NANDALALL RAMBIRICHE V. AMBOUTIE PERSAUD
And ANUPCHAND HARIPAL

[COURT OF APPEAL OF GUYANA (Bernard, C., N. Kissoon and I. Chang, JJ.A)
November 7, 15; December 14, 2001; February 11, 2002]

Contract- Agreement of sale of Immovable property pending execution of a formal agreement of purchase and sale at mutually agreed terms- Whether agreement valid.

Contract- Illegality- Purchase price payable in US currency- Whether contract illegal or void for non-compliance with Statute- Exchange Control Act, Cap 86:01- Bank of Guyana Act, Cap 85:02 s.21 as amended, [G].

Landlord and Tenant- Order for possession- Whether application to the High Court permissible- Rent Restriction Act, Cap 36:23 s.26(1) [G].

In February 1990 the Appellant went into occupation of premises situate at Lot 5-7 Lombard Street, Georgetown pursuant to an oral agreement of tenancy coupled with an oral option to purchase the said property.

On 9th November 1992 the Appellant paid to the Respondents the sum of US$10,000.00 as a deposit on an agreed purchase price of US$100,000.00 for the said property and a receipt was issued which stated that the amount was paid "pending execution of agreement of purchase and sale thereof at mutually agreed terms." On 10th December 1993 the Respondents instituted proceedings against the Appellant seeking a declaration that the oral agreement entered into between them was null and void, alternatively, rescission of the agreement, damages for breach of contract and possession of the premises. The Appellant counterclaimed for specific performance of the said agreement of sale, alternatively, a declaration that he is entitled to remain in the property by reason of promissory and / or proprietary estoppel.

The trial judge rescinded the agreement and ordered the Appellant to deliver possession of the premises to the respondents.

The appellant appealed contending that the trial judge was wrong when she held that the evidence did not disclose a binding contract between the parties for the sale of the said property.

HELD,
(i) there was no valid agreement of sale and purchase of the said property;
(ii) in the particular circumstances of this case, the High Court had no jurisdiction to make an order for possession; accordingly, the order for possession is set aside.

Cases referred to in the judgment:

Branca v. Cobarro [1947] 2 All E. R. 101
Riley et anor v. Troll [1953] 1 All E. R. 966
Scammell v. Ouston [1941] 1 All E.R. 14
Ambrose v. Boston (1993) 55 WIR 184
Johnson v. Agnew [1979] 1 All E. R. 883

O. Valz, S.C. for the Appellant
C. Ramson, S.C. and J. Persaud for the Respondents.

BERNARD, C. delivered the judgment of the Court.

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

G U Y A N A

CIVIL APPEAL NO. 22 OF 1997

BETWEEN:

NANDALALL RAMBIRICHE

Appellant/Defendant

- and –

1. **AMBOWTIE PERSAUD**
2. **ANUPCHAND HARIPAL**

Respondents/Plaintiffs

BEFORE:

Hon. Madame Justice Desiree P. Bernard	-	**Chancellor**
Hon. Mr. Justice Nandram Kissoon	-	**Justice of Appeal**
Hon. Mr. Justice Ian Chang	-	**Justice of Appeal**

Mr. O. Valz, SC for Appellant
Mr. C. Ramson, SC for Respondents

2001: November, 7, 15
December, 14

2002: February, 11

J U D G M E N T

BERNARD, C.:

In February, 1990 the Appellant went into occupation of premises situate at lots 5-7 Lombard Street, Georgetown as the tenant of the Respondents with an oral option to purchase it later.

On 9th November, 1992 the Appellant paid to the Respondents the sum of $10,000 US as a deposit on an agreed purchase price of $100,000 US for the said property and a receipt was issued which stated that the amount was paid "pending execution of agreement of purchase and sale thereof at mutually agreed terms".

Relations between the parties deteriorated over the years, and on 10th December, 1993 the Respondents instituted proceedings against the Appellant seeking a declaration that the oral agreement entered into between them was null and void, alternatively, rescission of the agreement, damages for breach of contract and for waste, and possession of the premises.

After a hearing the learned trial judge rescinded the agreement and ordered the Appellant to deliver possession of the premises to the Respondents on or before 1st October, 1997. The Appellant has appealed to this Court against those orders.

At the hearing of the appeal this Court having examined the legal issues which fell to be determined invited both Counsel for the Appellant and the Respondents to consider arguments on the issue of illegality in the light of the fact that the deposit and the purchase price were payable in US currency ostensibly in contravention of the Bank of Guyana Act, Cap. 85:02 and the Exchange Control Act, Cap. 86:01.

Before embarking on a discussion of the issue of illegality, I shall first deal with the question of whether there was a valid agreement for the sale of the property in question. Counsel for the Appellant indicated that the agreement was contained in the receipt (Ex. H) issued on 9th November, 1992 to which I alluded at the beginning of the judgment. Since this is relied on as the basis of the contract and much turns on its wording I shall set it out verbatim. It is to this effect:

“ 9th November, 1992

Received from Nandalall Rambiriche the sum of Ten Thousand US Dollars (US$10,000) being a deposit on purchase price of US $100,000 of property situate at 5 Lombard Street, Georgetown – pending execution of agreement of purchase and sale thereof at mutually agreed terms.

A. Persaud
A. Haripal”

Section 3(d) (iv) of the Civil Law of Guyana Act, Cap. 6:01 provides that no action shall be brought to charge anyone upon any contract or agreement for the sale of immovable property unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged. On the face of it it seems as if the above receipt satisfies the criteria in that it is in writing and is signed by the parties on a purchase ~~price~~ for immovable property described in the document.

However, on closer scrutiny the document indicates that the deposit was made “pending execution of an agreement of purchase and sale at mutually agreed terms”. This indicates that the parties intended to have a proper agreement executed in terms on which they had mutually agreed. The question arises as to whether the parties intended immediately upon issuance of the receipt to have effected a sale of the property or intended to await the execution of a proper agreement with mutually agreed terms.

Counsel for the Appellant made reference to the case of **Branca –v- Cobarro (1947) 2 AER, 101** where an agreement which concluded with the words “this is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed” was held to imply by the use of the words “until “ and “provisional” that the agreement was intended to be immediately fully binding and to remain so unless and until superseded by a subsequent agreement of the same tenor but expressed in more precise and formal language.

In **"Cheshire, Fifoot & Furmston's Law of Contract",** 13th Edn., page 40 the view is expressed that in each case it is a question of construction whether the parties intended to undertake immediate, if temporary, obligations, or whether they were suspending all liability until the conclusion of formalities. These questions were posed – have they made the operation of their contract conditional upon the execution of a further document, in which case their obligations will be suspended, or have they made an immediately binding agreement, though one which is later to be merged into a more formal contract? It was suggested that the use of the formula "subject to contract" creates a strong presumption that the parties do not intend an immediate binding contract. (See **Riley and Another –v- Troll (1953) 1 AER, 966).**

Lord Wright in **Scammell –v- Ouston (1941) 1 AER, 14** expressed the view in relation to transactions entered into "subject to contract" that a court will do its best if satisfied that there was an ascertainable and determinate intention to contract, but if these words, considered broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there was no contract.

The receipt in the instant appeal although a memorandum in writing in my view just reflected a payment in earnest expressing an intention to purchase the property at a later date when the parties entered into an agreement on mutually agreed terms. I can see nothing in the words "pending execution of agreement of purchase and sale at mutually agreed terms" that indicates an intention of the parties to be bound immediately it was issued. The Respondents were stakeholders holding the deposit for the Appellant until an agreement was executed. If they failed to do so the Appellant was entitled to repayment of his money. The fact that the parties had to execute an agreement of sale on terms on which they had to agree mutually suggests that they did not intend to create a legal relationship of vendor and purchaser until an agreement was executed. I am reinforced in this view by a perusal of a letter dated 18th June, 1993 written by Mr. Stanley Persaud, Attorney-at-Law to the Appellant on behalf of the Respondents in which he made mention of an oral agreement for an increase of the deposit to $35,000 US to be paid not later than 31st January, 1993, after which a formal written agreement embodying all the terms of the proposed sale of the property would be executed. (Underlining mine). This oral agreement for an increase of the deposit was denied by the Appellant in a letter dated 12th July, 1993 sent in reply by his Counsel, Mr. O.M. Valz, SC.

Be that as it may it is a clear indication that no mutually agreed terms of the agreement of sale had been arrived at by the parties.

Counsel for the Appellant contended that acts of part performance of the contract were committed by the Appellant and were done in pursuance of the contract, e.g. "sprucing up" the demised premises and paying rates, taxes and insurance. However, the terms under which the Appellant occupied the premises as a tenant seem to include these obligations as set out in a letter dated February 19, 1990 from Mr. A. Ramsaran, Senior Trust Assistant of the Trust Company (Guyana) Ltd. who acted as agents for the landlord – the Respondents, and at page 45 of the record the Appellant agreed that they were part of the tenancy agreement. There is no doubt that the conditions of tenancy were unusual and maybe contrary to normal landlord and tenant relationships, but the Appellant accepted the tenancy on these terms; he can, however, seek to recover these sums paid on behalf of the Respondents.

Therefore these acts which the Appellant now relies on as acts of part performance were not referable solely to the intended agreement of sale.

In the circumstances I come to the conclusion that there was no legally binding agreement of sale and purchase between the Appellant and the Respondents.

Even though this finding may effectively determine the appeal in the light of the fact that we invited Counsel for the parties to consider the legality of the transaction I shall now consider this aspect of the appeal.

Both the deposit and the purchase price of the property were designated in the receipt (Ex. H) in United States currency, and all discussions between the parties concerning payment of the deposit and increased deposit envisaged payment in US dollars.

Section 21 of the Bank of Guyana Act, Cap. 85:02 expressly provides for all monetary transactions in Guyana to be expressed, recorded and settled in Guyana dollars unless otherwise provided for by law or agreed between the parties.

In 1990 the **Bank of Guyana (Amendment) Act** was passed, and **Section 21** of the principal Act was amended to read **Section 21(1)** by the addition of a proviso to this effect:

> "Provided that a party shall not agree to settle, or settle under any agreement, any monetary obligation or transaction in Guyana in any currency other than Guyana dollars (hereafter in this section referred to as "foreign currency") except with the permission of the Minister."

Other new sub-sections to the old **Section 21** were added including **sub-section 3** to provide in addition to the imposition of a penalty for contravention of Section 21(1), the following:

> "................and any agreement for settling any monetary obligation or transaction in a foreign currency, entered into without the permission of the Minister under the proviso to subsection (1) shall have effect as if for any amount payable thereunder in a foreign currency, the equivalent amount in Guyana dollars were payable."

In the light of the above amendment, the agreement between the Appellant and the Respondents cannot be regarded as unenforceable for illegality under the proviso to **Section 21(1)** even though it might have been entered into without the permission of the relevant Minister. It might have attracted the imposition of a penalty under **Section 21(3),** but, the agreement had the effect as if the amount payable in foreign currency was payable in the equivalent in Guyana dollars. The amendments to **Section 21** were not discussed in the case of **Ambrose v. Boston (1993) 55 WIR 184,** since, in that case, the agreement for payment was expressed in Guyana dollars and the question of illegality arose only because of doubts as to whether the deposit on the purchase price had in fact been made in foreign currency. In that case there was nothing illegal or unenforceable about the terms of the agreement. It is instructive to note, en passant, that the new **Bank of Guyana Act 1998** has a similar provision (see **Section 20**).

With regard to the order for possession made by the learned trial judge based on her findings that the Appellant had defaulted in his performance of the terms of the agreement of sale and that he had agreed to give up possession of the property upon refund of his down-payment by the Respondents, she stated that it was neither convenient nor practical to require the Respondents to have recourse to the Magistrates' Court to seek an order for possession.

From the conclusions of the learned trial judge one can glean that she was of the opinion that there was a valid agreement of sale for the property between the parties. Among her findings were that the Respondents were entitled to an order for rescission which she granted. In the light of the fact that I find there was no valid agreement of sale between the parties the question of rescission does not arise. If there was no valid agreement of sale the relationship of landlord and tenant continues, and the Respondents' remedy for possession rests within the jurisdiction of the Magistrates' Court.

The proviso to **Section 26(1) of the Rent Restriction Act, Chapter 36:23**, permits claims arising out of the Act to be brought in the High Court where an equitable remedy, whether in conjunction with any other remedy or not, is being sought. Counsel for the Respondents submitted that since the Respondents have sought rescission of the agreement it was open to the Respondents also to claim an order for possession. This alternative claim for rescission was based on breach of fundamental terms of the agreement.

In my view the Respondents were not seeking an equitable remedy of rescission which arises in cases of fraud, misrepresentation, mistake or lack of consent. They were seeking a finding or declaration by the Court that the Appellant was in breach of a fundamental term of the agreement and that they were entitled at common law to elect to treat the contract as terminated or discharged.

In **Johnson v. Agnew (1979) 1 AER 883**, **Lord Wilberforce** in the House of Lords at page 889f had this to say:

> "It is important to dissipate a fertile source of confusion and to make clear that although sometimes the vendor is referred to ....as "rescinding"

> the contract, this so-called rescission is quite different from rescission ab initio, such as may arise for example, in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence........In the case of an accepted repudiatory breach, the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from the old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission ab initio."

In **The Law of Contract by Cheshire, Fifoot and Furmston, 13th Edition**, the learned authors stated at page 558:

> "It is better therefore, in this context, to talk of termination or discharge rather than of rescission".

In my view the proviso to **Section 26(1) of the Rent Restriction Act** (supra) does not apply where a vendor is asking the Court to hold that a contract has been terminated or discharged for fundamental or repudiatory breach since the vendor is not seeking an equitable remedy from the Court.

The application by the Respondents for an order of possession to the High Court was misconceived since the application for rescission was not really and in substance an application for an equitable remedy. The remedy was misdescribed and such a misdescription cannot be used to circumvent the provisions of the **Rent Restriction Act**.

The High Court therefore had no jurisdiction to make and ought not to have made an order for possession.

In the circumstances I would set aside the order for possession and allow the appeal on this aspect of it. In relation to the learned trial judge's findings concerning the validity of the agreement of sale although I do not agree with her reasoning the result is that there was no valid agreement, and in this regard the appeal is dismissed.

There will be costs to both the Appellant and the Respondents to be taxed certified fit for Counsel.

Dated the 11th day of February, 2002.

D. P. Bernard
Desiree P. Bernard
Chancellor of the Judiciary.

I have had the benefit of reading the judgment of the Hon. Chancellor and I agree with the conclusion.

Nandram Kissoon
Justice of Appeal.

I have had the benefit of reading the judgment of the Hon. Chancellor and I agree with the conclusion.

Ian Chang
Justice of Appeal.