IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0015.2018
[On Appeal from the Fiji Court of Appeal No: ABU 0088.2016]

BETWEEN : **ATTORNEY GENERAL OF FIJI**

1ST Petitioner

DIRECTOR OF LANDS

2ND Petitioner

AND : **CHANDAR LOK**

Respondents

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : **Mr. J. Mainavolau for the Petitioners**
Mr. V. M. Mishra for the Respondent

Date of Hearing: **22nd October, 2019**

Date of Judgment: **1st November, 2019**

JUDGMENT

Saleem Marsoof, J

[1] The 1st Petitioner, Attorney-General of Fiji, as the legal representative of the 2nd Petitioner, Director of Lands, seeks leave to appeal against the judgment of the Court of Appeal dated 5th October 2018 by which it reversed the Ruling of the High Court of Fiji at Lautoka dated 3rd February 2017 to strike out pursuant to Order 18 Rule 18 of the High Court Rules 1988, the claim made by the Respondent Chandar Lok by way of originating summons lodged on 19th May 2016.

Factual Matrix

[2] Chandar Lok claims to be the proprietor of Registered Lease No. 44656 of native land situated in the District of Tavua in extent 25 acres 2 roods and 5 perches which he purchased from his deceased father Mr. Balliaya for $20,000.00, which transfer was registered on 10th June 1994.

[3] By a Sale and Purchase Agreement executed on 7 January 1971 (hereinafter referred to as "the SPA") the Director of Lands purchased from the said Ballaiya, 2 acres and 7 perches of the larger land constituting the subject matter of the said Registered Lease bearing No. 44656.

[4] The objective of the said admittedly, was to enable Government to acquire the land for the construction of a road

[5] The parties to the SPA did not agree on a specific price for the sale, and clause 1(a) of the standard form intended to insert the agreed price was left in blank. Clause 1 (b) in the SPA provided that "the consideration shall be such sum, being the true value thereof, as shall be agreed by and between the parties hereto as being such *true value* or as shall be determined by any court having the jurisdiction to determine the same." There is uncertainty as to whether clause 1(b) of the SPA had been scored out at the time of the execution of the SPA, as alleged by the Petitioners.

[6] Apart from this, there were certain other conditions laid down in the said SPA. One such condition included in clause 4 of the said SPA was that-

"The purchaser agrees to effect all surveys necessary to enable Government to acquire the land described in the First Schedule (in extent 2 acres and 7 perches) and *to pay the cost of all such surveys and of any application to any court made pursuant to this Agreement* and all legal costs incurred by the Vendor in connection with the transfer to Government of the said land"(*emphasis added*)

[7] Another condition of the said SPA as set out in paragraph 5 thereof was that-

"The Vendor agrees and undertakes that upon receipt of *the full purchase price* he will execute all necessary documents to *transfer his said interest in the said land to Director of Lands*." (*emphasis added*)

Proceedings in the High Court

[8] On 19th May 2016, the Respondent, Chandar Lok, as Plaintiff, instituted originating summons supported by affidavit, citing the 1st and 2nd Petitioners as Defendants at the High Court of Lautoka seeking following relief:-

"1. The First Defendant give survey plans and/or registered survey plans for the area of two acres and seven perches covered by the First Defendant's Caveat No. 121064 against the Plaintiff's Native Lease No. 44656 on Lot 1 DP 1700 taken by the First Defendant pursuant sale and purchase agreement dated 7th January, 1971 within 10 days;
2. An order that the First Defendant do pay the Plaintiff *compensation* agreed to be paid under agreement dated 7th January 1971 whereby the First Defendant [*purchased?*] 2 acres and 7 perches;
3. The First Defendant do pay *compensation* to the plaintiff in the sum of $108,000.00 or as assessed by the Court;
4. The Defendants do pay *damages* to the Plaintiff for not giving him possession of the old road area for not providing him with proper registered survey plan and proper varied lease to him which has stopped him from enforcing his rights to full usage of the area he is entitled to;
5. Alternatively, that *Caveat No. 121064* against Native Lease No. 44656 on Lot 1 DP 1700 do be removed;
6. The Defendants do pay the Plaintiff the *costs* of this action." (*emphasis added*)

[9] On 20th July 2016, the Petitioners filed summons to strike out Chandar Lok's claim pursuant to Order 18 Rule 18 of the he High Court Rules 1988 ('HCR') and the inherent jurisdiction of the Court, on the grounds:-

1. That it discloses no reasonable cause of action or defence as the case may be; or

2. That it is scandalous, frivolous or vexatious; or
3. It may prejudice, embarrass or delay the fair trial of the action; or
4. It is otherwise an abuse of the process of the Court.

[10] At the hearing before the High Court, it was contended on behalf of the Petitioners that the claim of Chandar Lok is defeated by sections 4 and / or 8 of the Limitation Act (Cap 35).

1. The learned High Court Judge [Ajmeer, J.] in his Ruling 3rd February 2017, relied on section 4 of the Limitation Act to strike out Chandar Lok's claim on the footing that the SPA sought to be enforced was a simple contract and the originating summons has been instituted after the expiration of six years from the date on which the cause of action accrued, and was time barred.

2. In the course of his Ruling, the learned Judge noted that as explicitly provided in section 27 of the Limitations Act, the provisions of the said Act apply to proceedings by or against the State in like manner as it applies to proceedings between subjects. He also held that section 8 of the Limitation Act is inapplicable to the case since the claim is based on the SPA and does not relate to money secured by a mortgage or other charge or proceeds of sale.

3. The learned High Court Judge also held that by reason of the statutory time bar, the original summons of Chandar Lok was an abuse of the process of court.

Proceedings before the Court of Appeal

[11] Being aggrieved by the said Ruling of the High Court, the Respondent Chandar Lok appealed to the Court of Appeal on the following grounds:-

1. The Learned Judge erred in law and/or in fact in holding that the Plaintiff's claim was statute barred 39 years ago and that the leave of the Court was required to pursue his claims out of time;

2. The Learned Judge erred in law and/or in fact in holding that the Appellant's claim was an abuse of process of the Court when after having signed the agreement dated 7th January 1971 to purchase the late Mr. Ballaiya's land of two acres and seven perches for a sum to be determined by the Court if not agreed and having taken possession the First Respondent had not complied with the agreement to:

   (a) Effect all surveys relating to separation of and issue of new or amended title(s) which it still has not done despite having lodged a caveat.

(b) To pay the costs of such surveys and the Appellant's costs of any application to the Court and here the Court has in fact declined to give any relief regarding survey or issue of amended Title (or lease) to the Appellant and in fact ordered costs against the Appellant.

(c) Take its road portion of land out and return a registered title to the Appellant and give a survey plan and amended lease for many years when there was a positive duty on it to do so.

(d) The Respondents were obliged *to specifically perform the agreement.*(*emphasis added*)

3. The Learned Judge erred in law and/or in fact in not making an order in the alternative claim to remove Caveat No. 1201164 on the basis that the Plaintiff could apply for the removal of the Caveat to the Registrar of Titles when that was the very issue the Appellant wanted to have determined by his claim under Section 109 of the Land Transfer Act (Cap. 131).

4. The Learned Trial Judge erred in law in making finding of fact against the Appellant on affidavit evidence and in not taking into account the provisions of the Land Transfer Act in particular section 109 and 110 and the implication of the First Respondent having lodged a caveat under the Land Transfer Act.

5. The Learned Judge erred in law and/or in fact in not taking into account the compensation to be paid to the late Ballaiya or his representatives or successors was to be that which represented the *true value* of the land taken and that Court had jurisdiction to assess the amount to be paid despite any steps by the Official Receiver."

[12] Having heard submissions of learned Counsel for the parties, Almeida Guneratne, JA (with whom Basnayake, JA and F. Jameel, JA concurred) noted in paragraph [10] of his judgement that time bars had no application to Chandar Lok's case since his claim was based on a *continuing cause of action* in that-

(a) the Petitioners up to the time of the impugned judgment of the Court of Appeal had failed to conduct a survey of the (larger) land in relation to the 2A 7P which was taken for the construction of a public road; and

(b) failed to discharge the Petitioner's part of the obligations in fixing the *true value* of the said portion acquired by them as envisaged by the SPA, (though a sum of $730.00 had been received by the Official Receiver when the Appellant's predecessor (his father) had been bankrupt).

[13] Almeida Guneratne, JA stated in paragraph [11] of his judgment that he felt it was incumbent on the part of the Petitioners to have conducted a survey in terms of Clause 4 of the SPA and went on to observe as follows in in paragraph [12] of his judgment:-

> "[12] That, in my view, stood as sufficient ground *per se* for the Appellant to have proceeded with his claim in the originating summons and for which reason the High Court could not have struck off his claim on the basis of Order 18 or any of the Rules feeding that Order, the criterion on which the Master had gone in his Order and affirmed in effect by the High Court. That factor, apart *from even having to go any further in considering as to the issue on the "true value" of the compensation to be paid for the acquisition of a 2A 7P of the land which the Appellant had purchased in 1994 – nevertheless, remained on foot.* Consequentially, in failing to do so, the High Court, as urged by the Appellant's Counsel, fell into error."(*emphasis added*)

[14] On the basis of this reasoning, Almeida Guneratne, JA concluded in paragraph [13] of his judgment as follows:-

> "(a) the Official Receiver receiving the payment of compensation for the 2A 7P did not put the final lid on the compensation that Appellant was entitled to agitate and claim as being the '*true value*' as envisaged in the SPA;
>
> (b) *the delay (to date) in failing to conduct a survey* by the Respondents, given the fact that, *the Caveat entered by the Respondents is still in operation*, *I am in agreement with Mr. Mishra's argument that his client's cause of action is still alive*.
>
> (c) In any event, the aforesaid matters could not have been determined in the context of an application/action on originating summons and in counter thereto in an opposition thereto in a summons to strike such an application.
>
> (d) *Given the nature of the matters/issues involved – they had to be gone in a viva voce trial. They could not have been determined on the basis of what is prescribed in Order 18 Rule 18 of the High Court Rules*."(*emphasis added*)

[15] The Court of Appeal made the following orders:-

1. The Appeal is allowed and the judgment of the High Court dated 3rd February, 2017 is set aside;

2. *The Orders sought by the Appellant (plaintiff in the original action/ by originating summons) are granted*;

3. *In the event of the Respondents [Petitioners to this application for leave to appeal] failing to comply with Order 2 above within 2 months of this Judgment, the Appellant [Respondent to this application for leave to appeal] shall be entitled to take further steps that he may be advised to/take against the Respondents*;

4. In the aforesaid circumstances, the Respondents shall pay costs in a sum of $5,000.00 as being costs of this Appeal to be paid to the Appellant within 21 days of this judgment."(*emphasis added*)

Application for leave to appeal

[16] In this application for leave to appeal, the Petitioners, the Attorney General for Fiji representing the Director of Lands, seek leave to appeal from this Court in terms of section 98(3)(a) and (b) of the Constitution of the Republic of Fiji read with section 7(3) of the Supreme Court Act.

[17] In paragraph 23 of their petition dated 9th October 2018, the Petitioners have set out the following grounds of appeal:

(a) the Learned Justices of the Court of Appeal contradicted themselves by declaring in their Ruling that the 'Orders sought by the Respondent (Appellant) in the originating summons are granted' when in paragraph 13(c) and (d) of said Ruling, they hold that the merits of the case cannot be determined in the context of an originating summons but by way of proper trial by evidence.

(b) The Learned Judges of the Court of Appeal ruled that 'the Official Receiver receiving the payment of compensation for the 2A7P did not put the final lid on the compensation that the Appellant (current Respondent) was entitled to agitate and claim as being the true value – envisaged in the Sale and Purchase (SPA) Agreement'. However, there is no clause in the SPA stating that the Appellant (current Respondent) is entitled to compensation and to payment of the true value of the land. Clause 2 of the SPA, which deals with the nature of payment to be made to the Vendor for the 'true value of the land', was crossed off. Mr. Balliya had endorsed the omission of this clause by initialing in the left margin of said clause; and

(c) The Learned Judge of the Court of Appeal wrongly interpreted clause 4 of the SPA in that the Respondent is entitled to compensation and payment for the true value of the land. The correct position is that Clause 4 of the SPA deals with the obligation given to the 2nd Petitioner to carry out the surveys at his own costs, and to bear the costs for the transfer of the subject land as well as any claims arising from the Vendor, in relation to the 2nd Petitioner's performance of the survey and the transfer of the subject land to the Government.

[18] It is trite law that in order to succeed in obtaining leave to appeal against a final judgment of the Court of Appeal, the Petitioners should satisfy one or more of the stringent threshold criteria set out in 7(3) of the Supreme Court Act of 1998, in the following manner-

> "In relation to a civil matter (including a matter involving a constitutional question), 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 general interest to the administration of civil justice."

[19] The criteria laid down in of Section 7(3) of the Supreme Court Act have been examined and applied by the Supreme Court of Fiji in decisions such as *Bulu v Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005), *Dr. Ganesh Chand v Fiji Times Ltd.,* CBV0005 of 2009 (31st March 2011), *Praveen's BP Service Station Ltd., v Fiji Gas Ltd.,* CAV0001 OF 2011 (6th April 2011) and *Native Land Trust Board v. Shanti Lal and Several Others* CBV0009 of 2011 (25th April 2012), *Suva City Council v R B Patel Group Ltd* [2014] FJSC 7; CBV0006.2012 (17 April 2014), *Shanaya & Jayesh Holdings Ltd v BP South West Pacific Ltd* [2015] FJSC 10; CBV0007.2014 (24 April 2015), *New World Ltd v Vanualevu Hardware* (Fiji) Ltd [2017] FJSC 10; CBV0004.2016 (21 April 2017) and *Sun Insurance Co Ltd v Qaqanaqele* [2017] FJSC 23; CBV0009.2016 (21 July 2017).

[20] Having examined the grounds urged by the Petitioners for seeking leave to appeal in the light of Order 18 Rule 18 of the High Court Rules and the principles applicable thereto, I am of the opinion that all 3 grounds raised by the Petitioners satisfy the threshold criteria, and leave to appeal is granted on all the said grounds.

[21] Ground (a) may be examined first, and thereafter it is convenient to consider grounds (b) and (c) together.

Ground (a): Was the judgment of the Court of Appeal self-contradictory?

[22] Ground (a) on which leave has been granted is whether the Learned Justices of the Court of Appeal contradicted themselves by declaring in their Ruling that the "Orders sought by the Respondent (Appellant) in the originating summons are granted" when in paragraph 13(c) and (d) of the said Ruling, they hold that *the merits of the case cannot be determined in the context of an originating summons* but by way of proper trial by evidence.

[23] It is significant that learned High Court Judge made the order to strike out Chandar Lok's claim pursuant to Order 18 Rule 4 of the High Court Rules on the basis that it was *an abuse of the process of court*. Order 18 Rule 18 of the HCR, which so far as material states that:

"18 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, on the ground that –

(a) It discloses *no reasonable cause of action* or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious: or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is *otherwise an abuse of the process of the court*;

and may order that the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph 1 (a).

(3) This rule shall, so far as applicable, apply to an *originating summons* and a petition as if the summons or petition, as the case may be, were a pleading. (*emphasis added*)

[24] The application for striking out Chandar Lok's claim had been made on the basis of Order 18 Rule 18(1)(a), (b), (c) and (d) but the learned High Court Judge preferred to make his Ruling for striking out based on paragraph (d) of Rule 18(1) on the footing that it was "*otherwise an abuse of the process of court*". The reason for the learned High Court doing so, as it appears from paragraph [11] of his ruling, was that no affidavit or other evidence was admissible for a determination based on paragraph (a) and it was desirable to consider other evidence in making his Ruling. The fact that affidavits filed by the parties were considered is demonstrable from paragraphs [26] and [27] of the Ruling. However, it is clear from paragraphs [29] to [31] of the Ruling that the determination that Chandar Lok was guilty of abuse of the process of court is based simply on the finding of the High Court that Chandar Lok's claim is time barred in terms of section 4 of the Limitation Act.

[25] The Court of Appeal held that the findings of the High Court on limitation were unfounded for the reason that the cause of action of Chandar Lok was possibly "still alive" it being based on the alleged failure of the Petitioners to perform some of their obligations under the SPA, which are matters for determination by *viva voce* trial. Mr. Mishra has in the course of his submissions before this Court added another possible argument to strengthen the decision of the Court of Appeal, namely that as provided in section 4(7) of the Limitation Act, section 4 of the Act has no application to a claim for *specific performance* of a contract or for any injunction or for other equitable relief.

[26] In fact, as submitted by Mr. Mainavolau at the hearing before this Court, in paragraph 13(c) and (d) of the said Ruling, the Court of Appeal has held, very rightly, that in view of its finding that the learned High Court Judge had fallen into error in making an order to strike out Chandar Lok's claim, the merits of the case cannot be determined in the context of an originating summons and that the Ruling of the High Court must be set aside to enable the High Court to try the case on its merits. The correctness of the finding is acknowledged at

paragraph 33 of the written submissions dated 27th September 2019 filed by the Petitioners, wherein it is stated as follows:-

> "The compensation is an integral component of the merits of the case, hence according to the learned Judges of the Court of Appeal, it cannot be determined by way of originating summons. On this premise, it is submitted that the orders sought in the originating summons should not have been granted by the Court of Appeal."

[27] It is manifest from a reading of the impugned judgment of the Court of Appeal that the said Court contradicted itself and made a substantial error by making its final order to the effect that the "Orders sought by the Respondent (Appellant) in the originating summons are granted."

[28] In these circumstances, I am of the opinion that for the foregoing reasons it is necessary to set aside the ruling of the High Court dated 3rd February, 2017 and the judgment of the Court of Appeal dated 5th October, 2018 for the purpose of remitting the case to the High Court for disposal of the originating summons on its merits after taking necessary steps.

Grounds (b) and (c): Findings in regard to payment of the true value of the land

[29] Grounds (b) and (c) are interconnected, although in my view the position taken up by the Petitioners that the SPA did not give rise "to compensation and to payment of the true value" is confusing. That is because *the word 'compensation' is not used anywhere in the SPA*, and I believe that word was used in *prayers 2 and 3* of Chandar Lok's claim (which is reproduced *verbatim* in paragraph [8] of this judgment) probably to refer to the payment of the '*full purchase price*' *as consideration for the sale of 2 acres and 7 perches of land to the Director of Lands*, which he felt entitled to in terms of clauses 1 and 5 of the SPA, and not the *cost of surveys* provided for in clause 4 of the SPA as is contended on behalf of the Petitioners.

[30] In this context, it is necessary to point out that prayer 2 of Chandar Lok's claim is not elegantly drafted since as it stands the prayer is meaningless unless one chooses to add the word "purchased" between the words "First Defendant" and the words "2 acres and 7 perches". This becomes very clear from paragraph 17 of Chandar Lok's affidavit dated 1st August 2016, filed in support of the originating summons.

[31] It is important to mention that there was controversy between the parties as to whether or not clause 1(b) of the SPA which in the original form provided for *payment of the true value of the land*, had been *scored out* at the stage of execution. That clause as well as clause 5 of the SPA dealt with the payment of the *purchase price*, which according to Mr. Mishra, has not been paid so far due to the delay of conducting the survey and assessing the *true value* of the land which is the responsibility of the Director of Lands. It appears

that the Director of Lands has taken an extremely long time to comply with his side of the bargain.

[32] At the hearing of this application for leave to appeal, Mr. Mounavolau, indicated to Court that after the pronouncement of the impugned judgment of the Court of Appeal, the survey of the land as contemplated by the SPA had been commenced and is nearing completion. As submitted by Mr. Mounavolau, clause 4 of SPA only deals with the payment of cost of surveys and any legal costs which may be incurred by Chandar Lok in connection with the transfer to the government of the land intended to be acquired for the construction of the road.

[33] It is necessary to mention that Mr. Mounavolau has contended that a sum of $730.00 had been paid to the Official Receiver on account of Mr. Ballaiya's insolvency as *the true value of the land*. This is contested by Mr. Mishra, who submits that these are matters that must be gone through at a *viva voce* trial, more so because clause 5 of the SPA entitles Chandar Lok to a right of resort to court in the event there is any dispute about the amount payable as the true value of the land.

[34] I am therefore of the opinion that grounds (b) and (c) raised before this Court should necessarily be determined by the High Court after trial. In my view, this case should be remitted to the High Court for trial on its merits, and for this purpose, it is necessary to set aside the Ruling of the High Court as well as the judgment of the Court of Appeal.

Conclusions

[35] For the foregoing reasons, I hold that the ruling of the High Court dated 3rd February 2017 and the judgment of the Court of Appeal dated 5th October 2018 must be set aside, and the case remitted to the High Court of Fiji at Lautoka to continue with pre-trial steps and to trial on the merits.

[36] In all the circumstances of this case I would not make any order for costs.

[37] Before parting with this judgment, I would like to make it clear that the findings and observations made by this Court are confined to the determination of this application for leave to appeal and appeal, and shall not bind any of the parties when this matter is taken up for trial as directed by this Court. The High Court is free to arrive at its findings on the various issues which fall for consideration in the suit on its own merits.

Suresh Chandra, J

[38] I have had the advantage of reading the judgment of Marsoof, J in draft and I agree with his reasons, conclusions and proposed orders.

Kankani Chitrasiri, J

[39] I have perused the judgment of Marsoof, J in draft and agree with his reasons, conclusions and orders proposed.

Orders of this Court

1. *Leave to appeal is granted.*
2. *Appeal is allowed.*
3. *The ruling of the High Court at Lautoka dated 3rd February 2017 and the judgment of the Court of Appeal dated 5th October 2018 are set aside.*
4. *The case is remitted to the High Court at Lautoka for it to take expeditious pre-trial steps and to proceed to trial.*
5. *The High Court is directed to expedite all proceedings in this case.*

Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

Hon. Mr. Justice Kankani Chitrasiri
Judge of the Supreme Court

Solicitors:

The Attorney General's Chambers for the Petitioners

Mishra Prakash & Associates for the Respondent