

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 197/2011

SC/ HCCA/LA/ 349/2011

CP/HCCA/Kandy/186/2008(F)

DC Kandy No/32786/MR

Keva Fragrances (Private) Limited,
Devakaran Mansion,
No. 36, Mangaldas Road,
Mumbai 400 002.

Plaintiff

Vs.

1. Bobby Industries (Private) Limited,
No. 14, 1st Lane,
Mawilmada,
Kandy.
2. A. Razaak,
Managing Director,
Bobby Industries (Private) Limited,
No. 14, 1st Lane,
Mawilmada,
Kandy.

Defendants

AND

Keva Fragrances (Private) Limited,
Devakaran Mansion,
No. 36, Mangaldas Road,
Mumbai 400 002.

Plaintiff Appellant

Vs.

1. Bobby Industries (Private) Limited,
No. 14, 1st Lane,
Mawilmada,
Kandy.
2. A. Razaak,
Managing Director,
Bobby Industries (Private) Limited,
No. 14, 1st Lane,
Mawilmada,
Kandy.

Defendant Respondents

AND NOW BETWEEN

Keva Fragrances (Private) Limited,
Devakaran Mansion,
No. 36, Mangaldas Road,
Mumbai 400 002.

Plaintiff Appellant-Appellant

Vs.

1. Bobby Industries (Private) Limited,
No. 14, 1st Lane,
Mawilmada,
Kandy.
2. A. Razaak,
Managing Director,
Bobby Industries (Private) Limited,
No. 14, 1st Lane,
Mawilmada,
Kandy.

Defendant Respondent-Respondents

BEFORE : PRIYASATH DEP, PC, J.
SISIRA J DE ABREW, J.
UPALY ABEYRATHNE, J.

COUNSEL : M.U.M. Ali Sabri, PC, with Ruwantha
Cooray for the Plaintiff Appellant-Appellant
Faiz Musthapha, PC, with Ashiz Hassin for
the Defendant Respondent- Respondents

WRITTEN SUBMISSION ON: 24.11.2015 (Plaintiff Appellant-Appellant)
16.03.2016 (Defendant Respondent
-Respondents)

ARGUED ON : 29.10.2015

DECIDED ON : 11.08.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Central Province holden at Kandy dated 27.07.2011. By the said judgment the Civil Appellate High Court has set aside the judgment of the learned District Judge of Kandy dated 22.04.2008 and sent the case back to the District Court of Kandy for a trial *De novo* on the same pleadings. By the said judgment the learned District Judge has dismissed the action of the Plaintiff Appellant - Appellant (hereinafter referred to as the Appellant) instituted against the Defendant Respondent Respondents (hereinafter referred to as the Respondents) on the basis

that the Appellant has failed to prove the case. The Appellant sought leave to appeal from the said judgment of the Civil Appellate High Court and this Court granted leave to appeal on the questions of law set out in paragraph 13 (e) (f) (h) and (i) of the Petition of Appeal dated 06.09.2011. Said questions of law are as follows;

- (e) Did the High Court err in law in deciding to order a trial *Denovo* after clearly coming to a conclusion that the Respondents have failed to discharge the burden of proof thrust upon them by the court based on admissions so recorded?
- (f) Is the judgment of the High Court contrary to the principles of burden of proof wherein the Respondents have failed to establish payments for goods admittedly received and the Appellant has establish its case by proving supply of goods?
- (h) Did the High Court err in law in failing to arrive at the correct conclusion and to carry out with the right decision based on the materials and evidence surfaced and/or transpired during the trial as depicted by the case record in remitting the case back to trial *De novo* when the judges could have clearly entered judgment in favour of the Appellant?
- (i) Is the said order totally contradictory to the legal precedent created by the superior courts in similar circumstances?

The Appellant instituted the said action against the Respondent to recover a sum of US \$ 68,505/- together with the legal interest. The Appellant averred that he was carrying on a business of manufacturing and exporting perfume and fragrance essence based in Mumbai, India, and the 1st Respondent

was engaged in the business of the appellant in buying perfume and fragrance essence for about 20 years until the year 1998. At the beginning of the business with the Respondents, for several years, goods were supplied after the letters of credit opened at relevant banks and since the Respondent was able to demonstrate his trustworthiness, the goods were therefore supplied on sight draft issued by banks. After 1998 the Appellant noticed that the Respondents were in the habit of delaying payments for the goods supplied and certain consignments of goods had been left unpaid. Having noticed that the payments for 09 invoices had not been settled by the Respondent, in July/August 2002, the Appellant stopped supply of goods ordered by the Respondents. In paragraph 11 of the plaint the Appellant averred that the Respondent has failed to settle the monies due on following invoices.

<u>Proforma Invoice No.</u>	<u>Date</u>	<u>Amount US\$</u>
1. KF-233-1999	24.01.2000	4,500/-
2. KF-333-2000	14.03.2001	3,175/-
3. KF-17-2001	17.04.2001	8,050/-
4. KF-58-2001	23.05.2001	3,000/-
5. KF-116-2001	20.07.2001	11,275/-
6. KF-189-2001	13.10.2001	5,430/-
7. KF-287-2001	29.01.2002	5,250/-
8. KF-352-2001	30.03.2002	12,475/-
9. KF02-03/0090	10.07.2002	<u>15,350/-</u>
Total		<u>68,505/-</u>

Said invoices have been produced with the plaint marked P 1 to P 9. At the trial the Appellant has marked the said invoices as P 13 to P 21 and the Respondent has marked the same invoices as D 15 to D 23.

In paragraph 10 of their answer, the Respondents whilst denying the averments contained in paragraph 11 of the plaint, have averred that they have settled all the payments which were due to the Appellant from the Respondents. In proof of that the Respondents produced certain documents with the answer marked D 1 to D 9. The aforesaid position taken up by the Respondent crystallized the fact that the Respondent had received the goods in question. Hence the whole case revolves around the alleged payments made by the Respondents.

At the trial the Appellant raised the issues No 01 and 02 on the averments contained in paragraph 11 of the plaint as follows;

1. Was a sum of US\$ 68.505/- due from the Defendant to the Plaintiff upon the supplying of essential oil as mentioned in paragraph 11 of the plaint?
2. Did the Defendant default the payment of US\$ 68.505/- as reflected in the invoices mentioned in paragraph 11 of the plaint on demand to the plaintiff?

The Respondent raised issue No 06 on the averments contained in paragraph 10 of the answer as follows;

06. Did the Defendant settle all the payments to be made to the Plaintiff as reflected in documents averred in paragraph 10 of the answer?

In view of the issue No 06 the burden of proof shifted on the Respondent to prove his case and he was requested to begin the case. Accordingly the Respondent has called several witnesses from several banks to prove certain payments made by the said banks to the Appellant which were set out in paragraph 10 of the answer. I now deal with the evidence of the said witnesses since the

Appellant's grievance was that both courts have failed to evaluate the evidence of the witnesses correctly who testified for the case of the Respondent, and failed to consider the defence set out by the Respondent in the light of the evidence so led.

Witness Janaka Kurukulasuriya who represented the Union Bank testified to the effect that the letter dated 06th October 2004 marked V 4 was issued on the request of the Respondent to certify the fact that the transactions revealed therein had been made in favour of Keva Fragrance Limited, Mansion 36, Mangaladas Road, Mumbai, India, on behalf of the Respondent. Said transactions are as follows;

<u>Transaction Date</u>	<u>Transaction Ref. No</u>	<u>Amount US\$</u>	<u>Proforma Invoice No</u>	<u>Date</u>
11.05.2001	UBC/KDY/TT/01/01	3,000/-	73-S	10.04.2001
09.07.2001	UBC/KDY/TT/01/04	5,625/-	55-SE-01.02	18.06.2001
19.03.2002	UBC/KDY/TT/02/12	6,300/-	189-A-0102	05.02.2002
28.06.2002	UBC/KDY/TT/02/14	5,350/-	No number	20.06.2002

Witness produced the said invoices marked V 5, V 6, V 7 and V 8 respectively. It is clearly seen from the above details of the said documents that the Appellant's case was not based on the invoices marked V 5 to V 8. A comparison of V 5 to V 8 with P 13 to P 21 clearly exhibits that none of the said payments made by the Union Bank had been made to settle any of the amounts mentioned in the invoices P 13 to P 21. Witness Kurukulasuriya too in his evidence has admitted that the details contained in V 5 to V 8 do not tally with the details in P 13 to P 21.

Witness Darshan De Silva, who was called by the Respondent to prove the payments made by the Hatton National Bank, in his evidence producing a letter, dated 26.01.2005, marked V 1 said that the Hatton National Bank had transferred a sum of US\$ 7250/- in favour of Keva Fragrance Limited on

10.04.2001. The witness produced a hand written proforma invoice No 1/2001(S) dated 23.03.2001, which was relevant to the said transaction, marked V 2. It is clearly seen from V 2 that the proforma invoice number, date and amount indicated therein or the amount mentioned in V 1 do not tally with the proforma invoices marked P 13 to P 21.

The next witness called for the Respondent's case was Sashik Abdul Kadar, the Manager, International Branch, Peoples Bank. In his evidence he testified to the effect that on 09th of July 2001 the Peoples Bank International Branch had remitted a sum of US\$ 5650/- in favour of Keva Fragrance Limited. In proof of that he produced a letter dated 22.09.2004 marked V 9. Even though he could not produce a proforma invoice relevant to the said transfer of US\$ 5,650/-. The witness admitted that in the absence of such proforma invoice he was not in a position to substantiate the said payment US\$ 5,650/- was in respect of any of the invoices referred to in the plaint marked P 13 to P 21.

Witness Harsha Chaminda Walpola who represented the Hongkong and Shanghai Banking Corporation Limited, has produced a letter dated 01st September, 2004 marked V 11. In his evidence the witness said that the said letter was dispatched by the Bank to confirm the telegraphic transfer of a sum of US\$ 10,000/- on 20th June 2002 under reference TT KAN200030MNY favouring Keva Fragrance Pvt. Limited. It is clearly seen that said reference number and date, and the amount mentioned therein has no bearing on any of the invoices referred to in the plaint marked P 13 to P 21.

The next witness Mahinda Wijesundera Ranasinghe, an officer from the Bank of Ceylon, who gave evidence on behalf of the Respondent, produced a letter dated 6th September 2004 marked V 12 and testified that V 12 was sent to the Respondent in reference to his letter dated 19.07.2004 in confirmation of Swift

Transfer of a sum of US\$ 6,175/- on 19.03.2002. But the witness had not produced an invoice pertaining to the said payment of US\$ 6, 175/-. Hence the said payment of US\$ 6,175/- too does not demonstrate that it was made in settlement of money due upon the invoices marked P 13 to P 21.

Thus it is crystal clear that all the aforesaid payments revealed by the said witnesses had not formed a part of the payments due on the invoices produced at the trial marked P 13 to P 21.

When the evidence led at the trial on behalf of the Respondent was as such, it is clearly seen that the learned District Judge has erred in evaluating the said evidence in a correct perspective. He has failed to examine the alleged payments made on behalf of the Respondent by the aforesaid financial institutions upon a due comparison with the payments due on the invoices produced at the trial marked P 13 to P 21. The learned District Judge has failed to give adequate reasons for the conclusions reached upon the invoices marked P 13 to P 21 and the alleged payments which the Respondent prayed court to believe those were made in settling the amounts indicated in the said invoices.

The learned High Court Judges having reached the conclusion that there was absolutely no evidence to support the view that the payments that were made by the Defendant Respondent in fact were made in respect of 09 invoices annexed to the plaint, have concluded that the case to be sent back to the District Court of Kandy for a trial *Denovo* on the same pleadings. But unfortunately before arriving at such conclusion the learned High Court Judges also have failed to adhere to the requirements to be considered by a court of law whether the facts and circumstances that were revealed at the trial on evidence warrant the case to be remitted back to the trial court for a trial *Denovo*.

The relevant provisions in section 773 of the Civil Procedure Code empower the Court of Appeal, **where think fit, or, if need be**, to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit. (Emphasis is mine)

In Lada vs. Marshall [1954] 3 All ER 745 at 748, Denning, L.J. said, "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

These conditions were taken into account and applied in *Ratwatte vs. Bandara 70 NLR 231 (SC)* where the question of the admission of fresh evidence at the hearing of the appeal was referred to; It was held that "Reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz., (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, (3) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible."

According to the said evidence led at the trial the Respondents' contention that they have settled all dues on the said 09 invoices is untenable. On the other hand said evidence crystallize the fact that the Appellant has proved on a balance of probability that the amount the Appellant is claiming from the

Respondents is due to the Appellant. I have no hesitation in concluding that overwhelming evidence adduced by the Appellant at the trial suffices to decide the matter without sending back for trial *Denovo*. The learned High Court Judges have failed to address their mind to the said requirements in law prior to reaching to the conclusion of a trial *Denovo*. Hence I answer the said questions of law in the affirmative.

In the circumstances I set aside the Judgment of the learned District Judge of Kandy dated 22.04.2008 and the judgment of the High Court of Civil Appeal of the Central Province holden at Kandy dated 27.07.2011. I hold that the Appellant is entitled to a judgment as prayed for in the plaint with cost in all courts. The learned District Judge is directed to enter a decree accordingly. Appeal of the Appellant is allowed with costs.

Appeal allowed.

Judge of the Supreme Court

PRIYASATH DEP, PC, J.

I agree.

Judge of the Supreme Court

SISIRA J DE ABREW, J.

I agree.

Judge of the Supreme Court