Solicitors. (Paragraph 25)*
- (6) *The defendant had neglected to inform the plaintiff or its solicitors of his new solicitors. (Supra)*
- (7) *The solicitors meant by the defendant were not Babu Singh & Associates. (Supra)*
- (8) *The defendant had not withdrawn his instructions to Neil Shivam lawyers to act for him as Solicitors in 2009. (Supra)*
- (9) *If either party did not instruct Babu Singh & Associates after the Consent order, paragraph 3 of the agreement could only be construed to mean that when the parties were negotiating the Consent orders they waived the payment of a deposit, which was a pre-condition to the sale under the agreement. (Paragraph 26 of the judgment).*

- (10) *The parties could not have enforced paragraph 3(1)(a) as it currently stands, as Babu Singh & Associates had confirmed that it was not acting for either party. Therefore, the paragraph is manifestly unenforceable.” (Supra)*
- (11) *Consent Order 1 replaced the entire section of paragraph 3, is fortified further by examining the conduct of both the parties.(paragraph 27)*
- (12) *In the circumstances, the plaintiff was only obliged to pay the sum of \$270,000.00 upon execution of the transfer documents. (Paragraph 28 of the Judgment).*
- (13) *Although Consent Order 3 required the parties to settle before 15th March, 2009 and time has been made the essence of the agreement by Paragraph 15 thereof parties mutual consent have amended the time limits, and therefore time was not of the essence of the agreement for the interpretation of the Consent order. (Paragraph 29 of the Judgment).*
- (14) *The conduct of the parties and their Solicitors commencing from 4th March, 2009 until 23rd April, 2009, clearly indicates that the settlement date had been extended by mutual conduct or implication, however without setting out a deadline. (Paragraph 30 of the Judgment).*

Conclusion arrived at by the High Court

- [19] The Court concluded “In the circumstances, under the discretionary powers vested in me under O.4 R. 5, I order the parties to give effect to the consent order filed on 28th November, 2008 by 30th June, 2012. Further, in the event the defendant fails to execute the documents as ordered, the Deputy Registrar of the High Court of Lautoka is directed to execute the transfer by 15th July, 2012 after the plaintiff deposits \$270,000/= in Court, which is the consideration stated in consent Order 1. In such an event, the defendant is ordered to deliver CT 23700 to the Deputy Registrar. (Paragraph 32 of the Judgment)

Grounds of Appeal Urged in the Court of Appeal by the Defendant

- [20] These grounds are found at pages 1 to 2 of the Court of Appeal record and may be reproduced as follows:-

- “1) That the learned Judge erred in law and misdirected herself in ordering the parties “to give effect to the consent order file on 28 November 2008 (sic) by 30 June 2012” under Order 45 rule 5 of the High Court Rules 1988 in the absence of an application for an order under the said rule by the Respondent and/pr of any amendment to the Summons filed by the Respondent.
- 2) That the learned Judge erred in Law and/or misdirected herself in making the said Orders when the Respondent was in breach of the Consent Order dated 20th November 2008 having failed to pay the deposit in accordance with Clause 3.1(a) of the Sale and Purchase Agreement dated 5th September 2005 referred to in Order 2 of the Consent Order dated 20th November 2008.
- 3) That the learned Judge erred in law and misdirected herself in effectively varying the terms of the consent order dated 20th November 2008 when she had no jurisdiction to do so.
- 4) That the learned Judge erred in law and in fact and/or misdirected herself in holding that “...the settlement dated had been extended by mutual conduct or by implication...” when Order 3 of the Consent Order dated 20th November 2008 clearly states “That settlement takes place on or before 15th day of March 2009 or such other date as mutually agreed between the parties.”
- 5) That the judgment of the learned Judge is wholly erroneous and ought to be set aside.

[21] Having made a preliminary ruling refusing an application to lead fresh evidence, the court of Appeal allowed the appeal and set aside the Judgment of the learned High Court Judge.

Basis of the Judgment of the Court of Appeal

[22] Almost the entirety of the judgment of the Court of Appeal is devoted to the rival contentions advanced by Counsel before it and we do not consider it necessary to repeat them in as much as the matter for this Court to determine is, whether the conclusion reached by the Court of Appeal bears scrutiny or not.

Conclusion reached by the Court of Appeal

The Court of Appeal concluded thus:

“I am of the view that the learned Judge had gone beyond the interpretation of the consent order. The learned Judge by her judgment fixed 30 June 2012 as the date for settlement. I could not find any agreement between the parties for another date. In terms of the agreement, any variation to the terms has to be with the consent of the parties in writing and signed. Considering the submissions of the learned counsel very carefully, I am of the view that the learned Judge erred in making amendments to the agreement without obtaining the consent of the parties as required by the agreement.”

Are there grounds to grant special leave to appeal against the Judgment of the Court of Appeal?

[24] We have earlier recapped the terms of the initial sale-purchase agreement between the parties and the Consent Order entered by the High Court.

[25] Be that as it may, upon a mere ocular examination of the judgments of the High Court and the Court of Appeal it is clear that this case involves the interpretation of a Consent Order entered by Court.

The legal principles applicable to consent orders and their interpretation

[26] A judgment by consent is just as effective by way of estoppel as a judgment whereby the Court exercises its mind in a contested case (vide: *Re South American & Mexican Co. 1895 (1) Ch.37 at 50*).

[27] Upon a compromise being effected, the right of action upon the original claim is lost. Any action thereafter must be on the compromise and not upon the original claim. (see: C.G Weeramnatry, *The Law of Contracts*, Vol.II, 2nd Reprint (2013) Section 735).

[28] For further elucidation it may be useful to refer to some Indian Authorities in this context.

- [29] In *N. K. Rajgarhia v Mahavir Plantation Ltd and Ors* (2006 62 ALR 491) the issue involved was the interpretation of the words “balance decree” occurring in a consent order. S.B, Sinha, J. observed that, “An order of a Court of Law and, in particular, a consent order, must be read in its entirety for the purpose of ascertaining its true intent and purport.”
- [30] In *Rekha Muherjee v Ashish Kumar Das and Anr* (AIR 2004SC 443) it was laid down that, “the intention of the parties need to be considered by reading the whole of the consent order and not isolated sections or clauses”.
- [31] In the instant case the consent order in question needs to be interpreted in conjunction with the sale- purchase agreement entered into by the parties initially in as much as the consent order embodies the sale-purchase agreement save for the modifications relating to the ‘consideration’ payable and the ‘date’ of completion of the transaction.

Tests and Principles applicable to the granting of Special Leave to Appeal

- [32] The tests and principles applicable to the granting of Special leave to appeal have been formulated by modern jurisdictions and are well settled. (See for example the India Supreme Court decisions in *Chunilal Mehta v Century Shipping & Manufacturing Co. Ltd.*[1962] 1 AR (SC) 1314 and *Subbarao v Veeraju* [1951] AIR Mad.969; the Sri Lanka Supreme Court ruling in *Colletes Ltd v Bank of Ceylon* [1982]2 Sri Lanka LR514, and the judgments of this Court in *Bulu v Housing Authority* [2005] 1 FJSC 1; *Chand v Fiji Times Ltd* [2011] FJSC 2 (8th April 2011) and *Praveena’s BP Service Station Limited v Fiji Gas Ltd.*; CBV 0018 of 2008 (26th April 2011).
- [33] In the aforecited Indian Supreme Court decision in *Chunilala Mehta* (supra), Modholkar, J articulated thus:

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

[34] The said decision has been cited with approval by this Court, for example, in *Praveena’s BP Service Station Limited* (supra) and in another judgment delivered on this very date. (see: *Vishnu Deo Swarup v Airport Land Development Company Limited*; CBV 0004/14.

[35] The said decision in *Chunilal Mehta* (supra) involved a managing agency agreement.

[36] The Court, applying the aforesaid tests held thus:

“Applying these tests it would be clear that the question involved in this appeal, that is, the construction of the Managing Agency Agreement is not only one of law but also it is neither simple nor free from doubt.”

[37] That judicial pronouncement, in our view, is very much in point.

[38] In the instant case before us it is the construction of the consent order made by the High Court taken in conjunction with the sale-purchase agreement that is in issue. In our view, it not only involves a question of law but also a question that is neither simple nor free from doubt.

- [39] Viewing the matter in that light and having regard to the grounds of appeal urged on behalf of the petitioner, we have no hesitation in holding that, the petitioner has overcome the threshold hurdle envisaged in Section 7(3) (a) to (c) of the Supreme Court Act No.14 of 1998.
- [40] Accordingly, we proceed to make order granting special leave to appeal against the impugned judgment of the Court of Appeal.

Consideration of the Judgment of the Court of Appeal as to whether it ought to be set aside on the merits

- [41] In setting aside the judgment of the High Court, the Court of Appeal concluded thus:-

“The learned Judge by her judgment fixed 30th June, 2012 as the date of the date for settlement. I could not find any agreement between the parties for another date. In terms of the agreement, any variation to the terms has to be with the consent of the parties in writing and signed. Considering the submissions of the learned Counsel very carefully, I am of the view that the learned Judge has erred in making amendments to the agreement without obtaining the consent of the parties as required by the agreement.” (Vide paragraph 34 of the Court of Appeal Judgment).

- [42] That conclusion needs to be assessed against the specific finding arrived at by the learned High Court Judge on the evidence on record.

- [43] Having examined the affidavit evidence of both parties and several email correspondence after the date of 15th March, 2009 set down by Court in the consent order, the learned High Court Judge found that: -

“the conduct of the parties and their solicitors commencing from 4th March, 2009 until 23rd April, 2009 clearly indicates that the settlement date had been extended by mutual conduct or by implication, however without setting out a deadline”. (at paragraph 30 of the judgment of the High Court).

- [44] That finding is in perfect harmony with the said affidavit evidence and the email correspondence exchanged between the parties which, regrettably the Court of Appeal has not examined.
- [45] The date of 15th March, 2009 had become past history as the said correspondence clearly reveals on the record.
- [46] The present litigation under Order 45 Rules 4 and 7 of the High Court Rules of 1998 were initiated on 30th September, 2010 on the basis that, there was breach of the consent order in question by the Respondent.
- [47] It is that question that the High Court was required to determine – that is, on the issue of time for the initially intended transaction, set down as 15th March, 2009 but by the conduct of parties had stood extended, which as observed earlier, the Court of Appeal has not addressed in its judgment when it went on to hold that:

“the Learned Judge... ..fixed 30th June 2012, as the date of settlement.”

- [48] That judicial pronouncement in our view is a misdirection in as much as their Lordships of the Court of Appeal have perfunctorily gone on dates *per se* without considering the antecedent circumstances.
- [49] For the aforesaid reasons, we set aside that part of the judgment of the Court of Appeal.

The Matter of the Deposit of 10% of the Purchase Price

- [50] Going back to the consent order, paragraph 2 thereof states in explicit terms that, the terms and conditions of the sale and purchase agreement dated 5th September, 2005 to remain the same except for the consideration sum stated in (1) above and the settlement date as stated in (3) hereinbelow.

- [51] The consideration sum as it originally stood was \$236,000/= and it is only that, that was replaced by \$270,000/= in the Consent order.
- [52] Clause 3.1(a) required \$23,600/= to be paid into the Trust Account of Messrs Babu Singh & Associates, Nadi and to be released to the vendor upon settlement and Clause 3.1(b) went on to refer to the balance purchase price of \$212,400/=.
- [53] Whether one calls it a deposit or an advance payment, one does not have to indulge in an exercise in semantics to ascertain that, 10% of the purchase price was to be paid as such deposit or advance payment as having been the intention of parties.
- [54] If so, and given the fact that, only the consideration sum was changed to \$270,000/= from \$236,000/= with no mention of a deposit or advance payment of 10%, did not \$27,000/= as being 10% of the substituted purchase price of \$270,000/= become payable as a deposit or advance payment and the balance of \$243,000/= become payable later?
- [55] We think it was, as being an implied term in the initial sale – purchase agreement that survived the terms of the consent order.

Principles relating to Implied terms applicable in the Instant Case

- [56] When parties contract they generally express themselves in regard to the main outlines of their agreement and leave unexpressed a number of terms upon which they have in fact agreed or in respect of which they must be deemed to have agreed. (vide: C.G.Weeramanty on The Law of Contracts, Reprint 2013, Section 593).
- [57] Viewed in the light of that principle, it is apparent that, a payment of a deposit or an advance amounting to 10% of the purchase price was in the minds of both parties as being a term by necessary implication. (Weeramanty, Supra, Section 595).

[58] The Appellant's own contention that, owing to a practical difficulty in making payments on account of Solicitors Messrs Babu Singh & Associates, Nadi, in effect withdrawing from being involved in the transaction shows that, the appellant itself had been proceeding on the basis that, such a deposit or advance payment was part of its obligations.

[59] For those reasons we are unable to agree with the contention of learned Counsel for the appellant that, the theory based on a 10% advance payment or deposit of the purchase price was a red-herring.

[60] For the same reasons we are compelled to fault the learned High Court Judge's view when she held thus:-

"I am convinced and therefore conclude that Babu Singh & Associates did not act as the defendant's solicitors after the parties executed the consent order. Therefore, I conclude that paragraph 3.1(a) of the agreement is unenforceable. I also conclude that consent order I replaced the entirety of paragraph 3 of the sale and purchase agreement dated 5 September 2005. In the circumstances, the plaintiff was only obliged to pay the sum of \$270,000.00 upon execution of the transfer documents".

Impossibility of Performance

[61] The Appellant's counsel argued strenuously that, on account of Messrs Babu Singh & Associates, Nadi, in effect, withdrawing from being involved in the transaction it was not possible for his client to pay 10% deposit (assuming it was to be paid).

- [62] If that argument is to be taken to a logical conclusion, then, the appellant's counsel's lament surely must be based on impossibility of performance, and in law the initial sale-purchase Agreement read with the consent order itself had become frustrated.

Principles relating to frustration of a Contract in their relevance to the Instant case

- [63] Shortly stated, apart from cases of discharge by illegality or physical impossibility to perform, a contract may yet be discharged on the ground of frustration if an assumption or state of things which parties regard as basic or fundamental to the contract is destroyed by later events, or ceases, for some reasons to exist. (vide: *Boast v Firth* [1868 L.R. 4 C.P.I].
- [64] We have already held that, the payment of 10% of the purchase price as a deposit or an advance contained in the initial sale-purchase agreement survived the terms of the consent order and indeed became part and parcel of that Order.
- [65] If the appellant's lament is that, it could not pay the same owing to the withdrawal of Messrs Babu Singh & Associates from being involved in the transaction thereby hinting that, there was impossibility of performance due to later events or that its obligation ceased to exist for that reason, then, the Contract (contemplated by the consent order read with those parts of the initial agreement that were left in tact) stood frustrated with no attendant obligation visiting either party.
- [66] In the background of those facts and circumstances as recounted in the light of the relevant legal principles as enunciated above, we now proceed to examine the conclusion arrived at by their Lordships of the Court of Appeal.

The Conclusion arrived at by the Court of Appeal

- [67] The Court of Appeal held thus:-

“The learned counsel for the plaintiff was not able to take this case any further other than supporting the findings of the learned Judge. Referring to the deposit that the defendant claimed was a requirement of the agreement, the learned counsel for the plaintiff submitted that the deposit could be paid at the settlement with the balance purchase price.

Considering the above submission there is no doubt that no attempt was made by the plaintiff to make a deposit. The primary task of the court is to discover from the consent order itself what the order says and means. I have already referred to the consent order. The consent order appears to vary the purchase price and the date of settlement. The court should have considered the terms and conditions of the agreement after amending the purchase price and the date of settlement.

In the agreement the purchase price was \$236,000.00. The consent order amended the amount to \$270,000.00. This was in favour of the defendant. The date of settlement was specified as 90 days from the date of execution of the agreement. The agreement was executed on 5 September 2005. The date of settlement has to be a date 90 days thereafter. The plaintiff made a deposit of \$23,600.00 into the Trust Account of Babu Singh & Associates on 31st August 2005. That was even prior to the execution of the Agreement. However, the balance purchase price was paid into the Trust Account of Babu Singh & Associates on 23 February 2006. That is again outside the 90 day period. The deposit and the balance purchase price were withdrawn by the plaintiff on 23 February 2006. The consent order fixed the date of settlement as 15 March 2009.”

[68] Although we do not agree with the observation made by the Court of Appeal that, “there is no doubt that no attempt was made by the plaintiff (appellant) to make a deposit.” (Paragraph (32) of its judgment), for the appellant did make an attempt to pay into the Trust Account of Babu Singh & Associates at some point, the Appellant could still have made the said deposit or advance payment through another mode of payment, which it did not do.

[69] However, given the fact that, such a mode of payment was not contemplated in the initial agreement, the Appellant could not be said to have been in breach of its obligations. Nevertheless, for the reasons stated above, the contractual obligation on the Appellant arising from the consent order read with the surviving parts of the sale- purchase agreement was rendered incapable of performance. Thus the Agreement stood frustrated.

Conclusion

[70] Consequently, although the Court of Appeal in its Judgment does not make a specific finding on the impact of the non-deposit of 10% of the substituted purchase price via the consent order, we are of the view that, that ought to have been a decisive factor for the determination of this case on the basis of principles relating to implied terms and frustration of contract.

[71] In the result, although we do not strike common ground with the reasoning of the Court of Appeal in allowing the Respondent's appeal before it, for the reasons adduced in our judgment we affirm the judgment of the Court of Appeal and dismiss this Appeal.

The matter of Awarding Costs

[72] We are mindful of the general rule that costs of litigation must follow the event.

[73] However, the matter for determination before us was not without difficulty, involving as it did a consent order super-imposed on a sale-purchase agreement between parties that warranted interpretation.

Some Comments on the Awarding of Costs

[74] Given the fact that, we initially granted special leave to appeal against the judgment of the Court of Appeal but have proceeded to dismiss the appeal it is our considered view that, in such a case the general rule relating to the awarding of costs warrants a departure.

[75] Accordingly, we make no order for costs in the context of this appeal before us but the costs ordered by the Court of Appeal shall remain.

The Orders of the Court are:

1. *Appeal is dismissed (though special leave to appeal was allowed in the first instance).*
2. *The Court of Appeal Judgment setting aside the Judgment of the High Court shall stand.*
3. *Costs fixed at \$5,000/= payable by the Appellant (Respondent in the Court of Appeal) ordered by the Court of Appeal shall stand and shall be payable by the Appellant to the Respondent within 28 days of the date of pronouncement of this Judgment.*



Hon. Justice Saleem Marsoof
Justice of the Supreme Court



Hon. Justice Suresh Chandra
Justice of the Supreme Court




Hon. Justice Almeida Guneratne
Justice of the Supreme Court