IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 58 OF 2012
(High Court Civil Action No. HBC 368 of 2007)

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| BETWEEN | : | SHANAYA & JAYESH HOLDINGS |
| | | *Appellant* |
| AND | : | BP SOUTH-WEST PACIFIC LIMITED |
| | | *Respondent* |
| Coram | : | Chandra JA<br>Lecamwasam JA<br>Amaratunga JA |
| Counsel | : | Mr. V. Mishra for the Appellant<br>Ms. R. Devan for the Respondent |
| Date of Hearing | : | 20 November 2013 |
| Date of Judgment | : | 26 March 2014 |

# JUDGMENT

Chandra JA

[1] This is an appeal against the judgment of the High Court at Lautoka where the action instituted by the Appellant against the Respondent resulted in the dismissal of the action of the Appellant and the granting of relief to the Respondents based on their counterclaim.

[2] The Appellant and the Respondent had embarked on a venture whereby the Appellant was to build a fuel service station at Nadi. The Appellant was to contribute the land and capital expenditure and the Respondent to provide the expertise, supply of equipment necessary for the fuel station. The service station design and general layout and location of the tanks, tank installation and standards had been done and completed according to the Respondent's guidance and directions. The parties were to enter into an agreement regarding supply of fuel at the fuel station which were spelt out in a letter sent by the Respondent to the Appellant dated 2nd February 2004. However, the agreement was not finalized. Nevertheless, the Appellant commenced operations of dispensing fuel in July 2005 and the Respondent supplied fuel on terms agreed upon by them regarding supply, payments and rebates.

[3] The operations which commenced in July 2005 went on until 2007 and in March 2007 the Appellant had offered to lease or sell the service station to the Respondent. The Respondent responded to the request of the Appellant and were interested in leasing out the Fuel Station and negotiations were made regarding same. However, the Appellant leased out the fuel station to a third party and the dealings with the Respondent ended.

[4] As the Appellant had delayed the payments for the supplies of fuel and was in arrears the Respondent demanded payment of the monies due for the supply of fuel within 7 days by letter dated 25th September 2007 and if they failed to make payment that legal action would be instituted against them. This was after several reminders had been sent earlier. The Appellant responded to this notice through their Lawyers by letter dated 25th September 2007 stating that the Appellant was disturbed at the threat made and stating that certain investigations were being done

regarding the supplying of the petrol pumps which were not properly calibrated which had caused loss to the Appellants without mentioning about the amount claimed by the Respondent for supply of fuel.

[5] Thereafter the Appellant instituted action against the Respondent in the High Court of Lautoka claiming damages for losses incurred by them from 1st July 2005 to 13th May 2007 and damages for breach of contract and breach of statute, general damages and interest.

[6] The Respondent in their statement of defence sought a dismissal of the Appellant's claim, and made a counterclaim for losses for the intended term of 10 years on the supply and sale of fuel products, costs incurred in refurbishing pumps, and a liquidated sum for sale of fuel, general damages, interest and costs.

[7] The High Court dismissed the action of the Appellant and granted the Respondent the liquidated sum on the sale of fuel with interest and costs.

[8] The Appellant filed notice of appeal setting out the following grounds of appeal:

> *" 1. The Learned Judge erred in law and/or in fact in :-*
>
> *(a) In not taking into account the express requirement by the Respondent by law of its own letter that as part of the contract/arrangement between the parties the fuel pumps had to be owned by the Respondent (and in the control of the Respondent by implication) until the Appellant could become a*

*principal licensee of its own and thereafter purchase the pumps;*

(b) *Holding there was illegality on part of the Appellant by using pumps which were dispersing extra fuel (page 21 paragraph 33 to page 24 paragraph 43 of the judgment) and failed to take into account that pumps were owned by the Respondent and was in their effective control with the Appellant having no control over the rate of disbursement of fuel;*

(c) *Applying the case of Latchman –v- Ajudhya Prasad, FCA ABU No.0008 of 1960 against the Appellant when it did not own the pumps and had no ability to measure the discharge of each pump itself and when the illegality was on part of the Respondent as owner of the pumps rather than the Appellant and when the said case was distinguishable;*

(d) *Applying the case of Latchman –v- Ajudhya Prasad, FCA ABU No.0008 of 1960 against the Appellant and then going on to deliver judgment against it in the counter-claim despite discrepancies in the evidence of the Respondent and the lack of delivery evidence and failed to take into account that a lot of the evidence was hearsay.*

2. *The Learned Judge erred in law and in fact and applied incorrect principles in holding that the dip stick readings not being produced by the Appellant led to the inference that the evidence from the same would be unfavourable to the Appellant and did not take into account the same evidence could have been produced by the Respondent who was the sole supplier of the fuel.*

3. *The Learned Judge erred in law and/or in fact in holding that the Parties refused to enter into 'further agreements' and preferred to remain in a state of negotiations and that the parties could not expect the Court to make a contract for them when:-*

(a) *The pleadings of the Respondent accepted there was an agreement for at least 10 years.*

(b) *There was substantial or part performance by the Appellant to the requirements laid down by the Respondent.*

(c) *The Respondent itself had assisted in supply of underground tanks and installed 17 fuel pumps owned by them and provided services by its engineers.*

(d) *When the judgment itself held (page 28 paragraph 56 of judgment) that Agreed Bundle of Documents No.1 prepared by and signed by the Respondent was the agreed and binding document between the parties.*

4. *The Learned Judge erred in law and/or in fact :-*

(a) *not taking into account that the Respondent as owner of the petrol pumps was bound to see the same were at all times properly callibrated and by held themselves out as experts in the area and that as such it was bound to provide pumps which were of reasonable standard and quality and which would remain callibrated for a minimum period of one year given the requirement of certification of calibration for one year.*

(b) *holding the presumption that the fuel pumps were fit for the purpose they were meant for as a presumption against the Appellant and in holding that the Appellant repaired the pumps illegally within the period of certification.*

5. *Further and/or in the alternative that the Learned Judge erred in law and/or in fact in entering judgment against the Appellant for fuel supplied in the circumstances when it was accepted there was leakage from the pumps and when there was non-compliance with Section 6 and 7 of Sales of Goods Act and when there was no evidence adduced of delivery*

*and when there was no adequate cross-examination of the same of the Appellant's witnesses according to the* ***Dunne – v- Brown*** *principle.*

[9] The Appellant and the Respondent had commenced their dealings in 2003 and there was correspondence between them on various aspects of the venture of running a fuel station but there was no written agreement between them. Attempts had been made to formalize a written agreement but it had not succeeded. However, in the setting up of the fuel station the Appellant had relied on the advice of the Respondent regarding the layout of the buildings, supply and installation of the tanks and pumps etc. The letter dated 2nd February 2004 sent by the Respondent seemed to spell out the understanding between them regarding the venture. Though a draft memorandum had been exchanged between them it had not been signed.

[10] In the absence of a memorandum of understanding between the parties regarding the venture the Agreed Facts at the Pre-Trial Conference spelt out the manner in which they had set out in respect of the venture and it would be necessary to examine the Agreed Facts as set out in the judgment of the learned trial Judge which are as follows:

> *"1. The Plaintiff built a Petrol Service Station at Nadi Back road, Nadi Fiji in 2005 pursuant to a binding contract with the Defendant.*
>
> *2. (a) It built its service station as directed by the Defendant and to its specifications.*
>
> *(b) The fuel supply and dispensation parts of the service station were built according to strict standards and requirements set by the Defendant.*

*(c) The service station design and general layout and location of the tanks together with tank installation and standards were built by the Plaintiff according to the Defendant's requirements.*

*(d) The Defendant installed the fuel pumps in the service station and calibrated and certified the same as accurate as part of the contract.*

3. *The Plaintiff expended considerable effort and substantial monies in construction of the service station.*

4. *It commenced its service station business in June, 2005 and bought fuel exclusively from the Defendant.*

5. *It was also part of the contract that :-*

*(a) The Defendant supply fuel to the Plaintiff at certain prices to allow it to make a percentage profit.*

*(b) The Plaintiff was not to advertise or accept fuel or other products of its two opposition fuel companies or enter into any arrangement with them to purchase fuel or associated products.*

*( c) The service station to be constructed by the Plaintiff with its advertising signs and colouring as a pre-requirement of the contract which was done by the Plaintiff at its own expense.*

*(d) The Defendant to supply the Plaintiff materials for its own advertising purposes which was to be used by the Plaintiff for the service station.*

*(e) The Defendant was to assist in technical problems at the service station.*

6. *The Plaintiff built the service station upon the representation by the Defendant of a long term contract of at least 15 years. A formal contract was never signed between the parties.*

7. *At the relevant time there were only three suppliers of bulk fuel in Fiji namely the Defendant, Shell and Mobil.*

8. *The Defendant contracted to:-*

   *(a) Supply fuel at the agreed rates between the Plaintiff and the Defendant.*

   *(b) Supply properly certified and calibrated fuel pumps and meters to the service station which would dispense fuel at certain defined rates of flow which were accurately reflected and charged on the fuel meters in the said pumps.*

9. *The Plaintiff built a shop and other facilities to supplement its profits from its service station project.*

10. *The Defendant supplied 17 pumps to the Plaintiff and assured the Plaintiff that the pumps supplied were properly certified and calibrated fuel pumps which dispensed fuel at certain defined rates within a certain range of accuracy which would allow the Plaintiff to dispense fuel at a rate which would allow it to make a certain percentage profit depending on the volume sold.*

11. *The Plaintiff offered to lease its service station to the Defendant.*

12. *Thereafter the Plaintiff rented out its facilities.*

13. *The Plaintiff paid a sum of $16,100.00 for the pumps on 31st day of August 2007.*

14. *The prices for fuel were as determined by the Prices and Incomes Board. The Plaintiff was to get a profit of three cents per litre.*

15. *It was agreed by the Defendant to give the Plaintiff a rebate of six cents per litre if volume of sales exceeded three million litres per year.*

> *16. The volume of three million litres target for the rebate was reached by the Plaintiff. For 2006 fuel sales of 3,065,124 was reached."*

[11] The letter of 2nd February 2004 set out the intention of the parties which was considered by the learned trial Judge, an extract of which is as follows:

> *"As discussed, the capital works to be carried out at this site, will be fully funded by S & J Holdings Ltd and clarification sought on certain issues before finalization of a supply agreement. These issues include the ownership of tanks, forecourt, pipeline, canopy and pumps. In recognition of the investment by Shanaya and Jayesh Holdings Limited, BP is offering a step up rebate to compliment both the investment and volume generated from petroleum product sales at this site. BP will require S & J Holdings Ltd to enter into a ten year supply agreement before commencement of any work that requires BP"s involvement."*

[12] Although the letter spoke of a ten year supply agreement, no such agreement was entered into. However the Appellant commenced operations of the fuel station on supplies made by the Respondent from July 2005. The supplies had been made on the basis of cash on delivery terms initially and after negotiation between them on credit basis which ultimately led to the counter claim of the Respondent for monies due for fuel that had been supplied up to the time that the dealings with the Respondent were concluded by the Appellant.

[13] The Appellant's position as regards concluding their dealings with the Respondent had been as a result of the losses it had incurred while having dealings with the Respondent and that they had given out the service station on rent to 'Total' in September 2007 to mitigate their loss and damage.

[14] The Appellant attributed the losses incurred by them to the fuel pumps supplied by the Respondent in setting up the fuel station. The Appellant's position was that they were defective which resulted in their incurring losses.

[15] The crucial issue in the case before Court was as regards the fuel pumps which were admittedly supplied by the Respondents as the Appellant had sought their advice regarding same. Although the Appellant had in certain instances stated that the Respondent had failed to supply new pumps, it is clear from the evidence both oral and documentary that the Appellants were being offered second hand pumps and the Appellants had indicated their willingness to get second hand pumps as new pumps were too expensive. The Appellant also contended that the pumps were defective and that the onus was on the Respondent regarding repairs and maintenance of the pumps as and when such repairs were necessary and that the Respondents failed to carry out such repairs and maintenance specially as they took up the position that the ownership of the pumps was with the Respondent until 31st August 2007 which was the date on which payment was made for the pumps by the Appellant to the Respondents.

[16] It is not disputed that 17 pumps were installed at the service station and that the meters were calibrated and certified when they were first installed and that such calibration was valid for one year. However, it was contended by the Appellant

that 8 of them were defective in that they were dispensing extra fuel which were not recorded or charged on the fuel meters with the result that the Appellant was not being paid for the extra fuel dispensed with, as the said eight pumps were not properly calibrated. It is on this basis that the Appellant had claimed their loss which they claimed from the commencement of their operations in July 2005.

[17] Since the issue of the fuel pumps was the crucial issue in the case it would be necessary to consider the position regarding their ownership and the installation of them. When the evidence regarding the obtaining of the fuel pumps is considered the following facts emanate:

> *"i. By letter dated 26th November 2004 Mr. Shiu Ram the Chairman of the Appellant Company had been informed by the Business Manager, Nemani Kobiti of the Respondent Company that the pumps were ready for inspection and that a pro forma invoice would be provided on determination of pump cost.*
>
> *ii. By fax dated 30th November 2004 Michael McAuliffe of the Appellant Company had requested the prices of the pumps from Nemani Kobiti.*
>
> *iii. By letter dated 30th November 2004 Mr.Kobiti had informed Mr.Shiu Ram the availability of the 17 pumps and where they were and they could be inspected and gave the description of the pumps and their prices which totalled up to $16,100.00.*
>
> *iv. Mr.Arunesh Ram of the Appellant Company by email sent on 6th December 2004 had informed Mr.Kobiti that they were happy with the pumps.*
>
> *v. Mr.Kobiti by letter dated 6th December 2004 informed Mr.Shiu Ram that they had noted the request with regard to BP"s assistance in providing a six-month payment arrangements for the purchase of the said pumps referred to in the letter dated 30th November 2004.*
>
> *vi. By letter dated 31st August 2007 Mr.Shiu Ram had informed the Manager of the Respondent that regarding the pumps supplied that their records showed that they have not settled the account referring to the letter of 30th November 2004 which sets out the prices of the pumps and also sets out the details of the pumps and the total price of $16,100.00.*
>
> *vii. The Respondent had drawn an invoice on 31st August 2007 regarding the sale of pumps.*

*viii. According to item 13 in the Agreed Facts at the Pre-Trial Conference ,the Appellant had paid a sum of $16,100.00 for the pumps on 31st of August 2007.*

[18] The Appellant was seeking to maintain the position that the ownership of the pumps was with the Respondent basing their assertion on the clause in the letter of 2nd February 2004 which read as follows:

> *"Under existing legislation, pumps will need to be owned by the Principal Licensee and that it is BP. However we are having discussions with Weight & Measures on information and process to be followed that will allow you to have a principal license and therefore own your pumps. We will have a written confirmation on this issue from Weights & Measures by the end of the week."*

[19] As has been stated earlier there was no written agreement between the parties, and the letter of 2nd February 2004 spelt out the manner in which the venture was to be initiated and operated and the above clause has to be considered in the light of the evidence placed before Court by both parties.

[20] Mr. Kobiti who had written the letter of 2nd February 2004 was cross examined as regards the said clause and his position was that for the Appellant to be able to operate or make repairs and open up a pump that they would need a principal license from Weights and Measures. He also stated that the Appellant was limited to owning the pumps and were not allowed to open and repair the pump if there was any problem. On being asked as to who was responsible for the maintenance and upkeep of the pumps, his answer was that it was the Appellant's responsibility and that there was nothing to prevent the Appellant from using other companies that had a principal license.

[21] The position set out by Mr. Kobiti regarding ownership of the pumps was confirmed by Mr. Bimal Kant Singh who was an Inspector with Trade Measures and Standard Department who said that it was not correct that only a principal license holder could own fuel pumps as the law implied a different meaning to whom a principal license holder was. According to him any business owner could own pumps but repairing pumps or opening pumps could be done only by a principal licensee and that an owner could have repairs effected under another company's principal license.

[22] It is clear therefore that the Appellant could own the pumps but could not repair or open them without obtaining the services of a principal license holder. It would appear that this was the basis on which the Appellant obtained the services of Mr. Rudi Fesaitu who was a licensed repairer and he gave evidence on behalf of the Appellant regarding the repairs he had carried out.

[23] The above position taken together with the evidence of Mr. Shiu Ram under cross-examination would also show that the Respondent had wanted the pumps to be owned by the Appellant when he stated that from day one the Respondent wanted them to own the pumps. From the correspondence set out in paragraph [17] above it is clear that the Appellant had after inspecting the pumps which were second hand, had agreed to purchase them. This is further confirmed by the fact that the Appellant had asked for six months time to pay and settle the price which payment of course did not take place until 31st August 2007. There too it is clear from the document written by Mr. Shiu Ram to the Respondent that it was considered as monies due and outstanding for the purchase of the pumps. Therefore the position that the Appellant had sought to take up that the ownership of the pumps was with the Respondent until 31st August 2007 does not stand to reason.

[24] The learned trial Judge in dealing with the issue of the ownership of the pumps stated that submissions as to who was the owner in view of the several provisions of the Sale of Goods Act are academic. This conclusion was on the basis of his conclusion that the Appellant was a 'user' of the pumps and that the Appellants had offended the provisions of paragraph 26(1)(iii) of the National and Trade Measurement Decree No.14 of 1989 by using defective pumps which constituted an illegality and therefore restrained the court from providing its assistance to the Appellant for the recovery of damages suffered by the use of the said pumps.

[25] Although the learned Judge did not consider the provisions of the Sale of Goods Act regarding the ownership of the pumps, there was evidence before Court to consider same. If the provisions of the Sale of Goods Act are considered it is clear that the Appellant had agreed to purchase the pumps and when they were installed at the Appellant's fuel station the property in the goods had passed to them in terms of S.3(3) of the said Act. The payment of the price was not the basis of conferring ownership of the pumps. It was acknowledged by the Appellant that the payment was outstanding which was ultimately paid on 31st August 2007, but by that time the property in the goods had passed to the Appellant. Once the property in the goods have passed to the Appellant, risks relating to same also passed on to them in terms of S.22 of the said Act. Further, there was no warranty given by the Respondent regarding the said pumps.

[26] It was also in evidence that the pumps were second hand pumps. However, they were properly installed and calibrated and were put to use by the Appellant and they were fit for the purpose at least on the basis of the evidence of the Appellant up to January-February 2007. The assertion of the Appellant was that the pumps were not of merchantable quality, but their own evidence goes against that assertion as

according to them there were no problems at least up to January-February 2007 taking into account the fact that they were second hand pumps and the Appellants had been satisfied when obtaining them after inspection.

[27] The Appellant is not entitled to take the stand that they were not the owners of the pump as well as to state that they were not of merchantable quality. The evidence in the case was that the pumps were second hand pumps and that no defects were detected till February 2007. This would imply that they were in good order from the time of their installation. This would also mean that they were of merchantable quality. If the position regarding merchantable quality is to be taken, it would necessarily be a case where ownership has passed to them. The submissions of the Appellant are self contradictory and do not have merit.

[28] The Appellant also contended that the duty of repairing and maintaining the pumps were on the Respondent as the Appellant was not a principal license holder basing their argument on the clause in the letter of 2nd February 2004 referred to at paragraph [18] above. If that were to be the case when the repairs were necessary they should have insisted on the Respondent to carry out the repairs and on their failure they should have taken meaningful steps to enforce such obligations. The position regarding repairs and maintainability were taken up only after the Respondent had demanded the arrears due on fuel supplies and had put the Appellant on notice. All that while they had been quite satisfied in getting the repairs done through a licensed repairer Mr. Rudi Fesaitu who gave evidence on behalf of the Appellant.

[29] The Appellant submitted that the pumps were not fit for use basing their submission on the evidence of Mr. Fesaitu who had stated that the pumps had been repaired

several times as they had broken down several times, that they were defective and not fit for the purpose that they had been fitted in for. However, the Appellant had used them without any defect until February 2007 and did not take any action against the Respondent regarding same until the present action was filed. As stated earlier, if the Appellant was complaining about the pumps being not fit for use, they were admitting ownership of the pumps. This would again go against the submission that the Appellant did not own the pumps and therefore has no merit.

[30] The claim of the Appellant for the loss incurred by them was based on the losses they claimed to have incurred between 28th February 2007 and 13th May 2007 (74 days) from the 8 defective pumps. This was divulged only in the statement of claim and not in any other correspondence between the parties. Even the letter sent by the Appellant' Lawyers stating that they had incurred loss did not indicate any figures.

[31] Based on the losses made up for the 74 days an average had been reached of $650.50 per day. Thereafter the Appellant claimed losses in a sum of $443,641.00 based on the average rate for the period 1st July 2005 to 13th May 2007. Mr. Arunesh Kumar in his evidence stated that they assumed that the pumps may have been leaking from the beginning and therefore did the calculation from the beginning. This by itself is rather confusing as it would suggest that the 8 pumps were defective from day one of the operation. There was no evidence to such effect as the defects had been detected according to the Appellant in February 2007. Such a claim would therefore be without any merit even though the statement of accounts would indicate a loss. The statement of accounts was highly questionable as they had been based on figures given by the Appellant and not on the basis of audited accounts as stated by the Appellant's own witness, Mr. Zari Khan who had prepared a report regarding projected loss that would have been incurred by the Appellant from 2008 to 2017. Therefore even if it was necessary to consider

whether there were any loss that was proved by the Appellant, it was not proved by the Appellant as the evidence placed before Court was unsatisfactory specially when the Chairman Mr. Shiu Ram when questioned about the claim stated that he did not know about it and that it came from his Accountant.

[32] The Appellant has submitted that there was a contract between the parties and relied on the decision in Photo Production Ltd –v- Securicor Transport Ltd. [1980] 1ALL ER 56 to substantiate that position. That case is distinguishable on the basis that the dictum cited by the Appellant is based on a primary written contract which may give rise to secondary obligations between the parties, whereas in the present case to start with there is no written primary contract to consider whether there are secondary obligations. The learned trial Judge cannot be faulted for stating that there was no binding contract between the parties. Therefore the submission that the Respondent committed a breach of the contract has no merit.

[33] The Appellant has argued that the learned trial Judge's findings on illegality against the Appellant are flawed on the basis that the responsibility to keep the pumps is good condition and repair was the duty of the owner and the owner according them was the Respondent. As discussed there was no written agreement between the parties regarding the operations of the fuel station and specially in relation to the operation of the fuel pumps. The Appellant is relying on the representation made by the Respondent regarding fuel pumps in their letter of 2nd February 2004 which as shown above has no binding effect when the evidence that was before Court was considered. In Re Fletcher Challenge Energy Limited -v- Electricity Corporation of New Zealand [2002] 2 NZLR 433 it was observed by Richardson P, Keith, Blanchard and McGrath JJ that an agreement to use all reasonable endeavours was enforceable if the full agreement was sufficiently precise for the Court to be able to spell out what the parties had to do in exercising their reasonable endeavours. But

an agreement to use all reasonable endeavours was unenforceable in the case of the negotiation of complex contractual terms because it was impossible for the Court to define what the parties ought to have done to reach an agreement. In the present case, the ownership of the pumps, their maintenance and repairs was very crucial but there was no binding agreement between the parties regarding these matters.

[34] The learned trial Judge's interpretation of Section 26(1)(iii) of the National and Trade Measurement Decree of 1989 in relation to a "user" of the pumps cannot be flawed as it would be applied to a user which the Appellant was. It would be further fortified by the fact that as shown above the Appellant was the owner of the pumps from the time that they were installed and not after the payment for them on 31st August 2007 as argued by the Appellant. In view of the above position the reference to the decision in Latchman –v- Adjuya Prasad FCA Vol.7 FLR though cited by the Appellant in the High Court in their favour being used by the learned trial Judge against them cannot be faulted.

[35] However, the learned Judge's interpretation regarding the position of the repairer does not seem to be correct as the evidence before Court from the official of the Trade Measures and Standards Department, Mr. Bimal Kant Singh, was clear that a businessman can own pumps and can get a licensed repairer to repair the pumps. Therefore the submission of the Appellant regarding that conclusion of the learned trial Judge regarding the position of the repairer need not be considered any further.

[36] The Appellant also contended that there was a breach of contract by the Respondent regarding the business venture which resulted in their suffering loss and damage. The Appellant's contention was that by supplying defective pumps they had incurred losses and thereby there was a breach of contract. As stated earlier there

was no written contract between the parties which set down the rights and obligations of the parties. In the absence of such an agreement regarding the running of the venture the only obligations between the parties that remained to be considered were the supply of fuel by the Respondent to the Appellant and the payment of commissions and rebates. As far as the commissions and rebates were concerned there was no dispute regarding any monies that were outstanding to be paid to the Appellant by the Respondent.

[37] The Appellant in its notice of appeal has set out five grounds of appeal. Of them grounds 1 to 4 all relate to the issue regarding the pumps, their ownership, the responsibility regarding repairs and maintenance to them and matters incidental to such issues. These issues overlap in the said grounds 1 to 4 and have been dealt with together from paragraphs [14] to [36].

[38] In ground 5 the Appellant addresses the question of the judgment entered against it regarding the supply of fuel supplied. Reference is made to section 6 and 7 of the Sale of Goods Act therein regarding non-compliance. Further it is adduced there was no evidence adduced regarding delivery and there being no adequate cross-examination of the same of the Appellants witnesses according to the **Dunne –v- Brown** principle.

[39] Section 6 of the Sale of Goods Act relates to Sale and Agreement to sell goods on credit in course of retail trade to be accompanied by invoice. The section applies to the enforceability of a sale agreement and there is no relevance at all to the sale of pumps in the present case. Section 7 refers to existing or future goods which again has no relevance to the present case. Specially in relation to the delivery of fuel by

the Respondent to the Appellant which was admitted by the Appellant when they admitted that the fuel station operated on fuel supplied by the Respondent up to the time that they ceased to have dealing with them.

[40] In dealing with the counterclaim of the Respondent, the learned trial Judge dismissed their claim for losses for the intended term of 10 years on supply and sale of fuel, the claim regarding monies expended by the Respondent for engineers support costs and in getting the pumps refurbished and for an air gauge after considering the evidence before court. However, there is no cross-appeal by the Respondent and there is no necessity to deal with such claims.

[41] As regards the claim for fuel supplied to the Appellant, the trial judge allowed the claim and granted interest at 10% per annum. The Appellant has not challenged the interest component in their appeal.

[42] As regards the position of the Appellant that the Respondent had not led evidence regarding delivery of fuel the learned trial judge in his judgment has referred to it in paragraphs [75] to [78] and allowed same being satisfied that there was evidence adduced by the Respondent through Nemani Kobiti's affidavit marked as P6 to which had been annexed the delivery dockets which had been signed as received for the fuel supplied from 27/7/2007 to 11/9/2007 and also considering the oral evidence given regarding same. Even though the Appellant has submitted that the Appellant's witnesses were not cross-examined on such aspects thus bringing in the principle in **Dunn –v- Brown**, an examination of the evidence of the Appellant's witness Mr. Shiu Ram shows that he was questioned about the delivery of fuel on cash on delivery terms and later on credit terms which he admitted.

[43] In view of the above position there is no merit in ground 5 of the notice of appeal of the appellants.

[44] The appeal of the Appellants is dismissed with costs fixed at $4000.00.

Lecamwasam JA

[45] I agree with the reasons and the conclusions of Chandra JA.

Amaratunga JA

[46] I have had the opportunity of reading the judgment of Chandra JA. I agree with the conclusion that this appeal should be dismissed. The facts and the grounds of appeal are contained in the said decision and I do not wish to repeat the same here. As in mathematics, there are more than one method to reach at the same correct solution. The Plaintiff's claim needs to be dismissed, and the Defendant's claim for the money for the fuel supplied, should be granted.

[47] The Plaintiff claims that it had incurred loss and or damage due to defective pumps supplied by the Defendant. The Plaintiff admits that it decided to purchase the second hand pumps as against the brand new pumps. The cost of a brand new pump is ½ million, according to the evidence of Plaintiff's Managing Director, whereas the second hand pumps where bought from the Defendant, at a fraction of that cost. Even the said drastically reduced cost could not be borne by the Plaintiff and sought credit from the Defendant. The Defendant dispatched a credit application agreement to the Plaintiff for the said purchase. Though this credit

application was not executed, the fact remained that the pumps were supplied on credit (without any conditions contained in the said application).

[48] The Plaintiff's contention is that since they did not sign the said document and there being a statutory prohibition that prevented them repairing the pumps, the ownership of the pumps remained with the Defendant. There is no statutory prohibition to own pumps, but repairing of the same could not be done without a principal licence. The repairing and calibration of petrol pumps needs to be separated from the issue of ownership. One may own a measuring instrument but would be precluded from repairing and or calibrating under law. These are measures that are taken for the protection of the consumer.

[49] The Plaintiff had paid for the pumps only in 2007, but they had not only acted as the 'owner' of the said pumps, by engaging technicians to repair them, without insisting the Defendant to do so or requesting the cost of repairs from them.

[50] In the letter written in 2007 the Plaintiff stated: *'further to your letter of 30th November, 2004, please be advised that our records shows we have not settled this account'* indicating the payment in 2007 was for a credit that was outstanding in their books from 2004. The payment was in 2007, but the price was agreed and goods delivered in 2005. The payment was delayed as the Plaintiff requested for credit, for the payment of the said pumps, which were delivered and used by the Plaintiff and admittedly repaired by the Plaintiff and paid for all the repairs without any dispute as to who should pay for them.

[51] If the ownership of the pumps were not transferred, upon the delivery of goods, the Plaintiff should have asked for a fresh quotation for price in 2007 from the Defendant or would have deducted a sum for repairs done on them. The price quoted three years ago cannot be paid , after three years unless the ownership had

already passed to the Plaintiff and had accordingly recorded in their books of accounts as an asset for which the agreed price in 2004 as an outstanding debt and this is what Plaintiff indicated to the Defendant in 2007. This is deducible from the said letter, where in 2007 the Plaintiff admitted that they have not settled the account for the purchase of pumps in terms of the letter dated 30th November, 2004.

[52] This indicates that the pumps were recorded as an asset in their books and the price agreed between the parties in 2004 was also shown in their books as an unsettled amount or debt to the Defendant. So, the argument of the Plaintiff that goods were in the Defendant's ownership fails. The issue of repairing the pumps without a principal licence cannot be a hindrance to ownership of the same under the Sale of Goods Act.

[53] Payment of price is not the date of passing the ownership of the goods. The goods were supplied on credit upon the request of the Defendant, this is clear from the letter dated 6th December, 2004(D7). This document is substantiated by emails of the even date where 'Midwest' had emailed to the Defendant that:

> *'we are happy with this (sic) pumps and we require these Pumps. You can proceed with the next step.'*

This email indicates that Plaintiff or its agents have inspected the pumps and were happy to purchase the same from the Defendant.

[54] In terms of Section 22 of the Sale of Goods Act (Cap 230) the risk passes with the good. The goods have passed to the Plaintiff, and the only remaining thing was the payment. Section 20 of the Sale of Goods Act (Cap 230) defines time at which the property in the goods passes to the buyer. In terms of the said provisions of the law, the property in the goods have passed to the Plaintiff upon the delivery of the

properly calibrated pumps in 2005 on the prices determined at the end of 2004. The payment of the price was not the time of delivery. Once the risk of the pumps had passed to the Plaintiff in 2005, they cannot claim for alleged damage due to malfunction of the pumps. The pumps were bought at a substantial discount, in a commercial dealing, after granting them an opportunity to inspect the same. The pumps worked without an issue upon the start of the business for nearly 6 months. There were no additional warranties given as contended by the Plaintiff for one year or even a lesser period. The pumps supplied were suitable for the purpose and admittedly worked even without any repair for 6 months.

[55] Without prejudice to what was stated above, I will analyse the Plaintiff's evidence for the alleged damage briefly here. The Plaintiff had exclusively purchased fuel from the Defendant for the material time period. They had a point of sales information management system (software), where they could obtain the amount of fuel sold. The evidence of Zari Khan, who gave evidence for the Plaintiff as their first witness categorically denied any fuel theft and stated that the system utilized by the Plaintiff for the sale of fuel, was fully computerized and sale on the meter of the pumps was directly relayed to the computer. So, the entire transaction of fuel sale was fully automated and the software could generate at a particular moment total, volume, sale and summaries. The witness further stated that software could even generate day by day profit or loss on final sales of fuel. When such a sophisticated and accurate software was available why the Plaintiff did not rely on that data has not been explained. These details were not supplied to the court and even in the estimate prepared there is no reference to such data being obtained from the point of sale system, which could have easily been checked for accuracy even at discovery stage.

[56] The Plaintiff had with them the details of amount of fuel supplied by the Defendant. When the amount of fuel supplied and amount of fuel dispersed was readily

available only the fuel stock at hand was needed in order to ascertain any pilferage of the fuel. The fuel stock at hand at a particular point, was measured through dip stick method, before the refilling. Submitting of dip stick data would only show the stock at hand of the Plaintiff at a particular moment. Without the point of sales details of the amount of sale the data obtained through dipstick would not help this court in its determination of alleged loss. So the data regarding the disbursement of fuel was only available to the Plaintiff and without that data there was no use of dipstick data. So the argument that dipstick data should have been provided by the Defendant in this trial cannot be accepted. Such data standing alone would not have proved or disproved a relevant fact for determination of the alleged loss.

[57] These statistics which were easily available with the Plaintiff were not presented to court. No reason was given for not providing those statistics when actual pilferage loss could be measured instead of an estimate, carried out by the Plaintiff after the demand notice was given by the Defendant for overdue payment for fuel. When the actual pilferage could be measured there was no need of obtaining an estimate, as done in this case. Estimates are helpful when the actual amount is not measurable eg. loss of future earnings or profits.

[58] In the court below the judge had indicated, that defects of certain pumps would have been set off by certain other pumps that would have discharged less. The Plaintiff's witness had ruled out any other manner of loss of fuel including theft, so if there was less revenue from the fuel the only reason according to the Plaintiff was the defective pumps. If so the correct method of ascertaining pilferage was to obtain the meter readings or amount of fuel dispersed through the pumps and the difference between the amount of fuel supplied and amount of fuel stock (dipstick). So by not providing these statistics the Plaintiff failed to prove any damage due to alleged defects in pumps. There was no need of an estimate when the Plaintiff readily had those data which was also easily retrievable from the point of sale

software, according to their own witness. The calculation related to past events and all relevant dates were at Plaintiff's disposal to calculate any loss.

[59] The estimate done on one of the defective pumps before the repair would only indicate projected loss if the said pump was used in that state for the entire period used for calculation. The defects in all the pumps may not be the same and at different times defects vary. How a defective pump could be detected and how much loss or profit incurred during that time needs to be obtained. Even in an estimate more than one data is needed for any projection, if not the projected value becomes speculative and less accurate. The duration of using a defective pump is also an important fact. If a pump is defective how it is detected and how long it would take to detect would also needs to be estimated if one were to obtain a reasonable accurate estimation. The estimate provided by the Plaintiff does not consider any of these factors and needs to be rejected as a proof of loss to the Plaintiff. The most important factor was that there was no need of such one by one detailed calculation of loss when the total loss of fuel could have been easily obtained from the data available from the point of sale software and stock at hand (dipstick). According to Plaintiff's evidence even daily profit or loss from fuel sales could be obtained.

[60] I reject the estimate of damage, as there was no need for an estimate when the actual loss or profit could have been measured if those data were provided. So I reject the claim of the Plaintiff, since it had failed to prove a loss due to malfunctioning of pumps. What was presented to the court was only an estimate and if the pumps were defective why was it not communicated to the Defendant till the ultimatum for payment of overdue sum was communicated needs explanation, too.

[61] Before the ultimatum of 7 days to settle the overdue fuel bill was communicated, the parties had reconciled the accounts and the email dated 14th September, 2007 (D21) indicates reconciliation attachment in a Spreadsheet, and requested the payment. There was no reply to this email, till the ultimatum was given on 25th September, 2007. There was no issue of defective pumps or ownership of the pumps being raised till the said letter 25th September 2007 was communicated.

[62] Though the service station was operational from 2005 to 2007 there was no indication of loss due to defective pumps. The loss due to defective pumps had to be proved by the Plaintiff and it had failed to do so. The Plaintiff selected second hand pumps as opposed to the new ones in order to minimize the cost and even for the second hand pumps credit was obtained from the Defendant. Second had

pumps which were obtained at a substantial discount needs repair, compared to a new one which cost ½ million.

## Orders of Court

1. The appeal of the Appellant is dismissed.
2. The appellant shall pay costs in a sum of $4,000.00.

Hon. Justice S Chandra
JUSTICE OF APPEAL

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice G Amaratunga
JUSTICE OF APPEAL