

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal under the provisions of Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter L VIII of Civil Procedure Code, from the Judgement of High Court of the Western Province delivered on 22nd March 2002 in Case No. H.C. Civil 150/98(1).

Master Feeds Limited,
14/2, Tower Building,
25, Station Road,
Colombo 04.

Defendant-Appellant

S.C. (CHC) No. 11/2002

Vs.

Case No. H.C. Civil 150/98(1)

People's Bank

No.75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

Plaintiff-Respondent

Before : Hon. Amarathunga, J.
Hon. Ekanayake, J.
Hon. Priyasath Dep, PC J.

Counsel : K.M. Basheer Ahamed with U.M. Mawjooth for
the Defendant-Appellant.

S.A. Parathalingam, PC with J. Bodhinagoda for
the Plaintiff-Respondent.

Argued on : 29.08.2011

Decided on : 05. 04.2013

Priyasath Dep, PC J

This appeal was filed by the Defendant against the judgment of the Commercial High Court of Western Province dated 22-03-2002 which gave judgment in favour of the Plaintiff as prayed for.

The Plaintiff is a banking corporation established under the People's Bank Act No 29 of 1961. The defendant is a registered company and a customer of the Bank and in the course of its business imports goods and raw material. The Defendant been unable to finance its imports applied and obtained finance facilities from the Plaintiff Bank.

The Plaintiff at the request of the Defendant issued three Irrevocable letters of credit to the defendant to facilitate its imports.

The first Letter of Credit dated 27-10-95 was issued under Documentary Credit No: Corp/95/00969 for US \$30,600/-. (equivalent in Rs. 1,648,395/62) This Letter of Credit was issued to the Bank of Tokyo in favour of the beneficiary Sumitomo Corporation which is the exporter(seller). A deferred payment facility of 120 days was granted from the date of the Bill of Lading to the Defendant which expired on 17-01-96. The application for the irrevocable letter of Credit was marked as P1A and the Letter of Credit was marked as P2.

The defendant collected the documents related to the Letter of Credit send by the exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the Letter of Credit instead executed a Bill of Exchange for US \$30,600/- payable to the Plaintiff Bank which

was marked as P3. Plaintiff marked the memorandum pertaining to the payment to the beneficiary's bank as P3A and the Statement of Account as P4.

The second Letter of Credit dated 5-7-95 was issued under Documentary Credit No: Corp/95/00647 by the Plaintiff for US \$61,500/- (Rs 3,297,301/34) This letter of credit was issued to the Rabo Bank Nederlands (Singapore Branch) in favour of the beneficiary Intra Business Pvt, Ltd which is the exporter (seller). A deferred payment facility of 90 days was granted to the Defendant from the date of the Bill of Lading which expired on 4-10-95. The application for the Irrevocable Letter of Credit was marked as P5A and the Letter of Credit was marked as P6.

The defendant collected the documents related to the Letter of Credit sent by the Exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the Letter of Credit instead executed a Bill of Exchange for US \$61,106/- payable to the Plaintiff Bank which was marked as P7.

The third Letter of Credit dated 4-9-95 for US \$30,360/- (Rs 1,634,886/=) was issued under Documentary Credit No: Corp/95/00821. This Letter of Credit was issued to the Bank of Tokyo in favour of the beneficiary Sumitomo Corporation who was the exporter (seller). A deferred payment facility of 120 days was granted to the defendant from the date of the Bill of Lading which expired on 16-11-95. The application for the Irrevocable Letter of Credit was marked as P10A and the Letter of Credit was marked as P11.

The defendant collected the documents related to the Letter of Credit sent by the exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the letter of credit instead executed a Bill of Exchange for US \$30,360/- payable to the Plaintiff Bank which was marked as P12.

The Defendant having collected the documents from the plaintiff and having obtained the release of the goods failed and neglected to pay monies due to the Plaintiff Bank contrary to the terms and conditions of the agreements relating to the issuing of Letters of Credit referred to above.

As the Defendant failed to pay the amounts due under three Letters of Credit, the Plaintiff Bank instituted this action against the Defendant. Plaintiff contains three causes of action based on these three Letters of Credit.

The Defendant in its answer admitted paragraphs 1,2 and 5 of the Plaintiff. The Defendant admitted that it is a customer of the plaintiff bank and was granted banking facilities. The Defendant denied the rest of the averments in the Plaintiff. In its answer the Defendant averred that the Plaintiff does not disclose a cause of action and in any event the Plaintiff's action is prescribed. Further, it was stated that the Plaintiff's claim is inflated and excessive and includes taxes, levies and interest that the plaintiff is not entitled to recover.

At the trial the defendant admitted the signatures on the documents annexed to the Plaintiff marked P1, P5 and P10 (the applications submitted by the Defendant to the Bank for the issuing of Letters of Credit) and P3, P8 and P12 (Bills of Exchange). At the trial Plaintiff raised issue numbers 1-13 and the defendant raised issue numbers 14-15.

The Defendant raised the following issues.

Issue No.14

Does the Plaintiff disclose a cause of action against the defendant?

Issue No. 15

Is the Plaintiff's claim prescribed ?

Plaintiff led the evidence of Withanage Don Dayananda, Senior Manager of the Plaintiff Bank to establish its case. In his evidence he stated that the Defendant on three different dates submitted three formal applications in respect of each Letter of Credit which were marked as P1,P5 and P10. The Plaintiff Bank accepted the applications and issued Letters of Credit marked P2, P6 and P11. The Defendant was given a deferred payment facility of 120 days from the Bill of Lading in respect of Letters of Credit marked P2 and P11. In respect of Letter of Credit marked P5A a deferred payment facility of 90 days from the Bill of Lading was granted to the Defendant. The Defendant collected relevant documents from the Plaintiff Bank which was sent by the beneficiary's bank and got the goods released. At the time of collecting the documents the defendant did not pay the value of the goods to the Plaintiff and instead executed Bills of Exchange for the value of the goods. The Defendant after obtaining the goods did not pay the money due to the Bank. The Plaintiff Bank had paid the money due under the Letters of Credit to the beneficiary's bank and in proof submitted the bank memos marked P3a, P8a and P13 send to the Defendant. As the defendant defaulted in paying the sum of money owing to the bank, the bank had charged the normal default interest

from the Defendant from the date of expiry of the deferred payment dates. The bank produced Statement of Accounts in respect of each transaction marked P4,P9, and P14.

The Plaintiff closed its case reading in evidence P1 – P14. The Defendant failed to discredit the evidence of the sole witness for the Plaintiff and did not challenge the documents produced in courts marked P1 – P14.

The Defendant did not call evidence nor produced documents. The Defendant took up the position that the Plaintiff does not disclose a cause of action. The Plaintiff which contained 58 paragraphs includes three causes of action. Each cause of action was described in detail and contains all necessary particulars and also referred to the relevant documents which were subsequently produced and proved at the trial. Therefore, the learned High Court judge correctly answered this issue in the negative.

The Defendant's second issue was that the action is prescribed and for that reason Plaintiff could not maintain this action. The evidence revealed that the Defendant made requests in writing followed by formal applications to obtain Letters of Credit. The Application contains the terms and conditions under which the facilities were granted. The Defendant signed the relevant documents and Plaintiff accepted the applications and granted the facility. Each transaction is evidenced by a written document. As these agreements are in writing in terms of the Prescription Ordinance action could be filed within six years of the date of default. These transactions had taken place in 1995 and the action was instituted in 1998. The relevant portion of Section 6 of the Prescription Ordinance reads as follows:

“ No action shall be maintainable upon any written promise, contract, bargain or agreement,.....unless such action shall be brought within six years from the date of the breach of such written promise, contract, bargain, or agreement, or other written security.....”

The plaintiff had filed this action well within time and the action is not prescribed. The learned High Court Judge correctly rejected the plea of prescription and answered the issue in the negative.

The Defendant had also taken up the position that the claims are inflated and excessive. The Defendant when applying for Letters of Credit accepted the terms and conditions in the application. The clause 4 of each application has the following condition

“We undertake to reimburse any amounts disbursed or paid by you or your branches /agents under the credit or hereunder whether in negotiating draft or otherwise interest commission and all charges...”

The Plaintiff bank had produced Statements of Accounts marked P4, P9 and P14 giving the principal sum due under the Letters of Credit and the interest accruing from the date of default up to the time of institution of action. The Defendant when obtaining facilities agreed to pay the sum of money due under the Letters of Credit and the interests, BTT and the Defence levy.

The learned High Court Judge rejected the defences put forward by the defendant and answered the issues raised by the plaintiff in the affirmative and gave judgment in favour of the Plaintiff as prayed for.

Being aggrieved by the judgment of the High Court the Defendant preferred this appeal to the Supreme Court. The Petition of Appeal contains several grounds of appeal. However at the stage of the argument the defendant restricted the submissions to following two grounds:

- 1 Whether the Plaintiff-Respondent has proved that it paid and or disbursed monies under the said letters of Credit to the beneficiaries to recover the same from the Defendant-Appellant?
2. Whether the Plaintiff Respondent is entitled to recover interest at the rate of 34% per annum as claimed by it?

As regards to the first question it is the position of the Defendant that the Plaintiff is only entitled to reimbursement of monies paid by the Plaintiff to the beneficiaries under the Letters of Credit and that none of the documents produced by the Plaintiff showed that the Plaintiff had in fact paid monies to the beneficiary under the said Letters of Credit. The question that arises is whether the defendant took up this position at the trial. The defendant in its answer did not take up this position nor raised an issue. Further the Defendant did not cross examined the plaintiff's witness on this point. However after the recording of evidence and the conclusion of the respective cases in its written submission for the first time the defendant raised this matter.

In its written submissions the Defendant submitted that “the Plaintiff bank has not disbursed or paid to the beneficiaries the sums for which the application for Irrevocable Documentary Credit was made and Letters of Credit issued and there is no evidence whatsoever of such

payment or disbursement by the Plaintiff. It is respectfully submitted that the memos are not payments or proof that the Plaintiff Bank had paid the monies to the beneficiaries under the respective Letters of Credit.”

The Plaintiff’s witness while giving evidence stated that when Bank pays the amount due under the letter of Credit to the beneficiary’s Bank it debits the customer’s account and forward a memo to the customer. He testified that the Bank paid the beneficiary’s Bank (seller’s Bank) the monies due under Letters of Credit and thereafter debited the customer’s account. Memos were send to the customer informing that the payments were made. The defendant did not challenge this evidence. If the defendant raised this point at the trial stage and demanded strict proof of payment ,the Plaintiff could have offered additional evidence to supplement or strengthen the evidence already led. The learned High Court Judge did not consider this matter as it was raised for the first time in the written submissions and acted solely on the evidence led at the trial.

It is appropriate at this stage to examine how payments are made under international sales of goods using Irrevocable Letters of Credit. The issuing bank at the request of the buyer undertakes to pay the beneficiary’s bank (Seller’s Bank) sum of money covered under the Letter of Credit upon receipt of documents relating to the letters of credit or on a future date agreed by the parties. Issuing Bank can withhold payment under Irrevocable Letter of Credit only if fraud was established. In this case beneficiary’s bank duly submitted the documents under the Letters of Credit to the plaintiff bank. The plaintiff bank accepted the documents and handed over the documents to the defendant who obtained the release of the goods. In the circumstances the Plaintiff’s Bank is liable to pay the amount due under the letter of credit to the beneficiary’s bank. Similarly the Defendant is liable to pay the Plaintiff subject to deferred payment . If the Plaintiff bank did not pay the amount due or in other words dishonored the Letters of Credit the beneficiary’s bank could claim the amount from the Plaintiff and also from the Defendant. There was no such claim by the beneficiary’s Bank. This supports the Plaintiff’s position that the money was duly paid to the beneficiaries Bank.

The Defendant Appellant next ground of appeal is that there is no basis to charge 34% interest on default payment. The agreement is silent on default interest rate. In such an instance Bank could adopt the normal default rate of interest. According to the Bank’s witness, the Bank charged the rate of interest ordinarily charged from the defaulters in similar transactions. Defendant in its answer took up the position that the Plaintiff is not entitled to charge taxes, levies and interest but however failed to raise this matter as an issue. It is settled law that when issues are raised the pleadings will recede to background and the trial judge is required to decide on the issues.

The defendants both grounds of appeal involves question of facts not raised as issues at the trial stage and for that reason it is precluded from raising at the appeal stage. The principle laid down in of Candappa nee Bastian vs Ponnambalampillai reported in (1993) 1 Sri Lanka Law Reports pp185-190 which followed the cases 'The Tasmania'(1890) 15 App.Case 233 and Setha vs Weerakoon 49 NLR 225 is relevant to the facts of this case.

'A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law'.

The questions of facts raised at the argument stage was not raised as issues at the trial stage. The learned High Court Judge correctly decided the case on the issues raised at the trial.

I hold that the judgment of the learned High Court Judge is in order and I see no reasons to interfere with the Judgment. Therefore I affirmed the judgment of the High Court.

Appeal dismissed.

Defendant- Appellant to pay Rs 100,00 as Costs of the appeal to the Plaintiff- Respondent.

Judge of the Supreme Court

Gamini Amaratunge J

I agree

Judge of the Supreme Court

Chandra Ekanayake J

I agree

Judge of the Supreme Court

