

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

CIVIL PETITION NO. CBV 0004 of 2014

(On Appeal from Court of Appeal No.
ABU 0061 of 2012; High Court Civil
Action No. HBC 296 of 2005L)

BETWEEN : VISHNU DEO SWARUP

Petitioner

AND : AIRPORT LAND DEVELOPMENT COMPANY LIMITED

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 : Petitioner in Person
Mr. D. S. Naidu for the Respondent

Date of Hearing : 3 November 2014

Date of Judgment : 14 November 2014

JUDGMENT

Justice Saleem Marsoof

[1] I agree with the conclusions and reasons in this judgment of Almeida Guneratne JA.

Justice Suresh Chandra

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

Justice Almeida Guneratne

- [3] In this application the petitioner seeks special leave to appeal from the Judgment of the Court of Appeal dated 5th March, 2014 which set aside an award of \$131,698.00 made by the High Court and substituted therefor \$52,425.00 claimed by the Petitioner as Commission arising out of a written employment contract.

Relevant Facts in Brief

- [4] The petitioner (hereinafter referred to as the plaintiff) a former Bank Manager and the Respondent (hereinafter referred to as the defendant company), a land developer, entered into a written employment contract dated 13th May, 2005 (P2) whereby the defendant company employed the plaintiff as General Manager effective from 1st February, 2005. His services were terminated on 30th June, 2005.
- [5] The object of the defendant company was to develop a large piece of land comprising 117 lots. The land being Native Land, it was common ground that 10% of the gross sale price of each lot was to be paid as a statutory obligation to the Native Land Trust Board (NLTB) as it was then called (presently known as the i Taukei Land Trust Board - iTLTB).

Material Part of the Contract

- [6] For purposes of this application it would suffice to reproduce the material part of the contract in as much as in the Court of Appeal, the argument was limited to the quantum of Commission payable to the petitioner on the lots of land sold during his period of employment in terms of Schedule 3 of the contract of employment.
- [7] The material part in Schedule 3 required the Petitioner to be paid viz:

Rival Contentions and the Basis on which the High Court awarded the sum of \$131,680

- [8] The petitioner's contention in the High Court had been that in terms of Schedule 3, the 10% of NLTB charge was to be computed on the difference between the sale price and fixed price and that consequently both parties were to share equally, the excess between the sale price and fixed price less the 10% NLTB charge.
- [9] On the other hand, the Respondent's contention had been that, the 10% NLTB charge was to be deducted from the sale price and that consequently, the parties were to share equally the difference between the figure resulting therefrom and the fixed price.
- [10] At this point, it may be appropriate to note the following findings arrived at by the learned High Court Judge in the light of the issues raised at the trial.
- (i) *That, "on a plain, normal and natural reading of the agreed proposal in P12..., it is clear that, 10% NLTB charges are not to be shared but it is the sale price in excess over the fixed price that is meant to be shared between the parties." (at p. 16 of the Judgment of the High Court)*
 - (ii) *"As set out hereinbefore the excess between the Fixed Price and the Sale Price was agreed to be shared, after deduction of the 10% NLTB charge. **The amount to be shared is arrived at after deducting the 10% NLTB charge.** To that extent and in that context this issue needs to be answered in the negative." (p.23 of the Judgment of the High Court)*
 - (iii) *That, "it is the excess between the fixed price and the sale price, after deduction of the 10%, NLTB charge in respect of a lot that, the parties agreed to share equally..." (p.21 of the Judgment of the High Court).*
 - (iv) *That, what the "respondent (petitioner to the present application) is entitled to, is not to the entire excess over the Fixed Price, but to share that excess after deduction of the 10% NLTB charges." (p 23 of the Judgment of the High Court).*

- (v) *That, “The attachment to P5 had not been challenged since 30th June 2005, either by the Defendant or it’s Solicitor and even at the trial the said attachment survived, subject to the Plaintiff admitting that he was not entitled to monies on certain lots including the two lots he is said to have agreed to purchase out of which he has purchased only one. At paragraph 64 of the written submissions of the Plaintiff, the Plaintiff after deducting the sum of \$17,525.00 (in respect of 5 lots) which he admits he is not entitled to, seeks the balance of \$131,698.00. There is no other acceptable account submitted by the Defendant in respect of such payments due to Plaintiff. Even the attachment to D1 does not mention the Fixed Price, the excess or the amount if any payable to Plaintiff. The Defendant did not submit an amount to be the component of NLTB charges paid in respect of the lots ‘sold’ by the Plaintiff to challenge the account in the attachment to P5, though the total of NLTB charges paid were submitted. Therefore the amount due to the Plaintiff as accepted by the Plaintiff at paragraph 64 of his written submission is \$131,698.00”*

- [11] As revealed from the last finding, the same formed the basis on which the High Court awarded the said sum of \$131,698.00.

Basis on which the Court of Appeal set aside the said award and substituted the sum of \$52,450.00

- [12] The Court of Appeal having examined the respective computations submitted on behalf of the parties (vide: page 15 and pages 16 to 17 of the Supreme Court Record) noted the argument that, “the learned trial judge, while arriving at a correct construction of the relevant clause, failed to apply that arithmetical formula and calculate the Commission on sales payable but instead relied on the claim for \$131,698.00 (vide: p.5, paragraph 16 of Court of Appeal Judgment).

- [13] Consequently the Court of Appeal held as follows:-

“In my judgment, the calculation adopted in the above accords with the correct construction of clause 3 and findings of the lower court. In my view, in the first instance, the 10% NLTB charge has to be deducted from the sale price. Then, the parties are entitled to an equal proportion of the difference between the sale price after the 10% deduction and the fixed price. A fortiori, that this is the proper construction of the relevant clause gains support from the sale to Girdhar Raniga, where the sale price was below the fixed price as highlighted in the above table. The

*NLTB 10% charges was quite correctly deducted from the sale price".
(at page 6, paragraph 19 of the Court of Appeal Judgment).*

Grounds Urged for Special Leave to Appeal

- [14] (a) That, the Court of Appeal erred in law and in fact accepting the Appellant's submission to set aside the Order of the High Court and it allowed the Appeal thereby reducing the Commission from \$131,698.00 to \$52,425.00;
- (b) That, the Court of Appeal based its Judgment on Clause 3 of the Employment Agreement in isolation and not considering the facts and evidence provided under Oath by the petitioner (original plaintiff during the Trial at the High Court). (vide: paragraph 1 (a) and (b) of the Petition for Special leave to appeal).
- [15] We now proceed to determine as to whether special leave to appeal ought to be granted or not on the grounds so urged.

Determination as to whether special leave to appeal ought to be granted or not

- [16] The conclusion reached by the Court of Appeal as recapped earlier was based on the computation submitted on behalf of the Respondent (Appellant in the Court of Appeal) and illustrated by the following transaction as an example, viz :

Name of Purchaser	Sale Price	\$28,000.00
Divendra Prasad	Less 10% of NLTB charge	\$ 2,800.00
	Resulting Figure	\$25,200.00
	Less Fixed price	\$23,500.00
	Balance	\$ 1,700.00
	50% (equal share by Way of Commission)	\$ 850.00

- [17] As against that computation, on that same transaction (viz: sale to Divendra Prasad), the computation submitted on behalf of the Petitioner (Respondent in the Court of Appeal) was as follows:-

Sale Price	\$28,000.00
Fixed Price	\$23,500.00
Difference	\$ 4,500.00
10% NLTB charge	\$ 450.00
Balance	\$4, 050.00
50% (equal share as Commission on the Balance)	\$2,025.00

- [18] Quite apart from a plain reading of Schedule 3 of the Contract (p2) in question as to the proper computation, the computation submitted on behalf of the Respondent stood fortified by the sale to one Girdhar Raniga (viz:)

Name of Purchaser	-	Girdhar Raniga
Sale Price	-	\$55,000/2
Fixed Price	-	\$58,000/2

(see in Annexure 'A' submitted along with a letter dated 30th June, 2005 by the Petitioner's lawyers to the Respondent. (p. 201 of the Supreme Court Record)

- [19] A mere ocular inspection of the said sale to Girdhar Raniga would show that there was no difference between the sale and the fixed prices in excess for 10% NLTB to be charged (on a difference on the side of the sale price) as observed by the Court of Appeal (vide: page 6 of the Court of Appeal Judgment).

NLTB Charges – A Statutory Obligation

- [20] Payment of NLTB charges is a statutory obligation on a sale of land should the construction placed on Schedule 3 of the Contract by the Petitioner was to be accepted, it would leave no room for the payment of NLTB charges. A sale would then go through without any payment of NLTB charges.
- [21] The statutory obligation to pay NLTB charges cannot be circumvented on contingencies that may arise.
- [22] Indeed, even if the contract in question had expressly stated such a contingency, the same would have been contrary to law and would have been liable to be struck down as being contrary to public policy and the law.
- [23] In short, the duty to pay NLTB charges arises immediately upon the sale of a land. It is not and cannot be dependent on whether a particular sale is a profitable one, that is the sale price exceeding the fixed price.
- [24] Accordingly, we hold that, there was no error of law or fact on the part of the Court of Appeal when it accepted \$52,425.00 as the proper computation and not \$131,698.00 as decreed by the High Court.
- [25] Consequently, we reject ground 1(a) urged in the Petition seeking special leave to appeal.

Ground (i) (b)

- [26] The petitioner urges that, the Court of Appeal based its judgment on Clause 3 (described as Schedule 3) of the employment agreement in isolation and not

considering the facts and evidence provided under Oath by the petitioner (original plaintiff during the trial of the High Court).

[27] Taking first the argument that the Court of Appeal based its judgment in isolation, in as much as for the reasons give by us in relation to ground 1 (a) of the grounds of appeal, it is our view that, the application of the said clause 3, and what ensues therefrom have been adequately dealt with by us hereinbefore.

[28] Secondly, what were those facts and evidence provided under oath that the petitioner is complaining of?

[29] To begin with we regret in having to state that, the averments following Paragraph 1(a) and (b) of the petition seeking special leave to appeal are prolix and argumentative.

[30] Even if that be ignored, what was the evidence of the petitioner himself provided under oath that is supposed to have not received the consideration of the Court of Appeal?

[31] Both in the petition seeking special leave, the written submissions filed of record and re-iterated at the stage of oral submissions, the petitioner harped on the contents of document P5 (letter of 30th June, 2005 with the Annexure 'A' referred to earlier being the purported computation of Commission).

[32] It was contended at the stage of oral submissions by the petitioner that, the said letter P5 was not denied or refuted at any time by the Respondent and therefore stood proved, thereby impliedly suggesting that, that constituted estoppel by conduct and further that, the same amounted to an admission in law.

[33] No doubt those principles are well entrenched in all modern Jurisdictions.

Procedural Principle against Substantive Rights

[34] But, could such procedural principle *proprio vigore* overcome and override if the substantive rights of litigating parties indicate otherwise?

[35] In this Court's considered view it cannot, which we venture to lay down as a proposition of law.

[36] We state this for the following reasons in the context of the present case.

[37] On the said procedural principle, *prima facie*, the petitioner could have been said to have had a cause for the effective prosecution of this application.

[38] But, as we note, the same could not have been sustained on account of the petitioner's own evidence.

[39] He had been asked in his oral examination in chief by Counsel thus: 'What was the NLTB charge?'

[40] The plaintiff's response had been '10% of total sale price' (vide: page 302 of the record of the High court – Volume 2).

[41] So it follows that, it had been the petitioner's own admission that, the Commission he was entitled to was 10% of the (total) sale price.

- [42] As Counsel for the Respondent submitted, it was not 10% of the NLTB charge that was involved but 10% of the sale price as the NLTB charge.
- [43] Then again Counsel for the Respondent quite pertinently argued that it was not 'P5' that the Respondent refuted but re: the interpretation as to what the NLTB charge was.
- [44] Although copious written submissions have been filed in this case on behalf of the petitioner this aspect has not been addressed. The petitioner was not able to throw any light on that aspect even during the stage of oral submissions.

Criteria for the granting of Special Leave

- [45] These criteria are contained in Section 7(3) (a) to (c) of the Supreme Court Act No.14 of 1998. It states that 'the Supreme Court must not grant special leave to appeal unless the case raises:

- a) a far reaching question of law;*
- b) a matter of great general or public importance;*
- c) a matter that is otherwise of substantial great interest to the administration of Civil Justice.*

- [46] In the present case, none of those criteria have been satisfied.

Some Guiding Principles in the interpretation of the aforesaid criteria for refusing special leave to appeal

- [47] Special leave will be refused if:-
- a) the matter raised is free from difficulty;*
 - b) the matter is palpably absurd;*
 - c) there is no room for reasonable difference of opinion;*
 - d) there is no misdirection by the Court below on the law or the facts;*

- e) *the Court below has taken into account relevant considerations;*
- f) *the Court below cannot be shown to have misconstrued a document or misinterpreted other evidence or correspondence between the contesting parties;*
- g) *the judgment sought to be appealed from is not attended with sufficient doubt.*

[48] In this connection and in laying down the aforesaid guiding principles, with some modifications of our own, we have derived valuable assistance from the Judgments of the Supreme Court of India in *Chunilal Mehta v Century Shipping & Manufacturing Co. Ltd.* [1962] 1 AIR (SC) 1314 and *Subbarao v Veeraju* [1951] AIR Mad. 969, the Supreme Court of Sri Lanka in *Colletes Ltd v Bank of Ceylon* [1982] 2 Sri Lanka LR 514, and the judgments of this Court in *Bulu v Housing Authority* [2005] 1 FJSC 1; *Chand v Fiji Times Ltd* [2011] FJSC 2 and *Praveena's BP Service Station Limited v Fiji Gas Ltd*; CBV 0018 of 2008(26th April 2011).

[49] To quote from one of the said judgments which is very much in point viz: *Chunilal Mehta's* case (Supra), it was stated thus:

"The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or 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 the Supreme Court or by the Privy Council or is not free from difficulty or calls for discussions of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or the plea raised is palpably absurd, then the question would not be a 'substantial question of law.'"

Conclusion

[50] On the application of the statutory criteria laid down in Section 7(3) (a) to (c) of the Supreme Court Act No. 14 of 1998 and the aforesaid guiding principles for refusing special leave to appeal against a Court of Appeal decision (which we may add are not meant to be exhaustive) we conclude that, there is no ground or basis revealed in this application for the granting of special leave to appeal.

In the Matter of Costs

- [51] The petitioner appeared in person in support of his application for Special Leave although the record reveals that some legal assistance had been obtained at the antecedent stages.
- [52] In those circumstances we decided to award a sum of \$500/= only to the Respondent as costs of this application.

The Orders of the Court are:

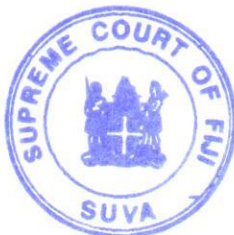
1. *The application for special leave to appeal against the Court of Appeal judgment dated 5th March, 2014 is refused.*
2. *The judgment of the Court of Appeal is affirmed.*
3. *The Petitioner shall pay as costs of this application fixed at \$500/= to the Respondent. This sum shall be in addition to the \$3,000/= decreed by the Court of Appeal in the cause before it thus making up a sum of \$3,500/=.*
4. *The Petitioner shall pay the said total sum of \$3,500/= within 28 days 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