RANJIT KUMAR BISWAS, Appellant, v. **PEARL ETHNA BURNETTE-BAKER,** Co-Lessor, Heir and Administratrix of the Intestate Estate of the Late **SAMUEL N. BURNETTE, SR.,** by and thru her husband , **J. NYEMA BAKER,** and **SAMUEL BURNETTE, JR.,** Co-Lessor, Heir, and Co-Administrator of the Intestate Estate of the Late **SAMUEL N. BURNETTE SR.,** Appellees.

MOTION FOR RE-ARGUMENT

Heard: November 10, 1983. Decided: December 21, 1983.

1. The prerequisites to the granting of a petition for re-argument postulate the previous appearance at the Supreme Court of the petitioning party, and his having fully presented his case to this Court, but that in spite of this, some point so presented and material to a decision in his favor had been, by inadvertence, overlooked in the opinion.

2. A petition for re-argument will be denied where the petitioner has failed to establish that the adjudication in question was grounded upon an oversight with respect to a material issue of law or fact.

Following an opinion of the Supreme Court, handed down on July 6, 1983, affirming the judgment of the trial court in an action of specific performance, the petitioner filed a petition for re-argument, wherein he contended that the Supreme Court had inadvertently overlooked a major point of law in its interpretation of the clause 'terms and conditions to be agreed upon'. On review, the Supreme Court held that the said clause was an executory contract which could not be enforced contingent upon the happening of an event, and that 'terms and conditions to be agreed upon' did not constitute a binding contract or obligation. The Court therefore re-affirmed its previous judgment and assessed costs against the petitioner.

Julius Adighibe and William Nelson Broderick appeared for the appellant/petitioner. Daniel Draper and Roger Steele appeared for the appellees/respondents.

MR. JUSTICE KOROMA delivered the opinion of the Court.

On the 6th day of July 1983, we handed down an opinion affirming the judgment of the trial judge of the People's Sixth Judicial Circuit Court, sitting in its December Term 1981, in an action of specific performance. On July 9, 1983, the petitioner/ appellant whose action had been dismissed at the disposition of the law issues and which dismissal judgment had been confirmed by us, took advantage of the Rules of this Court (Rule IX, Parts 1, 2 & 3), and petitioned the Court for re-argument alleging the following, to wit:

1. That certain palpable mistake was made in the opinion delivered by this Honourable Court by inadvertently overlooking some material facts and points of law. If clause four (4) of the lease agreement is carefully read, it will be clearly seen that the terms and conditions

to be agreed upon for the 15 years optional period refer to the amount of the annual lease payment which in any event shall not exceed 200% of the annual rental provided for the last 5 years of the period certain of the lease agreement, that is to say, more than $3,000.00 expressly and mutually agreed by both parties. To require petitioner to construct a third storey on the building at his own expense within six months to a year after the signing of the new lease agreement, the said third storey to contain two (2) residential apartments of two bedrooms each, etc., as contained in respondents'/appellees' exhibit "C" would be to impose new terms and conditions not provided for in the optional term of 15 years mutually agreed upon in clause 4 of the lease agreement, the cost of which will exceed $3,000.00, which fact the opinion of the Court inadvertently overlooked.

2. Petitioner submits as to the question of "offer" and "acceptance", the Court inadvertently overlooked the fact that not only did petitioner accept the offer made by respondents regarding the optional period of 15 years when it was clearly stated in clause 4 that "it is mutually agreed evidencing constructive acceptance, but in fact performed without variance by tendering the sum of $6,000.00 to cover payment for 2 years of the optional period in accordance with provision of the said clause 4 of the Lease agreement for the optional period establishing sufficient evidence of absolute acceptance by actual performance but which payment respondents refused to accept when the Court in its opinion said, "What we have here is an agreement to agree and as such we only see an offer being given but no corresponding acceptance (emphasis ours) without which the contract cannot be valid for lack of completion. This Court has often held that in order for a contract to be valid and thus enforceable, there must be a valid "offer", a valid corresponding "acceptance" and a valid consideration. Of these basic elements of a valid contract, "acceptance" actual or constructive, is the most importance."

3. Petitioner submits that in the argument before this Honourable Court on Thursday, April 14, 1983, petitioner's counsel specifically brought to the Court's attention and spread on records that several communications in writing were addressed to respondents proposing that both parties meet to discuss the terms imposed by respondents but which proposals respondents flatly rejected, referring to the letter of August 4, 1981 from respondents' counsel, Counsellor Daniel Draper in which he said: "...Besides the fact that she is out of the country, she decides to have no conference with you in respect of this particular lease since indeed your client, the doctor and lessee, has practiced deceit on her. Counsellor Draper in his argument never denied or challenged petitioner's counsel's statement that they had proposed meetings in writing. (See minutes/records of the court during the arguments Thursday, April 14, 1983, 12' day's session, bottom of sheet 2 of which petitioner respectfully requests this Honourable Court to take judicial notice. It is therefore evident that the Court in its opinion inadvertently overlooked this fact when it said: ...."If these terms were not acceptable to the petitioner, why did he decide to hide away from the

respondents rather than meeting them face to face or through written communication so as to iron out their differences?"

In a three-count resistance, the respondents/appellees prayed this Honourable Court to overrule the petition for re-argument and proceed to order the lower court to have its judgement enforced. For, they contended that the petition for re-argument was nothing more than a rehearsal of the petitioner's brief which was argued and determined by the Full Bench.

We have decided not to quote the resistance in this opinion as we did in the case of the petition, because we are not so much concerned with its merits or demerits in traversing and/or resisting the petition as we are particularly concerned with what our mistakes and inadvertence are in our opinion, the subject of our own review.

The prerequisites to the granting of a petition for re-argument postulate the previous appearance before this Bench of the petitioning party, and his having fully presented his case to this Court, but that in spite of this, some point so presented and material to a decision in his favor had been, by inadvertence, overlooked in the opinion. In the instant case, the point to which the movant has made reference as having been overlooked by this Court and that mistakes and inadvertence were made in its interpretation is that of clause four (4) of the lease agreement presented in counts 3, 4, 5 and 6 of the bill of exceptions and argued in counts 1 through 10 of the brief.

A judicial analysis and scrutiny of the contentions in the petition for re-argument will disclose that while the petitioner rests his petition upon the pivot of palpable mistakes made in the opinion delivered by this Court by inadvertently overlooking some material facts and points of law, this argument being a prerequisite to the granting of such petition yet, it appears very clearly that the petitioner is contending that this Court should have construed and interpreted clause four (4) of the lease agreement in the exact language and feeling of the petitioner, in that the petitioner has contended that the terms and conditions to be agreed upon for the 15 years optional period refer to the amount of the annual lease payment which in any event shall not exceed 200% of the annual rental provided for the last five years of the period certain of the lease agreement and not to what he calls "impose new terms and conditions not provided for in the optional terms of 15 years mutually agreed upon in clause 4 of the lease agreement." On the other hand, the opinion unequivocally construed and interpreted clause 4 as an "executory" or "conditional contract", with conditions precedent to the performance and assertion or attachment of rights under said contract. The opinion went further to state that an executory contract is one in which the obligation relates to the future, where a party binds himself to do or not to do a particular thing in the future. An executory contract conveys a choice in action as opposed to an executed contract which conveys choice in possession. Finally, the opinion declared that in consonance with the faces

and circumstances surrounding the case, there is no contract valid enough to warrant enforcement for want of certainty, and that what the court had before it as contained in clause 4, the bone of contention, was an agreement to agree.

We hold that Mr. Chief Justice Gbalazeh had admirably construed clause 4 of the lease agreement between the petitioner and respondents and had judicially interpreted our views in the opinion handed down in this case on July 6, 1983. For he expressly stated that clause four (4) is an executory or conditional contract with conditions precedent to the performance and assertion of right. This position of our distinguished colleague is well supported by legal authorities, whom we shall not proceed to quote.

As we cite the common law in support of our position and further explanation of clause 4 of the lease agreement, we shall take a microscopic look at said clause and note the issues laid therein. The contracting parties mutually agreed:

1. That the lessee shall have the right of option for the renewal of the contract;

2. That the optional period shall be 15 years;

3. That the optional period shall come into effect immediately after the expiration of the first 20 years period certain;

4. That terms and conditions will have to be agreed upon for the optional period by the contracting parties;

5. That whatever terms and conditions are agreed upon by the contracting parties for the optional period, the rental shall not exceed 200% of the amount that was paid for the period certain, that is, the first 20 years.

The five items constitute the ingredients of clause 4 of the lease agreement and the contracting parties are sounding the same note and in harmony with each other on all except item four. Item four being a condition in clause 4 of the lease agreement, let us see what legal authorities have said about its nature and classification:

"Generally speaking, a contracting party may impose such conditions in his contract as he desires and the law allows. A condition in a contract may be express or implied, and no particular form of words is necessary in order to create an express condition, although words and phrases such as 'if' or 'provided that' qualifying a promise, are commonly used to indicate that the duty of the promissor has expressly been made conditional, in the absence of anything in the contract to show that such was not the intention of the parties, and the employment of such words as 'when', 'after', 'as soon as' or "subject to" usually indicates that a promise is not to be performed except upon a condition of the happening of a stated event".

The word 'condition' has frequently been used by the parties to written instruments in a looser and broader sense than the law attaches to it. So far as the law is concerned, conditions in a contract may be classified as conditions precedent, and a 'condition' has been defined as either (1) a fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance of a promise arises, in which case the condition is a `condition precedent', or will extinguish a duty to make compensation for breach of contract after the breach has occurred, in which case the condition is a 'condition subsequent', or (2) a term in a promise providing that a fact shall have such an effect. Conditions in a contract have likewise been classified as 'suspensive' and `resolutory' conditions. If the obligation is not to take effect immediately but is liable to be defeated when the event happens, it is a `resolutory' condition.

A condition is to be distinguished from a promise in that a condition creates no right or duty of and in itself, but is merely a limiting or modifying factor; if it is breached or does not occur, the promisee acquires no right to enforce the promise. A promise, on the other hand, raises a duty to perform and its breach subjects the promissor to liability and damages, but does not necessarily excuse performance by the other party." 17 AM JUR 2d., Contract, § 320.

In defining and stating the essentials of a valid contract, the opinion of this court, now under review, went on record in these words:

"A contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligations".

The contract in the instant case has met all of these essentials of a valid contract and it is only the interpretation given by each party to the mutuality of agreement and mutuality of obligation, with particular reference to clause 4 that a controversy has arisen between the parties. Our distinguished colleague who expressed our views in the opinion of this Court well put it when he said, "what we have here is an agreement to agree". In other words, there is indeed mutuality between the contracting parties that the lessee shall have 15 years optional period to utilize the property of the lessors. That for this mutuality on the offer, the parties also mutually agreed that certain terms and conditions will have to be agreed upon. Among such terms and conditions that will have to be agreed upon, the annual rental for the optional 15 years shall not exceed 200% of the annual rent for the first 20 years period certain.

The contention of the petitioner that the terms and conditions for the optional 15 year period refer to the amount of the annual lease payment is a misconstruction and misinterpretation of clause 4 of the lease agreement. For, clause 4 of the lease agreement could have been written and read to convey a complete sense without this additional clause "on terms and conditions to be agreed upon". In other words, if the terms and conditions to

be agreed upon were referring to only the annual lease payment, then clause 4 could have been written thus:

"It is hereby mutually agreed that the lessee shall have the right of an option for the renewal of this indenture for a further period of fifteen (15) years immediately after the expiration of the first period of twenty (20) years certain; the rent, however, shall not exceed two hundred percent (200%) of the rent due for the last five (5) years of the period certain herein granted."

Hence, we must confirm the view of this Court well expressed by our colleague when he said that: "The appellees on the other hand interpret the provisions of clause 4 to mean that until such time that the conditions and terms of the new lease agreement, which include the 200% rental charges, are properly negotiated and agreed upon, there is no contract between the parties."

In further confirmation of this position of the Court on the point, let us make this analogy. Suppose the lessee (petitioner) had desired to expand or change his business during the 15 year optional period and therefore needed to enlarge the structure in which the business was housed, would it not have been the lessee's (petitioner's) right under clause 4 of the lease agreement to make such proposal and invite the lessors (respondents) to negotiate the terms and conditions of his proposal? Will the proposal and negotiation mean the same as the annual lease payment? Our answer being in the negative, our position must be and is a reaffirmation of our opinion.

Re-argument is intended to call the court's attention to the points of law and facts previously raised in the argument and which the court inadvertently overlooked to pass upon. Except where it is clearly shown and unequivocally supported by the facts in the records and law controlling the case that the Court has made palpable mistakes in the settlement of law and facts in a case, re-argument is not intended for any party to impose its own interpretation of any issue, be it law or fact, in the case, upon the Court. In the instant case, the petitioner has argued that the clause "on terms and conditions to be agreed upon" refers to the annual lease payment for the optional period of 15 years which shall not exceed 200% of the annual payment made during the last 5 years of the period certain. Hence, petitioner argued that this clause does not imply that any proposals should be made and negotiations held to agree upon any term and condition, except to decide and agree upon the percent of increment of the new rental payment for the 15 years optional period. This interpretation given to clause 4 of the lease agreement constitutes the basis of the petition for re-argument, quite contrary to what the law requires. In fact, this argument is suggesting that this Court should accept the interpretation given to the clause hereinabove quoted as a ground for the granting of the petition for re-argument instead of what the law prescribes. In other words, there is an open admission by the petitioner that this Court did pass upon the law and fact previously raised

in the argument, but that in doing so, it rejected the interpretation given to said law and fact by the petitioner/appellant. This Court would be setting a very ugly precedent detrimental to its dignity and repugnant to the health of the judiciary and good society if it would subjugate the interpretation of the law and the construction of the facts, being its principal office, to the desire and direction of the parties. As the final settlement of that fact and interpretation of the law in any case before this Court rest squarely and solely upon the shoulders of said Court, it would amount to a surrender of this most important office to the whims and notions of parties if they were permitted to dictate their own interpretation of a law or fact upon which a case or a controversy therein is determined. However, as judicial prudence can never encourage and support such practice, we hold and re-affirm our position in the opinion of this Court handed down on July 6, 1983 to the effect that the contract for the optional period is not valid for want of completion and therefore unenforceable. A petition for re-argument will be denied where the petitioner has failed to establish that the adjudication in question was grounded upon an oversight with respect to a material issue of law or fact. Caranda v. Richards, 14 LLR 294 (1961).

In view of the foregoing, it is our holding that the petition for re-argument should be and the same is hereby denied, and the opinion of the Court in the said case confirming the judgement of the lower court is hereby affirmed with costs against the petitioner. And it is hereby so ordered.

Motion denied.