

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

In the matter of an Application for Special  
Leave to Appeal under Article 128(2) of the  
Constitution of Sri Lanka.

Sri Co-operative Industries Federation  
Limited,  
Ceyesta Building,  
No.327, Galle Road,  
Colombo 3.

**Defendant-Appellant-Appellant**

S.C. Appeal No. 02/2005  
C.A. No. 1173/2002  
D.C. Colombo 24742/MR

**-Vs-**

Ajith Devapriya Kotalawala,  
Dharshana Electrical,  
202/106A,  
Isurupaya,  
Bandaragama Road,  
Kesbewa.

**Plaintiff-Respondent-Respondent**

**BEFORE** : Ms. Shiranee Tilakawardane, J.,  
R. A. N. G. Amaratunga, J., &  
Saleem Marsoof, P.C., J.

**COUNSEL** : Mr. T.M.S. Nanayakkara for Appellant  
  
Mr. C. Ladduwahetty for Respondent

**ARGUED ON** : 23.10.2008

**DECIDED ON** : 03.04.2009

MARSOOF, J.

This Court has granted the Defendant-Appellant-Appellant (hereinafter referred to as the "Appellant") special leave to appeal on the questions of law stated in paragraph 16 of his Petition dated 17<sup>th</sup> November 2004, which are set out below:

- a) Is there sufficient evidence for the Appellant to disclaim liability for the payment under item No: 01.01 of P4?
- b) In all the circumstances, is the Appellant not liable to pay the sum decreed by the District Court and the Court of Appeal?

It appears from the Appeal Brief that in 1997, the Appellant, a society registered under the Co-operative Societies Law No. 5 of 1972, called for tenders for the installation of the electrical system for its new *Ceyesta* factory in Navinna, Maharagama. The Tender Document issued by the Appellant marked P2 expressly described the *work* involved in the following manner:-

"The work covered by these tenders include the supply of all equipment and materials and erection at site and the provision of all plant, labour, documents, drawings, services in connection with the works described in these specifications and the tender drawings, all in strict accordance with the conditions set out in this contract Document and as required for handing over the complete Electrical Installation (400/230v) which shall be fully operational in every respect and intent."

Clause 9 of the part headed "Instructions to Tenderers" in the said Tender Document obliged the successful tenderer to furnish with his tender "all relevant information with respect to all equipment and materials included in his offer in order to allow full and detailed evaluation of his tender," and in the part headed "Specification of Work" it expressly provided in paragraph 0.2 that the contractor shall be responsible for *inter alia* "providing detail design, installation drawings, diagrams and schedules" and "completing the works to the satisfaction of Engineer and demonstrating both its satisfactory performance in accordance with the design intent and the accessibility of equipment, plant, wiring and accessories to facilitate maintenance work." He was also responsible for "drawing, the Engineer's attention to any discrepancies in documents, drawings or instructions issued after the time of tender, immediately upon receipt of same and prior to the commencement of any part of the works affected thereby."

The Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent") submitted a tender dated 18<sup>th</sup> September 1997 for the work described in greater detail in the Bill of Quantities marked P4. Though several other tenders were also received, the tender submitted by Respondent aggregating to a sum of Rs. 3,368,775.00, being the lowest, was accepted by the Appellant co-operative society by its letter dated 11<sup>th</sup> December 1997 marked P3. In the context of the questions on which special leave to appeal has been granted by this Court, it is instructive to refer to the Bill of Quantities marked P4, and in particular to items 01.01, 01.02 and 02.01 therefore, and the amounts tendered by the Respondent with respect to those items, which are quoted below:

Items No.	Description	Quantity	Unit Rate	Amount
01.01	Installation of 165 KVA Transformer	01	No.	627,500.00
01.02	Supplying and laying of 4 x 185 Sq mm PVC X LPE CU Cable from Transformer Room to the Electrical Room	300	Meters	17,500.00
02.01	Supplying and Installation of Main Switch Board consisting of the following complete with internal wiring according to the IEE regulations: one 400 Amp Change Over Switch, three 400 AF / 320 AT MCCB with UVT, one Indicator Lamps set, one Phase Failure Relay, one Earth Fault Relay, one Ammeter 0 – 400 Amp + Sel Sw, one Vold Meter + Sel Sw, one Poer Factor Meter, one 160 Amp MCCB, three 80 Amp MCCB, two 63 Amp MCCB, one 40 Amp MCCB, two 32 Amp MCCB, one 250 Amp MCCB, and three 20 Amp MCCB	01	No.	932,850.00

I note that the Bill of Quantities (P4) is a computer print out on which specific sums of money have been entered in the "Amount" column using a type-writer. This suggests that the Respondent merely typed on the Bill of Quantities provided by the Appellant co-operative society, the specific amounts he quoted for each of the items set out therein, and submitted his tender in accordance with the Tender Document marked P2.

It is common ground that the work has been completed, and the Respondent has been paid all money lawfully payable to the Respondent upon the completion of the work, subject to two exceptions. It is admitted that the Appellant has withheld the sum of Rs. 627,500.00 claimed by the Respondent for the *installation of the transformer* (item 01.01 in the Bill of Quantities), on the basis that the said transformer was supplied and installed by Lanka Electricity Company (Pvt.) Ltd. (hereinafter referred to as "LECO") and that the Respondent had no part to play in the installation of the transformer supplied by LECO. It is also admitted that the Appellant has paid the Respondent only 10% of quoted amount of Rs. 17,500.00 claimed by the Respondent under item 01.02 of the Bill of Quantities for *supplying and laying of 4 x 185 Sq mm copper cable* from the transformer to the electrical room of the factory, the balance 90% being withheld on the ground that the Respondent had to lay only 30 meters of cable.

The Respondent instituted action in the District Court of Colombo praying for judgment in a sum of Rs. 643,250.10, with interest at 22% per annum from the date on which the work was completed to the date of filing of action, and further legal interest from the date of judgement until payment is made in full, on the basis that although the Respondent has completed the work contemplated by items 01.01 and 01.02 of the Bill of Quantities, the payment of the aforesaid sum has been unlawfully withheld by the Appellant despite the recommendation of the Consultant Engineer of the Appellant that the same should be paid. The main questions for the District Court to decide were whether the Respondent had

installed the 165 KVA transformer as contemplated by item 01.01 of the Bill of Quantities and whether he had supplied and laid 300 meters of 4 x 185 Sq mm PVC cable which connected the transformer to the electrical room of the factory.

The District Court, after a brief trial, held that though the transformer was supplied and *affixed* to the ground by the Lanka Electricity Company (Pvt.) Ltd., (LECO), it was the Respondent who *installed* the transformer, laid the cable and provided the electrical connection. The District Court further held that the Respondent was therefore entitled to payment under item 01.01, but it disallowed the Respondent's claim for payment under item 01.02 as the Respondent had, in fact only laid 30 meters of cable for which he had already been paid by the Appellant. Dissatisfied with the said judgement of the District Court, the Appellant appealed to the Court of Appeal. The Court of Appeal, by its judgment dated 7<sup>th</sup> October 2004, affirmed the decision of the District Court. The simple question that arises in this appeal is whether the Respondent is entitled for payment under item 01.01 for the installation of the 164 KVA transformer at the Appellant's factory in Maharagama.

Before dealing with the submissions made by learned Counsel at the hearing of this appeal, it is necessary to refer to the report of Mr. K. Jagathchandra, Chartered Electrical Engineer, dated 10<sup>th</sup> July 2006, which was tendered to Court by the Attorney-at-Law for the Appellant with a motion dated 22<sup>nd</sup> August 2006, with the following recital:-

"Whereas when this matter came up before the Supreme Court, the Court directed the Defendant-Appellant-Appellant to refer this matter to an independent person; and whereas the Defendant-Appellant-Appellant requested a retired Deputy General Manager of the Ceylon Electricity Board to go into the matter and report;

The Defendant-Appellant-Appellant moves that permission be granted to file the said report and the same is filed herewith and move that Your Lordships' Court be pleased to accept the same."

The report of Mr. Jagathchandra states that there was no necessity for the Respondent to carry out any part of the work contemplated by item 01.01 of the Bill of Quantities as the said work had to be carried out by the authority that supplied and installed the transformer, which in this case was the Lanka Electricity Company (Pvt.) Ltd., (LECO) which carried out the functions of the Ceylon Electricity Board (hereinafter referred to as "the CEB") in the relevant area, and hence no payment is due under that item to the Respondent. However, journal entries and orders made by this Court do not substantiate the position that the Court had referred this matter for a report by "an independent person" as set out in the said motion, nor do they disclose that the said motion has been supported or accepted by this Court. In fact, in paragraph 15 and 16 of the further written submission filed on behalf of the Respondent, objection has specifically been taken to the acceptance of this report, specifically on the ground that apart from the absence of a prior order of this Court calling for a report, the Respondent has not been consulted in the process of selection of this "independent person". Learned Counsel for the Respondent has submitted that this report is a self-serving document which is totally biased in favour of the Appellant, and should therefore be rejected. In the circumstances, in view of the fact that there is no indication in the docket of this appeal and journal entries thereof that such a



fact, under cross-examination (at page 75 of the Appeal Brief), he was specifically asked about how he quoted for the installation of the transformer under item 01.01 in the Bill of Quantities marked P4, and his answers are quoted below-

22m% : .sjsiqug w;aika lrk fj,dfjs lshj,d ne,qfjs keoao @  
W : .sjsiqug w;aika lrkjd lshkafka ta f.d,af,daa bosrsm;a lrmq fgkav¾ m;%hg us<  
.Kka oeuSula muKhs wms lf,a' ta whs;uhka ilyd hk us< .Kka lshkak muKhs  
wmg ;sfnkafka'  
m% : ;ukaf.a .sjsiqfus fldgilao keoao lshk tl meyeos,sj lshkak @ me' 4  
f,aLKfha 01.01, 01.02 lshk fldgia hgf;a js¥,s g%dkaiaf\*daurhla ijs l,do @  
W : g%dkaiaf\*daurh ijs lrkak wmsg jsosyla keyefka'  
m% : ijs l,do @  
W : ijs lf,a keye'22

It is clear from the answer to the last quoted question that the Respondent did not install the transformer, which admittedly was supplied by LECO. This is further evident from the following portion of his further cross-examination at page 80.

22m% : fusfla whs;sh ;sfnkafka f.dvke.s,af,a whs;slreg' f.dvke.s,af,a whs;slre  
g%dkaiaf\*daurh us,oS .;a nj ;ud okakjdo @ Bg miafia ;udg fil ýkagd @  
W : us,oS .;a;u ug ýkafka keye, f.k,a,d ijs l,d'  
m% : ljsi ijs lf,a @  
W : jsý,s n, iud.fuka (LECO)  
m : ;ud fuu g%dkaiaf\*daurh us,oS .;af;;a keye, ;ud ijs lf,;a keye @  
W : keye'22

In fact, it appears to be the position taken up by the Respondent, in his evidence that the work done by him was to connect the transformer to the electricity room of the factory by laying 4 x 185 Sq mm cables and supplying and installing the Main Switch, and doing the internal wiring. It has been stressed by learned Counsel for the Appellant that these items of work were in fact covered by items 01.02 and 02.01 of the Bill of Quantities, for which the Respondent, admittedly, has been paid in full.

The entire case of the Respondent was based on the letters dated 10<sup>th</sup> July 1998 (P6) and 21<sup>st</sup> October, 1998 (P5) which the Electrical Consultant of the Appellant co-operative society, Rohan Jayasinghe, had sent to its General Manager after the dispute arose. It transpired in evidence that the said Rohan Jayasinghe (hereinafter referred to as the "Engineer") was engaged by the Appellant as the Engineer under whose supervision the work was performed by the Respondent, and that one of his functions was to measure and check the work periodically and recommend payment. When the Respondent claimed payment under items 01.01 and 01.02 of the Bill of Quantities (P4) and the Accountant of the Appellant raised certain queries, the Engineer wrote the letter dated 10<sup>th</sup> July 1998 (P6) addressed to the General Manager of the Appellant clarifying that item 01.01 of the Bill of Quantities (P4) did not contemplate the *supply* of the transformer and was confined to the *installation* of the transformer that was supplied by LECO. In P6, the Engineer merely stated that-

22by; l¾udka;dh;kfha jsý,s g%dkaiaf\*daurh ilyd us,.Kka leojSfu weia;fuka;+ jd¾;dfj  
we;+;a lr we;af;a g%dkaiaf\*daurh ijslrsu ioyd muKla nj;a" iemhSu ^jsý,s

g%dkaiaf\*daurh& thg we;+;a lr fkdue;s nj;a okajk w;r o¼Yk bf,lag%sl,aia wdh;kh  
u.ska fgkav¾ uKav,h ms<s.kakd ,o uq,q uqo,g g%dkaiaf\*daurh iemhSu ioyd uqo,la  
we;+;a lr fkdue;s nj oekajSug leue;af;us'<sup>22</sup>

The gist of P6 is that the cost of the transformer has not been included in the quotation for the installation of the transformer made by the Respondent. It appears that the Appellant co-operative society was not satisfied with this clarification and had requested the Respondent to give a statement of the work he claimed he had done under items 01.01 and 01.02 of P4. This he did by his letter dated 26<sup>th</sup> August 1998, marked P7, addressed to the General Manager of the Appellant setting out the basis of his claim under these two items aggregating to Rs. 645,000.00. The said letter contained a list of work claimed by the Respondent to have been performed under items 01.01 and 01.02 of P4, which list is quoted below in full in view of its significance:-

22kdjskak kj lrAudka; Yd,dfõ jsÿ,s /yeka weoSug ioyd wm us< .Kka bosrsm;a l<  
fgkavrfha 01-01 yd 01-02 ork whs;uh ioyd jeh l< jshoï igyk

01 4 x 185 fmd<jhg ;ekm;a lrk m%Odk jh¾ uSg¾ 30 la us,oS .ekSug ^tx.,ka;fha kslamdos;&	264"800'00
02 flan,h ;ekam;a lsrSu ioyd ldkqj lemSu" nsu ilia lsrSu yd fldkaIS%Ü ldkqj ieliSu'	43"000'00
03 je,s lshqí 03 la us,oS .ekSu ijyd	3"800'00
04 flan,h u;+msg we;s fldgi ;yvq u.ska wdjrKh lsrSu lsrSu ioyd ^flan,a g%lalska&	18"000'00
05 400 A /Mp m%Odk fika iqjsph ilia lsrSug wjYH f,day fmÜgsh ieliSu yd tu fmÜgsh ijslr iuznkaO lsrSu	128"000'00
06 185 Sq x 4 m%Odk jhrh m%Odk iqjsp mqjrejg iinkaO lsrSu yd mrs:m:h wx. iimQ¾K lsrSu ioyd Wm fldka;%d;alreg f.jk ,oS	86"000'00
07 wdh;ksl jshoï m%jdyk .dia;=" js¥,s iud.ug fiajd iemhSu ioyd wjYH m%udKh iemhSu yd wdh;k .dia;+j	91"600'00
08 flan,a ,skala us<oS .ekSu yd tu ,skala ijs lsrSu ioyd hka;%h l=,shg .ekSu	9"800'00 <sup>22</sup>

It will be seen that the above-quoted list contains eight heads of expenditure claimed by the Respondent himself to have been incurred under items 01.01 and 01.02 of P4, which I have translated as follows:

01. Cost of 4x185 Sq mm Cable (produced in England)	264,800.00
02. Excavation and preparation of ground and construction of concrete base for installing Cable	43,000.00

03. Cost of 3 cubes of sand	3,800.00
04. Cable tracking	18,000.00
05. Supplying and fixing of the metal box to which the 400 Amp primary main switch has to be fixed	128,000.00
06. Payment to sub-contractor for connecting 4x185 Sq mm cable to the primary main switch and completing circuit	86,000.00
07. Establishment cost, transport charges, cost of supplying of necessary material for LECO for the supply	91,600.00
08. Fixing of cable links and hiring of machinery for this purpose	9,800.00

It is significant that at the bottom of P7 there is an endorsement by the Engineer, which the Respondent claims was in effect the certificate of the Engineer that the said work has been performed by the Respondent, and equally significantly, that the total sum of 645,000/- is payable under items 01.01 and 01.02 of the Bill of Quantities. This too did not satisfy the General Manager of the Appellant society, and I would not blame him for the doubts he entertained as it is manifest that items 01, 02, 03, 04, and 08 of P7 relate to item 01.02 of the Bill of Quantities, which is the supplying and laying of 4x185 Sq mm cable, and items 05, 06 and 07 of P7 relate to item 02.01 of the Bill of Quantities, which is the supply and installation of the Main Switch Board, *for all of which admittedly the Respondent had by that time been fully paid.*

It was in these circumstances that the General Manager of the Appellant society, by his letter dated 4<sup>th</sup> September 1998 (not marked in evidence by either party but referred to in P5) appears to have sought further clarifications from the Engineer. The letter dated 21<sup>st</sup> October, 1998 (P5) was the Engineer's response to this letter, in which he observes that-

22tys 01-01 whs;ufha g%dkaiafmdaurh iinkaO lsrSu iinkaOj ud úiska bosrsm;a lr we;af;a re. 6,57,500/= ls. ud tu uqo, bosrsm;a lf<a g%dkaiaf\*daurh iúlsrSu ilyd ú¥,s n, uKav,hg jeh jk uqo, fkdí,ld yerh. Bg fya;+j wka lsisu mqoa.,fhl+g fyda fldka;%d;alrefjl+g ú¥,s g%dkaiaf\*daurhla iúlsrSfí whs;shla ke;s ksidh. th ú¥,s n,uKav,fhkau isyúh hq;a;la nj ud oek isá ksidh. f.úu isy l< yelafla fiajdodhlhdg muKs.

m%udK ì,am;%fhys 01-02 whs;ufha g%dkaiaf\*daurhla isg ú¥,s ldurh olajd 4x185 Sq MM flan,h weoSu ilyd ñ. 300 la ilyd re. 17"500/= la olajd we;. tysoS ñ. 300 la ilyka lf<a g%dkaiafmdaurhla bvfi fl,jr mrK g%dkaiafmdaurh wdikakfha iúlsrSug uq,oS ie,iqí l< ksidh. miqj ia:dkh fjkia lsrSu ksid ñ. 30 lska th ksu l< yels úh.

ta ilyd ud bosrsm;a lr we;s ñ, .kkao m%udKj;a fkdjk nj uu ms<s.;sñ. tfy;a wxl 01 whs;ufha tl;+j f,i ie,flk 01-01 g%dkaiafmdaurhla iúlsrSí yd tys isg 01-02 flan,h iemhSu yd t,Su hk jev fldgia folu ilyd ud bosrsm;a lr we;s ñ, .kk idOdrKh. fldka;%d;alref.a fgkav¾ b,a,Sfuys whs;u wxl 01 ilyd bosrsm;a lr we;s uqo, ^6,27,500 + 17,500& = 6,45,500/= ls th b;d idOdrK uqo,ls. ....

wjldk jYfhka ud ilyka l< hq;af;a m%udK ì,a m;%h ilia lsrSfíoS ud w;ska m%udo fodaYhla isyù we;s nj;a tA ksid ú¥,s /yeka iemhSu yd weoSu iikaO fldka;%d;a;+fjka



Tn wdh;khg uQ,Huh jYfhka lsisÿ mdvqjla fyda wjdishla isÿ ù ke;s njhs. fi wkqj fldka;%d;alre 01 whs;uh ijyd b,a,d we;s uqo, f.ùu idOdrK nj uf.a ks¾foaYhhs.<sup>22</sup>

This is a rather interesting letter, in which the focus is on the reasonable nature of the amounts quoted by the Respondent for items 01.01 and 01.02 of the Bill of Quantities, and the only reference to work that has been completed relates to the fact that work contemplated by item 01.02 was performed by laying 30 meters of cable. Nowhere in P5 does the Engineer seek to assert or certify that the Respondent has performed the work envisaged by item 01.01 of the Bill of Quantities, namely the installation of the 165 KVA Transformer, although he has stated categorically that it is reasonable to pay the amount claimed by the Respondent under this item. It is difficult to understand how the Engineer sought to recommend the payment claimed by the Respondent under item 01.01 of the Bill of Quantities in the face of the Respondent's letter P7 in which the Engineer through his endorsement appears to certify that *certain other work* (which did not include the installation of the transformer) has been performed by the Respondent under this item.

In this context, it is important to note that the learned District Judge and the learned Judges of the Court of Appeal have relied heavily on P5 and P6, and emphasised the fact that the Engineer, who was employed by the Appellant society, has recommended the payment of the amounts claimed by the Respondent under items 01.01 of the Bill of Quantities (P4). The Court of Appeal has in fact observed that-

“.....the evidence had disclosed that the Electrical Consultant of the Defendant-Appellant had *recommended to the Defendant-Appellant by the letters P5 and P6* that the payment for the item 01.01 in the Bill of Quantities (P4) be made to the Plaintiff-Respondent for the reasons mentioned therein.” (*My emphasis*)

In my view, the trial court and the Court of Appeal have fallen into the error of being guided solely by the statements of the Engineer contained in the letters marked P5 and P6, in circumstances where the truth of such statements have not been admitted by the Appellant, and are in fact somewhat contradicted by the contents of P7. Furthermore, the Engineer who wrote the letter P5 and P6 and endorsed P7 had not been called to testify in the case. The omission on the part of the Respondent (who had listed him as one of his witnesses) to call the Engineer to testify is glaring in the context that the Respondent had in his testimony (at page 68 of the Appeal Brief) stated that when he sought clarification from the Engineer about the role he was expected to play in the “installation” of the transformer under item 01.01 of the Bill of Quantities, the Engineer did not offer any explanation but indicated that if any problem arises, he will pay.

<sup>22</sup>fuu ^1& fjks tfla ima,hs ke;af;a” fgkav¾ m;%h yomq frdydka chisxy uy;df.ka uu weyqjd fifla bkaiafgdf,alka tl fudllao lsh,d f;areī lrkak lsh,d’ t;fldg chisxy uy;d lsōjd fifla uqo,a f.jSu iinkaOj ug ;uhs ndr oS,d ;sfnkafka’ Thdf.a jefvs lrf.k hkak fudkj d yrs m%Yakhla jqfkd;a uu f.jkak Tsk’

To me, this sounds like the blind leading the blind, but had the Engineer been called into the witness box, he would no doubt have had the opportunity to corroborate or contradict the position taken by the Respondent, whilst clarifying some of the vital matters that were in issue in the case including the manner in which he had discharged his professional responsibilities as Consultant Engineer for the Appellant co-operative society.

Relying on the *truth of the contents of P5 and P6* is clearly contrary to the hearsay rule enunciated by the English courts and recognized by our courts in decisions such as *Eliatamby v. Eliatamby* 27 NLR 396 in which Lord Darling delivering the opinion of the Privy Council at page 400, emphatically rejected the proposition that the Evidence Ordinance “practically swept away all the English law relating to hearsay.” The hearsay rule is so firmly established in Sri Lanka that it is instinctively followed and applied by our courts, and in *Sheila Seneviratne v. Shereen Dharmaratne* [1997] 1 Sri L.R. 76, the Supreme Court even set aside an *ex parte* decree which was based on hearsay. Where the court is called upon to rely on any statement contained in a document such as P5 or P6 without the maker of the document being called to vouch for the truth of such statements, it has been observed by the Privy Council in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, at page 970 that-

“It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made.”

It is, therefore, legitimate for the Respondent to rely on P5 and P6 to show that the Engineer had in fact recommended payment, without relying on the truth of any assertion made by the Engineer in either of these documents. Such use would not offend the hearsay rule, but no such recommendation can be deemed to be conclusive in the face of evidence which clearly show that the recommendation is not well founded. In this case, the fact that the Engineer had recommended payment has been virtually admitted by the Appellant society, which very consistently disputed the correctness of the recommendation on the basis that to act thereon and make payment would result in loss to the co-operative society which has already paid LECO for not only the supply but also the installation of the transformer.

The burden is always on the plaintiff to prove his case, and in my opinion, the reception in evidence of the letters marked P5 and P6 would not *per se* relieve the Respondent of the burden of establishing on a preponderance of probabilities that he had in fact performed the work contemplated by item 01.01 of the Bill of Quantities. In my considered view, the Respondent has miserably failed in this respect, and I find it extremely difficult to agree with the conclusion of the Court of Appeal that the learned District Judge has based his findings on a correct analysis and evaluation of the evidence. I am of the opinion that the decisions of the lower courts are clearly contradicted by the evidence in the case, particularly in the context that the Respondent, in his testimony, has consistently taken the position that he *did not* install the transformer but only linked it by laying 30 meters of cable to the electricity room of the factory *after the transformer was installed by LECO*, which position is corroborated by not only the letter P7 sent by the Respondent to the Appellant with the Engineer’s endorsement but also the quotation marked D2 and voucher receipt marked D3 which show that the transformer was in fact supplied *and installed by LECO*, for which a sum of Rs. 596,322.00 was paid to it by the Appellant co-operative society. Another intriguing aspect of this case is that the Respondent has claimed a sum of Rs. 627,500.00 to *install* a transformer which had cost the Appellant society only Rs. 596,322.00.

A curious feature of this case is that the Respondent, in his testimony, has consistently taken the position that he *did not* install the transformer. Despite the fact that the

Respondent in his testimony conceded that he could not, and actually did not, install the transformer, the record of proceedings before the District Court reveals that an attempt was made by learned Counsel for the Respondent to suggest to Upali Indrajith Ariyadasa, the General Manger of the Appellant society that the Respondent had in fact provided a metal cover to protect the transformer. I quote below part of the cross-examination (page 90-91 of the Appeal Brief) in which this baseless suggestions was made-

22m% : uy;auhd okakjdo g%dkaiaf\*dau¾ tl f.kd fj,dfjs tal ijslrkak f,dayj,ska ;kk ,o wdjrKhla iEÿj nj okakjo @  
W : g%dkaiaf\*dau¾ tl yokak tfyu fohla ;snqfka keye'  
m% : g%dkaiaf\*dau¾ tl f.akfldg tal wdjrKh lsrSu ilia lsrSu lrrkak Tsk meusKs,slre lsh,d okakjo @  
W : keye  
m% : wdjrKh lsrSu lf,a meusKs,slre lsh,d ;ud okakjo @  
W : wdjrKh lsrSula lf,a keye'  
m% : ;ud lshkafk wOslrKhg wi;Hhla' ;ud wi;Hhla m%ldY lrrkjd lsh,d ;udg uu lshkafka @  
W : ke; uu m%ldY lf,a wi;Hhla' fkfjhs'  
m% : ;ud okakjd Th g%dkaiaf\*daurh T;kg ijs lrrkak biafi,a,d talg odkak Tsk flan,a j.hla @  
W : Tjs  
m% : ta flan,a oeusfus fi meusKs,slre @  
W : keye ,xld jsÿ,s n, uKav,h u.ska mdf¾ bl,d flan,a wfma fldimeKshg oeiffi' iemhSu iy boslsrSu lf,a ,xld jsÿ,s n, uKav,h' tal t;kg .syska n,kak mq^jka'  
m% : ;ud okakjdo g%dkaiaf\*daurh f,day wdjrKhlska jy,d ;sfnkafka @  
W : wfma g%dkaiaf\*daurh tfia jid ke;'<sup>22</sup>

In my opinion, the said suggestion is without foundation, as the Respondent in the course of his testimony never claimed that he had installed a metal cover (**f,day j,ska ;kk ,o wdjrKhla**) for the transformer or drew any cable from the main line to the transformer. It was the position of the Respondent that he only laid the cable to link the transformer to the electricity room of the factory, which is covered by item 01.02 of the Bill of Quantities (P4).

In regard to this item of supplying and laying of cable, it appears that the Respondent had sought relief from the District Court on the basis of the quantity for which he tendered, which was altogether 300 meters, despite his admission that in fact he had only laid 30 meters of cable. This becomes apparent from the letter of the Engineer dated 21<sup>st</sup> October 1998 (P5), in which he himself has explained that it became necessary to lay only 30 meters of cable because the original place where the transformer was to be installed was later shifted to a point much closer to the factory. The Respondent has, however, testified at the trial that he had to incur much higher expenses than what had been quoted by him for item 01.02 to complete the work of "supplying and laying" copper cable from the transformer to the electrical room. According to the Respondent, the said cable was imported from the United Kingdom, and cost Rs. 7,500 per meter. His testimony (at page of the Appeal Brief) refers to this matter in the following manner:-

22m% : ;ud fuu 01.01 hgf;a ;sfnk g%dkaiaf\*daurh ijs l,do @  
W : g%dkaiaf\*daurh ijs lf,a keye' g%dkaiaf\*daurha bl,d jsÿ,sh ,nd ÿkakd l¾udka; Yd,dj ;=,g

m% : whs;u 01.02 ;sfnkafka jsy,sh jh¾ weo,d f.dvke.s,a, ;=,g oeuSu @  
W : 01.02 fjks tfla uu woyia lf,a tal ilyd hk f,an¾ pd¾ca j,g;a us,suSg¾ 185 ) 4 orK  
jh¾ uSgrhlau fj<lfmdf,a us, re( 7500 la fjkd tajdg hk jshou'<sup>22</sup>

If this be so, 30 meters of the copper cable would have cost him a tidy sum of Rs. 225,000.00, which is very much more than the sum of Rs. 1,750.00 quoted by him and paid under item 01.02 of the Bill of Quantities. The learned District Judge has in fact, summarily dismissed his meager claim of Rs. 17,500.00 under this item on the basis of an admission made before the trial court before which the only issue was whether the Respondent had laid 300 meters of cable. It may very well be that the amount quoted by the Respondent under item 01.02 was Rs. 17,500.00 per meter, which will take the Respondent to a sum of Rs. 525,000.00 for this item alone, but that was not the basis on which his case was presented in the trial court. Here we can only speculate, but the question may again be posed as to why the Respondent did not call his best possible witness, Consultant Engineer Rohan Jayasinghe, to clarify this matter and support the Respondent's claim that the sum of Rs. 17,500.00 was only the labour rate and excluded the cost of the cable supplied by him. The answer probably is that item 01.02 of P4 very clearly contemplates the "supplying and laying of 4 x 185 Sq mm PVC XLPE CU cable" from the transformer to the electrical room of the factory, and persistence with this line of reasoning would have exploded the distinction drawn by Counsel for the Respondent between item 01.02 which provided for only the installation of the transformer, and certain other items such as item 01.02 providing for "supplying and laying" and item 02.01 providing for "supplying and installing".

It is also important to stress that the Respondent has not appealed against the decision of the learned District Judge with respect to item 01.02, and hence it is not possible to re-agitate this matter in the course of this appeal as the doctrine of *res judicata* would clearly preclude such a course. It is therefore my firm view that there is no justification for the Respondent to include in P7 the sum of Rs. 264,800.00 as the cost 4x185 Sq mm cable imported from England, or the other amounts specified in items 02, 03, 04 and 08 which I presume were incidental to the work of laying the said cable, which add up to an additional Rs. 74,600.00. The Respondent had already been paid the amount quoted by him for supplying and laying the cable in question, and he can claim no more.

The same observation may also be made regarding the claims made by the Respondent in his letter dated 26<sup>th</sup> August 1998 (P7) under items 05, 06, and 07. Under these items, he has claimed Rs. 128,000.00 for supplying and fixing the metal box to which the 400/ AP primary main switch has to be fixed, Rs. 86,000.00 on account of money alleged to have been paid to LECO as sub-contractor for connecting the 4x185 Sq mm cable to the primary main switch for completing the circuit, and a further sum of Rs. 91, 600.00 as establishment cost, transport charges and the cost of supplying of necessary material to LECO for this purpose. It is manifest that these items relate to the "supplying and installation" of the 400 AP Main Switch Board, which falls under item 02.01 of the Bill of Quantities, for which the Respondent had already been paid a sum of Rs. 932,850.00 on the basis of his own quotation. In fact, here, there is even less justification for including these items in P7, as there is neither any allegation nor any evidence to the effect that the Respondent had incurred any extra costs on account of this work.

Although I am compelled by the foregoing to disagree with the assessment of the evidence made by the lower court and the Court of Appeal in the peculiar circumstances of this case,

I am not unmindful of the fact that an appellate court would not lightly interfere with the decision of the trial judge who had the advantage of seeing and hearing the testimony of witnesses who are called to give evidence. In *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243 at 248, Viscount Sankey L.C. quoting James L.J. in *The Sir Robert Peel*, 4 Asp. M. L. C. 321, at 322, emphasized that an appellate court-

“will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour *unless they find some governing fact which in relation to others has created a wrong impression.*”

In *Munasinghe v. Vidanage* 69 NLR 97, the Privy Council quoted with approval an extract from the speech of Viscount Simon in the decision of the House of Lord in the oft-quoted case of *Watt vs. Thomas* [1947] 1 All E. R. 582, at pages 583 observing that-

“.....an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given”.

In *Attorney General v. Gnanapiragasam* 68 NLR 49, H. N. G. Fernando, S. P. J. (as his Lordship then was) quoting the observations of Lord Reid, in the case of *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370 noted that “where the point in dispute is the proper inference to be drawn from proved facts, an appellate court is generally in as good a position to evaluate the evidence as the trial judge and ought not to shrink from that task,” when overruling the findings of fact of the trial judge where such findings were in “no way based upon credibility or demeanour and were referable solely to inferences and assumptions. . .”

I am of the opinion that in this case too the District Court did not have to choose between the conflicting testimony of witnesses on the basis of credibility or demeanor, as on the most vital question whether the Respondent had in fact installed the transformer, the testimony of the Respondent as well as that of the General Manager of the Appellant co-operative society was to the effect that he did not, and in fact the District Court as well as the Court of Appeal had been swayed mainly by the contents of the letters marked P5 and P6. Unfortunately, the District Court which did not have the advantage of hearing the testimony of the Engineer who wrote those letters, had arrived at its findings in total disregard of the cautionary hearsay rule and in the face of oral and documentary evidence

which clearly contradict the contents of these letters, to infer that the Respondent's claim under item 01.01 of P4 was reasonable, when the real issue for determination was whether he had in fact performed the work envisaged thereby. I also consider it repugnant to all notions of justice for a contractor to be paid for work he admittedly did not perform, where he has altogether failed to discharge the burden placed upon him by law to prove his case.

I am firmly of the opinion that the two questions on which special leave to appeal has been granted should be answered in the affirmative, despite the fact that the Appellant has in fact taken over a higher burden than what is expected of it in formulating the first of these questions (question (a)). Accordingly, I set aside the decision of the District Court insofar as it relates to item 01.01 of the Bill of Quantities (P4), allow the appeal and vacate the judgment of the Court of Appeal appealed from, and formerly enter judgment as prayed for in the answer of the Appellant filed in the District Court and dismiss the action filed in that Court with costs. I make no order for costs of appeal in all the circumstances of this case.

**JUDGE OF THE SUPREME COURT**

**HON. TILAKAWARDANE, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**HON. AMARATUNGA, J.**

I agree.

**JUDGE OF THE SUPREME COURT**