IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0092 of 2017
(High Court No. HBC 212 of 2014)

BETWEEN : **BHANABHAI PROPERTY HOLDINGS LIMITED**

Appellant

AND : **SHIV RAM**

Respondent

Coram : **Basnayake, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel : **Ms N Choo for the Appellant**
Mr D Prasad for the Respondent

Date of Hearing : **10 September, 2019**

Date of Judgment : **4 October, 2019**

JUDGMENT

Basnayake, JA

[1] I agree that this appeal should be dismissed with costs as suggested by Almeida Guneratne, JA

Almeida Guneratne, JA

[2] This is an appeal against the judgment dated 26th June, 2017 of the High Court of Fiji at Suva. The matter involved the alleged negligence of the Respondent in carrying out general carpentry work and repairs to the Appellant's building. The Appellant claimed damages for breach of contract. After trial, the High Court struck out the Appellant's claim and dismissed the action.

[3] The acts of negligence were based principally on the following matters:

(i) that, contrary to instructions, the Respondent had installed the guttering (down pipes) through inside the building and not from the outside.

(ii) that, the Respondent failed to use the scaffolding to install the guttering and the Appellant having had to engage a third party (Suva Property and Maintenance Ltd) to provide the same, the Respondent had failed to collect the same.

(iii) that, the Respondent had used a jack hammer to drill the floors and walls.

(iv) that, on the whole the Respondent had delayed to do the repairs. (vide: Statement of claim and Amended Statement of Claim at pages 16 – 19 and 53 – 57 of Vol. 1 of the Copy Record).

[4] As against the Appellant's position, in essence, the Respondent pleaded that:

(i) The guttering was done with the consent of Mahesh Kumar (Director of the Appellant Company).

(ii) Although the plaintiff paid for the scaffolding to a third party (Suva Property and Maintenance Limited) it never reached the work site. It was the plaintiff's responsibility to obtain and deliver the same.

[5] The Statement of Defence and the Amended Statement of Defence are at pages 22-25 and 60-64 of the Copy Record. Reply to the Statement of Defence and the Amended Statement of Defence are at pages 26 -31 and 65–69 respectively.

[6] That is the broad compass within which the dispute lay on the pleadings. I shall now refer to the evidence led on behalf of the parties and other specific acts of the alleged negligence and the claim for damages, in the light of the grounds of appeal urged against the judgment of the High Court.

The evidence

[7] On the issue of 'guttering', the learned trial Judge accepted and believed the evidence of the Respondent. It is not as if the judge merely said that, he believes 'X' and not 'Y'. He gave reasons for saying so. Mahesh Kumar who had been visiting the work site had continuously approved and payments made to the Respondent over a period of time and it was only after that he had been struck by ill-health and not visiting the site that his son Vinay Kumar turning up at the site had asked the Respondent to stop work.

[8] Consequently, if I were to construe that issue, there was Acquiescence on the part of the Appellant in allowing the Respondent to effect the guttering from inside the building.

[9] On the issue of scaffolding, the trial Judge himself noted the discrepancy in the Respondent's pleadings and his sworn evidence but went along with his evidence holding that it was incumbent on the part of the Appellant's Counsel to have confronted the Respondent in cross-examination which was not done.

[10] Next I looked at the other extrinsic evidence in the following order.

(a) On the Appellant's argument that, the Respondent had used a jack hammer for the purpose of drilling the floors and the walls, the learned Judge held that, no one had seen the Respondent doing that. Thus, there was no evidence to support the

Appellant's said contention on that score, whereas the Respondent's evidence had been that he had used a utility drill.

(b) Another ground urged by the Appellant in its attempt to have the judgment of the High Court set aside was that, the gutter works had not been done in accordance with the Design Hut Architect's Plans.

[11] On that issue, I could not see any specific finding by the trial Judge although the architect was called by the Appellant as a witness to substantiate that ground.

(c) Then I considered the evidence of Krishnal Pratap (Manager of the Safeway Plumbing Sheet) who had been employed by the Appellant after termination of the contract in question. He deposed to the fact of having been contracted by the Appellant to make good the work improperly done by the Respondent in regard to roof repair, repair of the gutter and the leakage. In that regard, the witness is seen to have given detailed evidence as revealed at page 178 onwards of the Copy Record, principally going on the Design Hut Architectural plans at the end of which evidence, there followed the evidence of Pranil Vijendra Singh beginning at page 233 of the Copy Record (a Draftsman and Office Manager). Thereafter, there was the evidence of Vinay Kumar (Mahesh Kumar's son referred to earlier in this judgment) (his evidence at page 266 to 356 of the Copy Record).

(d) Thereafter, I perused the evidence of the Respondent.

Analysis of the evidence of the witnesses in its overall impact on the case in the light of the findings of the High Court Judge

[12] The Architect was heard to say that, "as per our drawings the down pipes (were) supposed to go out of the building …" (at page 245 of the Copy Record). There is also his evidence that, if the drawings had been followed, the Respondent ought to have completed the work within two months.

[13] In that regard, as I have already articulated, the learned Judge came to a finding of fact, accepting the Respondent's evidence. As a matter of law, a trial judge's assessment in accepting and rejecting evidence ought not to be disturbed unless some error is clearly discernible or there is some perversity a well entrenched proposition in the law which was enunciated in **Attorney-General of Fiji & 2 Others v. Melania Romanu Tikotikoca** (Civil App. No. 048 of 2012 – 29 May, 2014).

[14] In so far as the evidence on "the two months" period (supra paragraph [12] above is concerned) the contract in question not being one in writing, thus, not bringing the concept of 'Mora' (that is, time as being of the essence of the contract), I could not find myself to respond to that contention.

[15] Consequently, for the aforesaid reasons, the Architect's evidence could not have been accepted.

[16] As regards the evidence on the issue of drilling, where the Respondent is said to have used a jack hammer, I refer back to what I have said at paragraph [10] above read with what I have penned in paragraph [13] of this judgment.

The High Court Judgment and the Grounds of Appeal
(at pages 6–12 of the Copy Record and the Grounds of Appeal urged at pages 1 to 4 of the Copy Record)

[17] I have approached this appeal on the evidence led at the trial as if it was in the nature of a 'Re-hearing'.

[18] In consequence thereof, while I feel no constraint in holding that I could not see any basis to interfere with the judgment of the learned Judge for the reasons adduced above, nevertheless, I felt that there was one outstanding matter which needed to be addressed and that is as regards the claim of the Appellant. This struck me as being a matter that needed to be addressed in the light of:

(a) the evidence of Krishnil Pratap referred to earlier in this judgment;

(b) the Respondent's own response thereto; <u>and</u>

(c) the learned Judge's exposition thereon.

(a) <u>The Evidence of Krishneil Pratap</u>

[19] When he took over the contract there were defects in the work the Respondent had been contracted to attend to. That remains as a fact on Record.

(b) <u>The Respondent's response thereto</u>

[20] The Respondent in his written submissions condescended as follows:

> *"... if the plaintiff is successful in recovering the sum claimed as the amount required for the remedial work it will be sufficiently compensated for the alleged damages caused to the building by the defendant. If the plaintiff is awarded all the monies claimed in the statement of claim it will be unjustly enriched." (vide: paragraph 3.22 of the said written submissions)*

[21] That, to my mind, is a concessionary response on the part of the Respondent that, some monies may have been due to the Appellant on its claim.

(c) <u>The Learned High Court Judge's exposition thereon</u>

[22] The learned Judge in that regard held thus:

> *"It is common ground that the leakage in the gutter had been there since late 2010, before the defendant commenced work in the building and water marks were found on the walls. Therefore, the defendant cannot be held liable for the entire damage caused to the building due to the leakage in the roof."*

(at page 11 of the Copy Record)

[23] So, if one pauses at that point, by inference it would follow that the defendant (Respondent) did stand liable <u>for some damage</u>.

[24] However, the learned Judge also found at the same page (that is, page 11 of the Copy Record thus:

"The witness Krishneil Pratap testified that the cost of work done by them for the plaintiff was $45,000 (giving a discount of $2,000). In cross-examination the witness admitted that for the above price they also did some other work. The burden was on the plaintiff to satisfy Court that the amount claimed is the exact amount incurred for the (said) remedial work."

(Evidenced further at page 226 of the Copy Record in Pratap's evidence (in regard to the payment certificate he had received).

[25] It follows therefore that, without discharging the burden on that issue, as to what exact amount the plaintiff could have claimed for the "remedial work", the claim of the plaintiff (Appellant) could not have been sustained.

[26] Remaining on the aforesaid conspectus, I was influenced (in regard to contracts of repair) by the judicial thinking (by analogy) of Lord Reid in **Young & Marien v Mc Manus Childs** [1969] 1 AC 454 at 468 (H/L) commenting on the dicta of du Parcq, J. in **Myers v Brent Cross** [1934] 1 KB 46 at 55. Lord Reid had said:

". . . less cogent circumstances may be sufficient to exclude an implied warranty of quality where the use of spare parts is only incidental to what is in essence a repairing operation where the customer's main reliance is on the skill of the tradesman, than in a case where the main element is the supply of an article, the installation being merely incidental."

Conclusion

[27] For the aforesaid reasons I conclude that, I could not find sufficient reason to interfere with the learned Judge's findings.

[29] Accordingly, I proceed to make order dismissing this Appeal.

Jameel, JA

[30] I agree with the conclusions of Guneratne, JA.

Orders of Court:

1. *The Appeal is dismissed.*

2. *The Appellant is ordered to pay a sum of $3,000 as costs of this Appeal which shall be in addition to the costs ordered by the High Court. These costs shall be paid to the Respondent within 21 days of Notice of this Judgment.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Justice F. Jameel
JUSTICE OF APPEAL