19,1982

IN THE PRIVY COUNCIL No. 44 of 1978

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN :

CHOORAMUN JHOBOO Appellant

- and -

ELIAS IBRAHIM COOWAR Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment dated 19th December, 1977 delivered by the Court of Civil Appeal in the Supreme Court of Mauritius, which upheld a judgment dated 2nd February, 1977 of the Trial Judge of the Supreme Court sitting as single Judge. The Appellant was the Defendant before the Trial Judge; he was the Appellant before the Court of Civil Appeal. p.52, l.15 to p.56, l.18 p.26, l.22 to p.40, l.10

2. The principal issues raised by this Appeal are:-

(a) whether an 'Agreement' contained in a deed under private signatures dated 29th August, 1973 made by Appellant, as projected Vendor and Respondent as projected Purchaser of an immoveable property (including a house) in Curepipe, Mauritius, was not made expressly subject inter alia to the signature of an authentic notarial deed by Appellant for its perfection (parfait); and in which case, there was no obligation, even born, to transfer the properties. p.15, l.23 to p.20, l.17

(b) whether the 'Agreement' contained a "stipulation de dédit" i.e. provisions enabling either party to withdraw from the 'Agreement' at any time before the actual signature of the authentic notarial deed OR

whether the said 'Agreement' was a contract of sale binding upon the Appellant requiring him to execute a notarial authentic deed of sale in any event.

(c) whether service by the Appellant upon the Respondent of a Notice 'Mise en Demeure' dated 17th December, 1973, requiring Respondent to pay all outstanding sums under the 'Agreement' and then to sign the authentic notarial deed of sale - operated in such a way that Appellant is precluded from withdrawing from the 'Agreement' and that Respondent is entitled thereby to a Judgment decreeing that he had become lawful owner of the said property situate at Curepipe.

p.8, l.6 to p.9, l.18

N.B. The law governing contracts in Mauritus is the Code Napoléon (the French Code Civil) as amended by Local Statutes.

3. The issues raised necessitate the decision in Appeal of the following matters:-

(a) What, in the light of the provisions of the Code Napoléon, was the nature of the said 'Agreement' under private signatures?

(b) What was the effect of provisions in the said 'Agreement' whereby the parties had declared their intention to subordinate and subject :

(i) the perfection of the deed of sale; and

(ii) the transfer of ownership to the pre-requisite condition precedent of the signing an authentic notarial deed (passation de l'acte authentique).

(c) In other words, did the parties not agree:

(i) that a contract of sale or even a promise of sale would not even come into existence?

(ii) that their contract would not be complete (parfait) 'perfect' until the authentic notarial deed had actually been signed by Appellant?

(d) Though there was an obligation on the part of the Appellant to return deposit-moneys (arrhes) plus 20,000 rupees and a similar obligation on the part of Respondent by which he forfeited any deposit money, yet qua contract of sale,

(i) Was the agreement of the parties merely still at the stage of proposals?

(ii) Was there a reservation of a 'locus poenitentiae' made on the part of both parties especially Appellant until the very moment of signature of the authentic notarial deed?

'Arrhes' are defined in para. 41 lines 37-46 page 20 infra

(e) Was not the signing of authentic notarial deed the condition precedent to any contract of sale becoming complete (la vente n'est parfaite qu'à la réalisation de l'évènement)?

In other words, was not the incidence of liability to make the contract of sale postponed until the authentic notarial deed had been drafted by Notary and signed by Appellant?

(f) Was the drawing up of an authentic notarial deed in this case a mere incident in the performance of an already binding obligation of sale (qu'un élément de l'exécution d'une vente déjà parfaite)?

(g) When the 'Agreement' had provided inter alia that both the eventual contract of sale and the signing of the authentic notarial deed were expressly made subordinate and subject to the fulfilment of two pre-requisite conditions precedent -

- payment of the entire purchase price within the delay fixed AND the making of an authentic notarial deed -,

Was the Appellant bound to execute a specific transfer of the properties, in case he did not sign the notarial deed?

(h) Since both projected vendor and projected purchaser were free to 'back out' of the 'Agreement' - one by

reimbursing the deposit money (arrhes) with another 20,000 rupees and the other by forfeiting the 'arches' respectively -

- did such freedom to 'back out' in any way affect, avoid, or nullify the conditions precedent of a contract of sale?

(i) Since the transfer of ownership (transfert de propriété) and the enjoyment (jouissance) of the property were expressly made subordinate and subject to the signature of an authentic notarial deed, was not the obligation on Appellant merely one to 'do' (de faire) and whose consequences were a 'créance mobiliére' entailing only the payment of damages as decided by the Court of Cassation in its decision mentioned in para.54 below?

(j) If the provisions of the 'Agreement' allowed the Appellant to withdraw from the 'Agreement' at any time before the actual signature of the authentic notarial deed by him and to put an end to it, was not the consequence only and merely that Appellant had to reimburse deposit-money plus to pay 20,000 rupees as damages?

OR Was the Respondent entitled to the declaration he sought and also to enforce execution by the transfer of the lands?

p.35, l.10 (k) Had not the parties intended to convert the principal obligation of Appellant into an obligation to pay the agreed sum, in the event of non-execution of the principal obligation?

(Les parties ont entendu convertir l'obligation principale en une obligation de payer la somme, dans le cas ou l'obligation principale ne serait pas exécutée)?

In which event, could not the debtor of the performance (here the Appellant), at his choice, liberate himself by paying the sum promised?

RECORD

(l) Whether the 'Agreement' in allowing the Appellant to refuse to sign the authentic notarial deed and thus prevent any contract of sale coming into operation would not attract the provisions of Article 1170 and Article 1174 of Code Napoleon?

These provisions render null and void, not the clause only, but the whole agreement when it is made 'sous condition potestative' de la part de celui qui s'oblige', i.e., dependent entirely, on the Appellant's pleasure, where Appellant is the debtor of the performance.

Articles 1170 and 1174 of the Code Napoleon are reproduced at paragraph 66 below.

(m) By serving the notice dated 17th December, 1973, had not the Appellant only exercised the rights conferred by the 'Agreement' to call upon the Respondent to pay the balance of the purchase price, etc.?

And did he not preserve intact, his right to withdraw granted especially by clause 4 of the 'Agreement'?

Was he waiving or renouncing any such right?

Was he acting outside the conditions and scope of the 'Agreement'? By so doing was he making a new offer?

4. The action was brought by Respondent as Plaintiff before the Supreme Court of Mauritius by a Statement of Claim dated 26th January, 1974. p.2, l.3 to p.8, l.4

The Respondent alleged that by virtue of an agreement under private signatures dated 29th August, 1973 (hereinafter called the 'Agreement'), the appellant had sold to him two portions of land with a building standing thereon at Curepipe for a total sum of 85,000 rupees. The Respondent paid 20,000 rupees on 29th August, 1973 at the time of signing the 'Agreement' and undertook to pay the balance of 65,000 rupees on the 15th October, 1973 to the Appellant.

RECORD

The Respondent stated that "it was agreed that the transfer of ownership was only to take place on the signature of the authentic deed which was to be drawn up by Notary Maigrot".

The balance was payable on proof of clear title, i.e. inter alia that the properties were neither leased nor encumbered.

He further stated that the transfer of ownership was to take place on the signature of an authentic notarial deed of sale, to be drawn up before Mr. Notary Bertrand Maigrot; that up till 15th October, 1973, he was ready and willing to sign the authentic deed and pay the balance of the sale price; that on 21st December, 1973, the Appellant caused a notice 'Mise en Demure' calling upon the Respondent to appear before Mr. Notary Maigrot on 14th January, 1974 and there to pay the sums due and to sign the authentic notarial deed.

The Respondent alleged that he was always ready and willing to pay the balance and sign the notarial deed but Appellant failed to appear on 14th January, 1974, at the Notary Bertrand Maigrot's office and to sign the deed.

The Respondent claimed that he was entitled to judgment that he was the owner of the properties at Curepipe and ordering Appellant to execute the authentic deed of sale before Mr. Notary Maigrot and to pay Rs.5,000 rupees as damages.

p.9, l.24 to p.10, l.23

5. The Appellant filed his Statement of Defence on 12th August, 1974, admitted the document relied upon by Respondent and also that it was agreed that the transfer of ownership was to take place on the signature of the authentic deed which was to be drawn up by Mr. Notary Maigrot.

But he denied that Respondent had always been ready and willing to pay the balance and sign the authentic deed. He denied that Respondent has suffered any loss.

He stated that he was bed-ridden on 14th January, 1974, and could not call on the Notary. He alleged that he had a right by the 'Agreement' to withdraw from it and not sign the deed. He averred that it was a condition of the 'Agreement' that should Appellant refuse to sign the deed,

RECORD

Appellant had to refund all sums cashed by him and pay a further sum of rupees twenty thousand as damages.

Appellant stated he was ready and willing to make the refund and pay the further 20,000 rupees.

He called upon Respondent to state whether he was prepared to accept the refund, the damages and the costs.

(This stand was reiterated in Defendant's Notice of Facts). p.14, l.16 to 22

6. The Respondent in a Reply dated 9th December, 1974, denied the denials of Appellant and claimed that the sale between the parties had become perfect and was "valid to all intents and purposes" any clause in the deed notwithstanding; he was entitled to the reliefs he claimed. Respondent further claimed that Appellant having himself summoned Respondent to appear before the Notary and to sign the authentic deed, was estopped from relying on his "own turpitude" and from asking for cancellation of the sale upon refunding 20,000 rupees. p.11, l.1 p.12, l.3

7. At the trial before the Senior Puisne Judge (Mr. Justice Garrioch) on 2nd February, 1977, parties "agreed that the facts as set out in the Statement of Claim are not contested and that these facts which are not admitted are not relevant to the point of law in issue". p.21, l.1 to 4

8. No oral evidence was led by either Respondent or Appellant. The Respondent produced the 'Agreement' dated 29th August, 1973, as well as the Memorandum of non-appearance dated 14th January, 1974 drawn up by the Notary Maigrot. (These were marked Documents "A" and "B" respectively). p.15, l.21 to p.20, l.18 p.21, l.6

9. Appellant's Counsel tendered in Court 40,000 rupees but Respondent's Counsel objected saying that the procedure for tender has not been followed. p.23, l.14 p.23, l.13

Appellant's Counsel stated that the Appellant was still ready and willing to pay to Respondent the sum of 40,000 rupees. p.23, l.16

RECORD

10. The main issue before the Judge was the construction of the 'Agreement' dated 29th August, 1973 in the light of the Notice 'Mise en Demeure' served by Appellant.

p.21, l.9 to p.23, l.2

11. Respondent's Counsel, Mr. Hamid Moollan Q.C., referred to various aspects of 'Promesse de Vente' and relied upon Encycloepédie Dalloz, Verbo "Promesse de Vente", the Mauritian cases of Gaffoor v. Desbro - S.C.R. 15173, Lalou "Responsabilité Civile - 6th Edn. 1962, Note 64 p.36 and Mazeaud Vol. III 5th Edn. p.433 onwards and notes 2302 - 2315.

Counsel argued that where the intention is a sale, the principle was that the contract should be executed specifically, i.e. by the transfer of the property.

He argued that unless there is an objection of "d'Ordre public ou moral" - which did not exist here - the contract should be executed not by 'réparation par équivalence' but by 'execution en nature'.

Even, if the clause of 'withdrawal' was interpreted in favour of Appellant as an option to opt out of the contract by refusing to sign the deed, yet "the moment" "the Appellant caused the Notice dated 17th December, 1973 to be served, he realised his option and could not go back upon it".

Had the Plaintiff failed to turn up, the contract would have been annulled and Appellant would have forfeited the sum paid by Respondent.

He relied on Dalloz, Repertoire Pratique Verbo "Obligations" Notes 88 to 100. Further, the clause of 'withdrawal' was contrary to law, i.e. Article 1134 and 1135 of the Civil Code, because "if one of the parties says that if he decides not to sign, he will pay back, it is an event which depends simply and purely on the will of that party ..... the condition in itself is contrary to law". Reference was p.23, l.2 given to Articles 1134 and 1135 of the Code Napoléon; probably the clerk recording made a mistake, Counsel must have also referred to Articles 1170 and 1174 of the Code Napoléon, quoted below in paragraph 66.

RECORD

12. On behalf of the Appellant (Defendant), Mr. Dabee argued that the 'Agreement' itself provided how it would end at the instance of either party. p.23, l.3 to p.24, l.5

He stated : "there is no ambiguity in the responsibility of each party. The agreement explains how the contract will come to an end".

As regards Appellant if he refused to sign (en cas de refus) the only consequences by the Agreement was that Appellant had to refund 20,000 rupees already cashed by Appellant and to pay further 20,000 rupees as damages and interest (dommages et intérêts). The Notice 'Mise en Demeure' did not affect the case at all. He referred to Dalloz - Encyclopédie de Droit Civil.-Vo. - Contrat et Convention. Notes 91. 116. 161.

13. Appellant's Counsel submitted that even if the sum due would have been deposited, it would have made no difference because the 'Agreement' stated clearly : "Qu'en cas de refus de signer (in case of refusal to sign)", the Appellant would have to reimburse 20,000 rupees deposited plus twenty thousand rupees as damages. p.23, l.17

He argued that the parties having fixed the amount of damages in case of inexecution, that amount could not be varied by the Court. He relied on Dalloz - Repertoire - Pratique, Verbo 'Contrat et Convention' Notes 916 & 418.

Dalloz - Nouveau Code Civil - Article 1152 Notes 3, 9, 10 & 18 and Article 1654 Note 201.

14. Appellant's Counsel submitted that the Appellant reiterated his offer to pay 20,000 rupees as damages as provided by the 'Agreement'. p.24, l.3 to 5

15. Respondent's Counsel replied that there was no money tendered by Appellant but only an offer to do so in the Statement of Defence. Even though parties had determined the amount as "dommages par équivalence", yet the principle of law was that the execution must be "en nature". He relied on Fuzier Herman - Code Annoté (1930 Edn.) Article 1228 Note 7. p.24, l.6 to p.25, l.5

RECORD

p.25, l.22

16. On 2nd February, 1977, the Trial Judge (Mr. Justice Garrioch) delivered judgment. He decreed the claim that Respondent was the lawful owner of the properties. He ordered Appellant to sign the notarial authentic deed of transfer. He dismissed the claim for damages of 5,000 rupees.

The Trial Judge started by stating that:-

p.25, l.22 to p.26, l.5

"the parties have at the hearing stated that they were not calling any witness as the facts which were not admitted were not relevant to the issues which they proposed to submit for the decision of the Court.

The success or failure of this action has, as a consequence, been made to depend essentially upon the construction which the Court will place on a deed under private signatures signed by the parties on 29th August, 1973, and upon the effect which the Court will find should be ascribed to it, in the light of the 'undisputed facts'".

17. The Trial Judge proceeded to set out the terms of the 'Agreement' in some details.

He referred to the clause in the 'Agreement' relating to the conditions precedent to the transfer of ownership as follows :-

p.26, l.19-25

"Le soussigné d'une part aura la jouissance dudit bien à compter du jour de la signature du contrat authentique régularisant ces présentes, mais la dite vente étant faite sous la condition suspensive de paiement intégral du prix ci-après stipulé dans le délai ci-après fixé, la transmission de propriété est subordonnée au paiement intégral de ce prix dans le dit délai et à la passation d'un contrat authentique ci-après stipulé".

(Translation : The undersigned on the other hand shall have enjoyment (jouissance) of the said property reckoning from the day of the signature of the authentic deed regularising these presents, but as such sale is being made under the condition precedent (condition suspensive) of the payment in full of the price hereinafter stipulated within the delay hereinafter

fixed, the transfer of the property is subordinate to the payment in full of the said price within the said delay and to the drawing up of the authentic deed as hereinafter stipulated .....)

18. The Trial Judge read out the provisions of the 'Agreement' as to the Price. p.27, l.1 to 4

"Prix. La vente dont il s'agit sera faite pour et moyennant le prix principal de quatre vingt cinq mille roupies, sur lequel le soussigné d'une part déclare et reconnaît avoir à l'instant reçu et touché du soussigné d'autre part, la somme de vingt mille roupies".

(Translation : PRICE. The sale in question shall be made for and in consideration of the principal price of eighty five thousand rupees out of which the undersigned of the one hand declares and acknowledges having presently received and cashed from the undersigned of the other hand the sum of twenty thousand rupees).

19. After stating that the payment of the balance of the sale was by 15th October, 1973, and that certain conditions were imposed on the purchaser, the Trial Judge referred to on 4th Paragraph of the headings to "CONDITIONS". -

"4e. Que lorsque le soussigné d'autre part aura intégralement payé le dit solde de prix en capital, il sera dressé un contrat authentique par le soins de Me. Bertrand Maigrot, notaire choisi d'un commun accord par les parties qui déclarent entendre subordonner au paiement intégral du prix d'acquisition et à la passation dudit contrat de vente, la perfection du contrat et la transmission de propriété. p.27, l.8 to l.18

Et en cas de refus par le soussigné d'une part de signer le dit contrat de vente, le dit soussigné d'une part aura à rembourser au soussigné d'autre part toutes sommes versées par ce dernier et il aura à payer une somme de vingt milles roupies comme dommages et intérêts".

(Translation : Fourthly : When the undersigned of the other hand shall have paid in full the said balance of the price in capital, an authentic deed shall be drawn up by Mr. Bertrand

Maigrot, notary public chosen by common consent by the parties who declare their intention to subordinate the perfection of the contract and the transfer of ownership (transmission de propriété) to the payment in full of the purchase price AND to the drawing up of the said authentic contract of sale.

And in case of refusal by the undersigned of the one hand to sign the said deed of sale, the said undersigned of the one hand shall have to refund to the undersigned of the other hand all sums paid by this latter and he shall have to pay a sum of twenty thousand rupees as damages).

p.27, l.18 20. The Trial Judge went to observe that :

"It is not contested that at the time the payment of the balance of the sale price was due to be made, the plaintiff was ready to comply with his obligations under the deed."

But the Trial Judge failed to consider that no payment or tender was ever made by Respondent. As such, he should have held, in any view, the condition precedent to the incurring of any liability did not come into existence.

p.4, l.9-10 21. The Trial Judge failed to consider paragraph 5 of the Statement of Claim (which alleged that Plaintiff was ready and willing, prior to and before 15th October, 1973, to sign the deed and to pay the balance of the purchase
p.10, l.12 price) had been specially denied in paragraph 2 of the Statement of Defence.

The Trial Judge failed to consider that at no time, specially on 15th October, 1973, or on 21st December, 1973, or on 14th January, 1974, was the balance either paid to Appellant or tendered before the Notary.

22. The Trial Judge did not specifically refer to the other clause of the 'Agreement' relating to the effect of any breach of the conditions as to payment by the Respondent:-

Paragraph 3 of the 'Agreement' provided :

p.18, l.21 to p.19, l.4 "3o. Qu'en cas d'inexécution ou de violation par le soussigne d'autre part d'une des conditions ci-dessus énoncées comme aussi en

cas de non-paiement du susdit solde de prix à l'échéance sus-fixé, les présentes seront considérées comme nulles de plein droit et ce par le seul défaut de paiement dudit solde de prix ou d'inexecution ou de violation de l'une quelconques des dites conditions si bon semble au soussigné d'une part et huit jours après une simple Mise-en-Demeure adressée au soussigné d'autre part aux frais de ce dernier et restée sans effet ..... Toutes sommes versées par le soussigné d'autre part resteront acquises audit soussigné d'une part a titre d'indemnité sans qu'il soit tenu à restitution de toutes sommes encourues par le soussigné d'autre part sur le dit bien".

(Translation : Thirdly : In case of non-fulfilment or violation by the undersigned of the other hand of any one of the conditions hereinabove enunciated as well as in the case of non-payment of the aforesaid balance of price on the due date fixed hereabove, these presents shall be considered null and void as of right, and this by mere default of payment of the said balance of price or because of the non-fulfilment or violation of any one of the said conditions, and if the undersigned of the one hand so deems fit eight days after a simple notice 'Mise en Demeure' served on the undersigned of the other hand at the latter's costs and which notice 'Mise en Demeure' shall have remained without effect ..... All sums paid by the undersigned of the other hand to the undersigned of the one ha as indemnity without his being required to refund any sum whatsoever which may have been incurred by the undersigned of the other hand on the said property).

23. The Trial Judge ought to have construed the 'Agreement' in the light not only of clause 4 but of clause 3 and its other provisions.

In the light of the clauses dealing with 'price, the jouissance' and conditions 1, 2, 3 and 4, it is submitted that the parties to the 'Agreement' had foreseen and provided for monetary consequences only if either the Respondent did not pay the full purchase price at the time agreed OR the Appellant had refused to sign the deed when full payment was made.

The Trial Judge had to be guided by the said 'Agreement' and that 'Agreement' alone.

24. The Trial Judge ought to have considered that the 'Agreement' and its clauses should be looked at as a whole as provided by Article 1161 of the Code Napoléon.

"Toutes les clauses des conventions s'interprétent les unes par les autres en donnant à chacune le sens qui résulte de L'acte entier".

(Translation : All provisions of agreements are interpreted in accordance with each other, giving to each the meaning resulting from the entire document).

The Trial Judge should have considered that, in this case, where a deed under private signatures, was drawn up to witness the agreement of the parties, the intention of the parties had predominantly, or exclusively, to be gathered from the provisions of the deed under private signatures.

25. After summarising the Defendant's claim and the Defence, the Trial Judge defined the issues as follows :-

p.28 l.14 p.29, l.1 "The Defendant takes his stand on the clause of the Agreement providing for the possibility of his refusing to sign the authentic deed of sale. His contention is that all the Plaintiff is entitled to obtain in such an event is the reimbursement of the sums paid by him and 20,000 rupees as damages, which moneys the Defendant has offered and is ready and willing to pay to the Plaintiff.

The Plaintiff's case is that the contract entered into by the parties is in its nature and effect a promise of sale ("Promesse de Vente") and that, as promissee, he has the right, in law, to elect between insisting on the performance of the promise and claiming damages for breach of contract. He submits that the clause relied upon by the Defendant has in no way affected that right".

p.29, l.3 to 7 26. Four questions for decision were then set out by the Trial Judge:

RECORD

(1) What is the proper qualification to be attributed to the contract entered into by the parties?

(2) What is the effect of such a contract and the rights of the parties under it?

(3) What is the nature of the clause relied upon by the Defendant? and

(4) How are the rights of the Plaintiff affected by that clause?

27. The first question, the Trial Judge stated offered no difficulty. After considering a number of authorities, he found that the 'Agreement' was a "promesse synallagmatique de vendre et d'acheter" (a reciprocal promise to buy and sell). p.29, l.14 to 15

He further found that the realisation of the reciprocal promise to sell and purchase ..... and the transfer of ownership ..... have been conditioned on the fulfilment of two requirements ..... "the payment in full of the purchase price at the time stipulated and the signing of an authentic deed". p.32, l.8 to 12

The Trial Judge in coming to this conclusion was also dealing with the question No. 2 formulated by him.

The Trial Judge erred in finding that there was a reciprocal promise to buy and sell. As such, his approach was vitiated.

28. The answer of the Trial Judge to question (3) was that the nature of the clause relied upon by the Appellant was a "clause pénale" dealt with in Articles 1226 and following of the Civil Code. He mentioned parenthetically that the Appellant had "so described it" in an affidavit. p.33, l.20-24

The Trial Judge erred in holding that there was a "clause pénale".

29. As regards question (4), the Trial Judge found "that it was not the common wish of the parties that the Plaintiff should be deprived of his legal right to insist on the performance of the contract and the Clause was in essence truly penal in that it simply fixed p.36, l.11 to 15

RECORD

beforehand as a lump sum the damages claimable by the Plaintiff in the event of Defendant's default".

The Trial Court, it is submitted, erred in both its conclusions on this aspect of the case.

p.36, l.17

30. The Trial Judge also stated that even if it was assumed clause (4) was either a "stipulation de dédit" (Translation : an agreement to withdraw from the contract) or "a covenant which had for consequence to leave to Defendant with a choice between perfecting the sale retracting his undertaking", yet the result would be against the Defendant "as by calling upon the Plaintiff to stand by his own pledge, the Defendant could have manifested an unequivocal intention to proceed with the first of the two courses open to him and to sign the authentic deed".

These conclusions of the Trial Judge are challenged in paragraph 64 below.

p.37, l.5 to l3

31. The Trial Judge relied on the decision of the Court of Cassation dated 18th October, 1968 referred in the footnote to another arrêt of that Court dated 28th January, 1971 and summarily reported in Dalloz 1971 Sommaires p.152.

It is submitted that the facts and circumstances of those two decisions are different from and not applicable to the present case.

This matter is dealt with in paragraph 54 of this Statement of case.

p.37, l.13 to l6

32. The Trial Judge held finally that "the parties are now irrevocably bound and that the Plaintiff is entitled to sue for the regularisation of the sale under reference".

Here also, it is humbly submitted, that the Trial Court erred in both its conclusions here set out.

p.40, l.18 to 22
p.42-43

33. The Appellant appealed to the Court of Civil Appeal of the Supreme Court of Mauritius from the Judgement and order of the Trial Judge (Mr. Justice Garrioch) dated 2nd February, 1977.

p.48, to p.50, l.18

34. The appeal was argued before the Court of Civil Appeal on 16th November, 1977. Counsel

for the Appellant specifically argued that the effect of the conditions of the deed was 'a stipulation de dédit' and not a 'clause pénale'.

He specifically referred to clause (3) and clause (4) and the situations in which either Appellant or Respondent could have decided not to go on with the projected agreement.

The agreement was a "projet de contrat".

Counsel maintained that it was for the Court to interpret the true nature of the 'Agreement' independently of the names by which parties may have referred to the 'Agreement'.

The conditions of the 'Agreement' were clear and unequivocal. Counsel submitted even if the full money had been paid, condition (3) allowed Appellant "to refuse to sign, refund the money and back out".

The only enforceable contract of sale would come into being, when and only when, the authentic notarial deed would have been signed by the parties. There was a kind of 'locus poenitentiae' provided by the 'Agreement'.

He submitted further that Appellant had reserved to himself a 'locus poenitentiae' and had inserted in the 'Agreement' a provision (stipulation de dédit - Translation : Stipulation of withdrawal) which gave him the right to opt between transferring the property and paying the sum agreed as damages. p.54, l.23 to p.55, l.1

35. Counsel for the Appellant argued that the Trial Judge had misinterpreted the 'Agreement' He also argued that until the signature of the notarial deed, the Appellant had no obligation to give (de donner) an immoveable right to the Respondent, Appellant had a mere obligation to do (de faire). He referred to Article 1142 of Code Napoleon : "Toute obligation de faire (ou de ne pas faire) se résout en dommage et intérêt, en cas d'inexécution de la part du débiteur". p.50, l.3 to 6

(Translation :-Every obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor).

RECORD

p.50, l.18

36. On behalf of the Respondent, the submissions already made before the Trial Judge were renewed. Counsel argued that the clause was not a "stipulation de dédit" but a "clause pénale". Even it was a "stipulation de dedit", the Appellant had indicated his intention to go on with the contract.

p.51, l.7 onwards

Counsel said that paragraph 1 of the Statement of Claim wherein the word "sold" was used, was admitted by the Defendant. The good faith of the Appellant could not be seen.

p.52 to p.56

p.55, l.2 to 4

37. The Court of Civil Appeal delivered its judgment on 19th December, 1977. The Court held that the question whether there was a "stipulation de dédit" or a "clause pénale" was not free from difficulty and it was not essential to decide it; and the case could be decided on other grounds.

p.55, l.14-16

The Court said that it agreed with the Trial Judge that by sending the notice dated 17th December, 1973, the Appellant had "manifested an unequivocal intention to proceed with the sale and waived his right to liberate himself by paying damages".

38. The Court of Civil Appeal held further :

p.55, l.17-22

"Whatever may have been the exact rights of the parties under the original contract, when the Appellant summoned the Respondent before the Notary, he was electing on a definite course which amounted to an offer which became irrevocable when the Respondent accepted it : as a result, once the Respondent appeared before the Notary to pay the balance, the Appellant could no longer withdraw his offer to cash the money and transfer the properties".

p.56, l.1 to 4

p.56, l.1 to 4

The Court relied on the decision of the Cour de Cassation of 18th October, 1968 and reported summarily in Dalloz 1971. Sommaires 152.

p.55, l.24 and p.37 l.6 to 12

39. Both the Courts below referred to the decision of Cassation reported in Dalloz 1971. Sommaire 151. Two cases were decided by the III eme Chambre of the Court of Cassation on 28th January 1971. The report in Dalloz is as follows :-

(i) in the first case (Cavaglia contre Bourrely) - the Court of Cassation decided that "les juges du fond qui estiment que l'intention des parties a un contrat de vente a été de permettre le dédit dans un délai très bref peuvent en déduire que le vendeur qui a introduit une action en révision pour cause de lésion, plusieurs mois après la réalisation de la condition suspensive, a renouncé à la faculté de dédit".

(Translation : Trial Judges, who believe that the intention of parties to a contract of sale was to allow withdrawal from it to be exercised in a very short space of time, could infer therefrom that the vendor - who brought an action for reviewing (revise) the agreement, because of lesion (undue prejudice), several months after the condition precedent had been fulfilled - had renounced to his right of withdrawal.

(ii) - In the second case (Epoux Manceau contre Dame Froget) the Court of Cassation decided :

"De la constation que des vendeurs ont laissé consigner le prix de la vente de l'immeuble pendant plusieurs années entre les mains du notaire chez qui devait etre signé l'acte authentique, toléré diverses modifications matérielles des locaux par les acquéreurs et admis que tous les impôts afférents au bien vendus fussent réglés par ces derniers, les juges du fond ont pu déduire que les vendeurs avaient renoncé à la faculté de dédit prévue à l'acte.

(Translation : From the finding - that certain vendors (i) had allowed the paying (consigner) of the sale price of the building to remain for several years in the hands of the Notary before whom the authentic deed had to be signed, (ii) had tolerated the purchasers making divers material changes to the buildings and (iii) had agreed that all rates and dues relating to the property sold be paid by the purchasers, ---- the Trial Judges could very well infer that the vendors had given up their right of withdrawal contained in the document).

RECORD

40. The Court went on to add :

p.56, l.6 - 15

"On any other view, we would be allowing the Appellant to have the best of both worlds : if the Respondent had failed to appear, or had proved unable to pay the balance, the Appellant would, under the terms of the 'Agreement' have been entitled to rescind the contract and to keep the part-payments effected by the Respondent without incurring any obligations on his part; but if the Respondent appeared and offered to pay, the Appellant would still reserve to himself the right not to transfer the property on paying damages which might have turned out to have no relation to the loss suffered by the Respondent. To permit such conduct appears to us to be in contradiction with the fundamental rule that bilateral contracts must be executed in good faith".

41. In setting out the matters stated in paragraph 38 above, the Court of Civil Appeal ignored the provisions of Article 1134 and the express provisions of Article 1590 of the Code Napoléon which allows such agreements.

Article 1134 - Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.

Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi authorise.

Elles doivent être exécuteés de bonne foi.

Article 1590 - Si la promesse de vendre a été faite avec des arrhes chacun des contractants est maître de s'en départir,

Celui qui les a données, en les perdant,

Et celui qui les a reçus, en restituant le double.

(Translation : Article 1134 - Agreements legally formed have the force of law between those who are the makers of them.

They cannot be revoked except with their mutual consent or for causes which the law authorises.

They must be executed in good faith.

Article 1590 - If the promise to sell has been made with earnest, each of the contracting parties is at liberty to depart therefrom;

He who has given it, on losing it,

He who has received it, by restoring double.

42. It is submitted that if the Appellant stood to gain 20,000 rupees, had Respondent not paid the balance of 65,000 rupees agreed, Appellant also stood to lose 20,000 rupees on his default of the self same agreement.

The deposit money was 20,000 rupees and the amount which Appellant would have had to pay in refusing to sign the authentic notarial deed was 20,000 rupees plus 20,000 rupees - exactly the amount provided by Article 1590 in fine, i.e. twice the amount of the 'arrhes'.

43. From the judgment of the Court of Civil Appeal in the Supreme Court of Mauritius, the Appellant was on the 1st March, 1978 granted leave to appeal to the Privy Council. p.67, l.1 to 9

44. The Courts below, ought to have found that the 'Agreement' dated 29th August, 1973 was not a promise of sale but a 'projet de vente' (mere proposal to sell). In finding that there was a sale, both the Courts below erred.

45. The true position in law, it is submitted, is set out in Planiol et Ripert Vol. 10 (1930 Edition) at page 14 of paragraph 17 (c) and its footnote.

Paragraph 17 (c) : Les parties se sont entendues sur les conditions de la vente, mais elles ont stipulé que la vente ne serait pas parfaite tant qu'un écrit, authentique ou sous seings privés, n'aurait pas été rédigé. La vente ne se formera qu'au jour de la rédaction de l'écrit; en attendant, chacune des parties reste

libre de sa décision et l'accord constitutif de la vente n'est pas réalisé. Aucune des parties ne peut exiger que l'autre consente à signer l'écrit.

Footnote ..... En réalité les parties ont imposé une forme spéciale à leur contrat; elles ont ainsi retardé l'échange des consentements jusqu'à l'accomplissement de cette forme; et tant qu'il n'y a pas échange des consentements, la vente n'est pas parfaite.

(Translation : The parties have agreed on the conditions of the sale but have stipulated that the sale will not be complete (parfaite) so long as a document, authentic or under private signatures, was not drawn up.

The sale will be formed only on the day the document is drawn up; meanwhile, each of the parties remains FREE whether to take its decision, and the agreement constitutive of the sale does not come into existence. Neither party can demand that the other should agree to sign the document.

(Footnote .... In truth the parties have imposed a special form (forms spéciale)) for their contract; they have thus postponed the exchange of consent (échange de consentement) until the document is signed; and so long as there is no such exchange of consent, the sale is not complete (parfaite).

45A. The effect of a "condition suspensive" is that if the "condition suspensive" (condition precedent) is not realised, there is no obligation born.

Code Napoleon : Article 1168 : L'obligation est conditionnelle lorsqu'on l'a fait dépendre d'un evenement futur et incertain, soit en la suspendant jusqu'à ce que l'évènement arrive, soit en la résiliant, selon que l'évènement arrivera ou n'arrivera pas.

Article 1181 : L'obligation contractée sous une condition suspensive est celle qui dépend ou d'un évènement futur et incertain, ou d'un évènement actuellement arrivé, mais encore inconnu des parties.

Dans le premier cas, l'obligation ne peut être exécutée qu'après l'évènement.

Dans le second cas, l'obligation a son effet du jour où elle a été contractée.

Dalloz Nouveau Code Civil - Article 1181 - Note 53

"Lor sque la condition suspensive a fait défaut, il n'y a pas d'obligation, tout est non avenue".

(Translation - Article 1168 : An obligation is conditional where it is made to depend on a future and uncertain event; whether the condition is one which suspends the contracts until the event happens, or is one which rescinds the contract according as the event happens or does not happen.

Article 1181 : A contract subject to a condition suspending its operation is a contract which depends either :

(i) upon a future and uncertain event; or

(ii) upon an event, which, though it has actually happened, is unknown to the parties.

In the first case, the contract is not concluded until after the event.

In the second case, the contract takes effect as from the day it was entered into.

(Translation - Dalloz NCC - Article 1181 - Note 53

"When a condition precedent has not been realised, there is no obligation.

Everything is as if it never happened (non avenue)."

These two articles as well as the passage from Dalloz cited above were construed in 'Rampersad v/s Boodhun' 1957 Mauritius Report at page 237 -

Justice Osman said: "the obligation to sign the deed of transfer was suspended pending the realisation of the condition. That condition having become impossible of fulfilment, the obligation necessarily came to an end".

46. (i) The Courts below erred in not finding that by the 'Agreement', no contract between the parties would be 'parfait' until and unless the Appellant signed the authentic notarial deed.

p.30, l.14 to p.32, l.24 (ii) The Trial Court erred in impliedly adopting the view that an agreement under 'condition suspensive' operated as a binding promise to sell and purchase.

The correct position is as set out in the quotation from Planiol at paragraph 45 of this Statement of Case.

(iii) It is averred that in the present case, the clear intention of the parties was not to create any incidence of liability concerning either a promise to sell or a contract of sale to transfer any ownership. Any liability was restricted to the restitution of

the 'arrhes' (deposit-money) or alternatively the payment of twice the deposit-money.

47. On a proper construction of Doc. 'A', the conclusion is that the Appellant was "disposé à vendre", subject not only to the transfer of ownership and payment of the purchase price but subject also to the signing of an authentic notarial deed. The Courts below erred in finding impliedly or expressly that whatever amount was paid by Respondent was in part-payment; they ought to have held it was a deposit by way of 'arrhes' (earnest money) envisaged by Article 1590 of the Code Napoléon. p.16, l.6

48. The Courts below ought to have held that the true intention of the parties was not to be bound until the Appellant signed the authentic notarial deed.

49. The Courts below ought to have held that in so far as a contract or promise of sale was concerned, the same was subject to "condition suspensive" (condition precedent) to wit : the signing by Appellant of an authentic notarial deed which would then transfer ownership and give "jouissance" (enjoyment) of the properties.

50. Where the parties have set down their agreement in a document, as in this case, the Courts below were bound to find the intention of the parties from the terms of the 'document' itself.

51. The parties especially the Respondent chose to have their contract come into being upon the signature of a notarial authentic deed as distinct from a deed under private signatures.

52. Authentic notarial deeds have several advantages over deeds under private signatures. Some of these are :-

(1) they are irrebuttable proof that the parties described therein, have appeared, have signed, have given their consent etc. until and unless the assertions of the notary are proved to be false through the very costly and cumbersome procedure of 'inscription en faux' (inscriptio falsi).

(2) Further, the notary engages his responsibility that the property demised is free from any burden or 'charges' except for those stated in the notarial deed.

53. The differences between a deed "under private signatures" and a notarial deed are clearly set out in Le Doyen Carbonnier's - Traite de Droit Civil - Volume II (1959 Edition) at pages 425 to 428 (129). The same is reproduced in an annexure to this Statement of Case.

Annexure to the Appellant's Statement of Case

54. Further, if there was any binding obligation upon Appellant, it was merely an obligation to do (de faire) of a 'créance mobilière' which could engender only the payment of damages and not specific performance.

The Arrêt, Balland versus Meyard, of the Cour de Cassation, 3 eme Chambre Civile dated 2nd April, 1979 as reported in Dalloz - Semaine Juridique 1979 page 205, states :-

> "Dès lors que l'acte sous seing privé de vente d'un terrain stipule que l'acquéreur deviendra propriétaire à la signature de l'acte authentique, le cédant n'est tenu jusqu'à ce jour que de transférer la propriété, obligation de faire qui ne peut engendrer au profit du beneficiaire qu'une créance mobilière sous forme de dommages et intérêts".

(Translation : Being given that the deed of sale under private signatures regarding a portion of land lays down (stipule) that the purchaser will become owner upon the signature of the authentic deed, the transferor (cédant) is obligated till that day only to transfer the ownership, an obligation to do (obligation de faire) which cannot engender in the beneficiary anything other than a moveable claim of right of damages (qu'une créance mobilière) sous forme de dommages et intérêts).

55. The Courts below erred in not finding that the only obligation, if obligation there was, was to return the amount paid by way of "arrhes".

RECORD

56. The Trial Court did not sufficiently or at all refer to the right of withdrawal by reference to Article 1590 of Code Napoléon but contented itself to considering clause (4) in the light of Article 1228. It is humbly submitted that the Trial Court's approach begged the very question, the Court had to decide.

57. The Courts below erred in not finding that the 'Agreement' contained a provision of "stipulation de dédit" (right of withdrawal) until the very last moment before the actual signature of the Appellant had been affixed to the notarial deed.

58. The Court of Civil Appeal ought, in the circumstances of the case, to have decided whether the 'Agreement' postulated a "clause pénale" or a "stipulation de dédit" and it was wrong in not deciding all the issues raised between the parties, in a case which was appealable to the Privy Council.

59. (I) The Trial Court erred in finding that there was a "clause pénale" in the 'Agreement'. Any reference to a "clause penale" by or on behalf of Appellant, was in fact a misnomer especially as the whole brunt of the argument was to refer to the refund of twice the deposit made (40,000 rupees) as being the consequence of the "faculté de dédit". p.24, l.3

(II) The words "clause pénale" are used loosely even by lawyers and authors to refer also to the "only monetary consequences which ensue when an obligation is not executed".

(III) 'It is often difficult to know if the sum given by the purchaser, when making a contract constitute truly earnest moneys given in the guise of a penal clause ..... In fact, by Article 1590, the debtor (of the performance) is FREE not to execute. The paying of double the sum by one party, the forfeiting of earnest moneys by another party, does not constitute the reparation of loss caused by the inexecution, it is in fact the exercise of a right given by the contract'. -

RECORD

- Vide Mazeaud - Leçons de Droit Civil (6th Edition) Tome Deuxieme (Premier Volume) "Obligations : - Thirty-third lecture page 752 - "Mais il est souvent difficile de savoir si la somme versée par l'ascheteur à la conclusion du contrat constitue des arrhes veritables en application d'une clause pénale .....

En effet, il resulte de l'Article 1590 que le débiteur est LIBRE De ne pas executer. Restituer le double pour l'un, perdre les arrhes pour l'autre, pas réparer un dommage causé par l'inexécution, mais bien exercer une faculté ouverte par le contrat."-

60. The Courts below ought to have held, in considering the question whether Respondent could, at his choice sue for damages or specific transfer of the properties - that

'the parties had intended to convert the principal obligation of Appellant into an obligation to pay an agreed sum, in the event of non-execution of the principal obligation".

p.35, l.5-11 This is supported by the passage in Dalloz Nouveau Code Civil Annoté - Article 1152 Note 3.

61. The Court of Civil Appeal made an error of record when stating at page 53 line 11 that the Respondent had made 'part-payments' under the contract. This error of record was repeated at page 56 line 9. In fact, the Respondent had paid only earnest money or a deposit, at the time of signing the 'Agreement' A. This deposit was, it is submitted, by way of 'arrhes' (earnest-money).

62. The Court of Civil Appeal committed another error of record when at page 55 line 21 it is stated that "once the Respondent appeared before the notary to pay the balance etc. ...."; the utmost the Court could hold was that Respondent was ready and willing to pay the balance. The deed of the Notary does not mention anywhere the fact of Respondent appearing to pay. It only says that Respondent appeared. The same error of record was made at the same page 55 line 8.

RECORD

63. The Courts below had no sufficient material upon which to infer that Appellant had 'renounced' (renoncé) to his power of withdrawal. Especially as "renunciation" is not to be presumed. (Dalloz - Encyclopédie Juridique - 2eme Edn. Vo. Preuve N.225).

64. The Trial Court and the Court of Civil Appeal erred respectively when holding that the sending of the Notice dated 17th December, 1973 amounted :-

(i) "to the manifestation of an unequivocal intention to proceed with the sale" - and constituted a waiver of Appellant's right "to liberate himself by paying damages"; p.55, l.11-16

(ii) that Appellant "had elected on a definite course which amounted to an offer which became irrevocable when the Respondent accepted it". p.55, l.16-22

65. The Courts below ought to have held that the Appellant when summoning the Respondent as he did, was only exercising his rights under the 'Agreement' without in any way giving up his rights of ultimately not signing the authentic deed of sale in favour of Respondent.

The summoning of Respondent to appear before the Notary was made by virtue of the 'Agreement' and could not in any way be considered as a new offer; this is borne out by the fact that Appellant was asking for payment of the balance under the 'Agreement' of 29th August, 1973. p.4, l.18

66. In the alternative, in the event of it appearing that the signing of the authentic deed by Appellant constituted an "obligation potestative" on the part of Appellant, the whole 'Agreement' in its entirety should have been deemed to be null and void by operation of law specially by virtue of Article 1174 of the Code Napoléon already cited. p.22, l.23 to p.23, l.2

The only duty would then have been for Appellant to restitute only the 20,000 rupees received by him under a null agreement.

RECORD

Article 1170 - La condition potestative est celle qui fait dépendre l'exécution de la convention d'un évènement qui'il est au pouvoir de l'une ou de l'autre des parties contractantes de faire arriver ou d'empêcher.

Article 1174 - Toute obligation est nulle lorsqu'elle a été contractée sous une condition potestative de la part de celui qui s'oblige.

(Translation: Article 1170 - A "potestative" condition is one which makes the performance of the contract depend upon an event which can be prevented from happening or can be caused to happen at the will of one or other of the parties.

Article 1174 - Every contract is void when the person who is bound to something has bound himself to a condition which is "potestative" on his part).

p.4, l.6 to 8

67. In paragraph 4 of the Statement of Claim, the Respondent himself averred that "the transfer of ownership" was to take place on the signature of the authentic deed which was to be drawn by Mr. Notary Maigrot". In so doing, Respondent admitted in effect that there had been no sale or promise of sale and the Courts below could not enforce and create by their judgment rights to transfer of ownership which could only come into being by the signature of Appellant to an authentic notarial deed.

p.31, l.11-12
p.32, l.5

68. (i) The questions about the nature of the deed or the intention of the parties where such intention is embodied in a document and on agreed facts, are not matters which are left to the 'sovereign appreciation' (souveraine appréciation) of the Trial Judges (Juges du Fond). Both the Trial Court and the Court of Civil Appeal, in the present case, erred in holding and/or proceeding on the assumption that the question of intention was for the Trial Judge only or the 'Jugesdu Fond'. In so doing, the Court of Civil Appeal

misdirected itself as to its powers to construe document 'A' - the 'Agreement'.

(ii) The jurisdiction and powers of a Court of Cassation in France prevents Cassation generally from considering matters of fact or intention of parties which it leaves to the 'Juges du Fond'. The 'pourvoi en Cassation' being always restricted to mis-interpretation of the law. Appellate Courts of Mauritius have jurisdiction to decide matters of law and facts with due regard to the advantage which a Trial Court has in assessing credibility or veracity of witnesses.

69. a) The Courts below erred in decreeing the claim of Plaintiff that "he was the lawful owner of the property".

b) The Courts below had no power to order the Appellant to sign any authentic deed nor to order that the Judgment of the Trial Court would stand in lieu of an authentic deed and be transcri able.

70. The Appellant hereby submits that the Judgement and Order of the Court of Civil Appeal of the Supreme Court of Mauritius dated 19th December, 1977 affirming the Judgement and Order dated 2nd February, 1977 was wrong and ought to be set aside for the following

R E A S O N S

(1) BECAUSE the 'Agreement' was not a promise of sale or contract to sell.

(2) BECAUSE no promise of sale or contract of sale was complete. The completion was expressly subject and subordinated to the reälisation of the authentic deed and to its signature by Appellant.

(3) BECAUSE, in the alternative, there was at the most "une promesse faite avec des arrhes" from which either party could withdraw under Article 1590 of the Code Napoléon.

(4) BECAUSE, in any event, until Respondent had actually paid the 65,000 rupees, no obligation on the part of Appellant came into existence to sign the notarial deed.

(5) BECAUSE, clause 4 of the 'Agreement', was in any event "a stipulation de dédit". The mentioning of even a "clause pénale" did not alter the character or effect of the "stipulation de dédit".

(6) BECAUSE, should it be held, that the realisation of the authentic deed depended entirely on the pleasure and will of Appellant, then the entire 'Agreement' is null and void, under Article 1174 entailing the only consequence of Appellant restituting the 20,000 rupees he had received.

(7) BECAUSE the Trial Judge and the Court of Civil Appeal misdirected themselves on the facts and on the law and did not apply the relevant provisions of the Code Napoléon relating to the interpretation of the 'Agreement' (in particular Articles 1152, 1174 and 1590).

(8) BECAUSE the Notice 'Mise en Demeure' served by Appellant was exercised in accordance with and under the 'agreement' and was not an 'itération' of a new offer to complete, but only a formal notice to Respondent to fulfill the contractual obligations - he had made. Because, further, by the said Notice, Appellant did not renounce the right not to sign the authentic notarial deed.

(9) BECAUSE the Courts below had no power :

(i) to order Appellant to execute a notarial authentic deed, or (ii) to order that the Judgment of the Court be transcribable.

(10) BECUASE the Judgment and Order of the Trial Judge and the Judgment of the Court of Civil Appeal in the Supreme Court of Mauritius partially affirming it were wrong and ought to be set aside.

MADUN GUJADHUR

JAYA KRISHNA CUTTAREE

No. 44 of 1978

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

CHOORAMUN JHOBOO — Appellant

- and -

ELIAS IBRAHIM COOWAR — Respondent

CASE FOR THE APPELLANT

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