

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

In the matter of an appeal in terms of  
Section 5(2) 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 / 11/2016

CHC/233/2013/MR

Western Refrigeration (Private) Limited,  
7/B, Panna Lal Silk Mills Compound,  
78, LBS Marg, Bhandup (West),  
Mumbai-400076, Maharashtra,  
India.

Plaintiff

**Vs.**

State Bank of India,  
16, Sir Baron Jayathilake Mawatha,  
Post Box No. 93, Colombo 1,  
Sri Lanka.

Defendant

AND BETWEEN

State Bank of India,  
16, Sir Baron Jayathilake Mawatha,  
Post Box No. 93, Colombo 1,

Sri Lanka.

Defendant Appellant

**Vs.**

Western Refrigeration (Private) Limited,  
7/B, Panna Lal Silk Mills Compound,  
78, LBS Marg, Bhandup (West),  
Mumbai-400076, Maharashtra,  
India.

Plaintiff Respondent

**AND NOW BETWEEN**

Western Refrigeration (Private) Limited,  
7/B, Panna Lal Silk Mills Compound,  
78, LBS Marg, Bhandup (West),  
Mumbai-400076, Maharashtra,  
India.

Plaintiff Respondent Appellant

**Vs.**

State Bank of India,  
16, Sir Baron Jayathilake Mawatha,  
Post Box No. 93, Colombo 1,  
Sri Lanka.

Defendant Petitioner Respondent

BEFORE

: PRIYANTHA JAYAWARDENA, PC, J.  
UPALY ABEYRATHNE, J.  
NALIN PERERA, J.

COUNSEL : Gamini Marapana PC with U.  
Wickremasinghe for the Plaintiff  
Respondent Appellant

Milinda Jayathilake for the Defendant  
Petitioner Respondent

WRITTEN SUBMISSION ON: 06.05.2016 (Plaintiff Respondent  
Appellant)

06.05.2016 (Defendant Appellant  
Respondents)

ARGUED ON : 02.03.2017

DECIDED ON : 01.06.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted an action in the Commercial High Court of Colombo against the Defendant Petitioner Respondent (hereinafter referred to as the Respondent) seeking inter alia a declaration that the corporate guarantee dated 14<sup>th</sup> January, 2008, furnished by the Appellant (Plaintiff) Company to the Respondent (Defendant) is *void ab initio* and *Non-Est* (does not exist). The Respondent filed the answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. Furthermore, the Respondent in his answer, set out a claim in reconvention and sought reliefs as prayed for in prayer (b) and (c) of the answer.

Thereafter the Respondent by way of a Petition dated 22.08.2014 has made an application under Section 416 of the Civil Procedure Code seeking inter alia an order directing the Appellant to furnish a sum of Rs. 2,600,000/= as security.

The Respondent has calculated the said amount of security on the basis that in the event the Appellant's action being dismissed and an order being made for the Respondent to pay costs on the basis as set out in paragraphs 5 and 6 of the said Petition, the costs will amount to a minimum of approximately Rs. 1,100,000/- and, in addition, incidental expenses would amount to at least a sum of Rs. 1,500,000/-.

The Appellant, in his Statement of Objections, has taken up the position that the Respondent has made the said application with the intention of oppressing and causing undue harassment and inconvenience to the Appellant and the costs prayed for by the Respondent is excessive and not reasonable considering the circumstances of the case.

The learned High Court Judge after hearing evidence of an employee of the Respondent Bank has made the order dated 10<sup>th</sup> of December, 2015, directing the Appellant to deposit a sum of RS. 1,250,000/- as security for costs in terms of Section 416 of the Civil Procedure Code, on or before 01.02.2016.

Being aggrieved by the said order, the Appellant preferred an application seeking leave to appeal to this court and leave to appeal was granted on the following questions of law set out in paragraph 9 of the Petition dated 29.12.2015;

9. 1. Has the learned High Court Judge erred in law in arbitrarily granting a sum of Rs. 1.25 Million as security for costs without considering Section 417A of the Civil Procedure Code?
2. Has the learned High Court Judge erred in law in clearly ignoring the amounts to be awarded as costs that were stipulated by the gazette marked DP1?
3. Has the learned High Court Judge clearly ignored the provisions in Section 214 of the Civil Procedure Code with regard to taxed costs?
4. Has the learned High Court Judge erred in law by awarding an excessive amount as security of costs for the Respondent?
5. Has the learned High Court Judge misconstrued the provisions of Section 416 of the Civil Procedure Code and the applicable case law?

The learned President Counsel for the Appellant submitted that the amount claimed by the Respondents as costs of litigation had been simply estimated by the representatives of the Respondent and the Respondent had not made any attempt to have the amount taxed by the Registrar of the court. He further submitted that in terms Section 416 of the Civil Procedure Code the court has the discretion to make such an order and it should not be made as a matter of course and such an order should not be made to oppress the Appellant.

Section 416 of the Civil Procedure Code reads thus;

416. If at the institution, or at any subsequent stage, of an action it appears the court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing outside Sri Lanka, the court may in its discretion, and either of its own

motion or on the application of any defendants, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payments of all costs incurred and likely to be incurred by any defendants.

This Section clearly stipulates that ‘the court may in its discretion make order to give security for the payments of all costs incurred and likely to be incurred by the defendant. In doing so the court should not make such an order to oppress the Plaintiff.

In the case of *Scott vs. Mohamadu* (1914) 18 NLR 53 it was held that “An order under section 416 of the Civil Procedure Code requiring a plaintiff in an action who resides out of the jurisdiction of the Court to give security for the payment of the defendant's costs may be made on an ex-parte application. An order for security under section 416 or section 417 of the Code should not be made as a matter of course. The Court in the exercise of its discretion should be satisfied that the aid of either section is not being oppressively invoked by the party moving.”

In the said case *Pereira J* observed that “As regards the merits of the appeal, the order of the District Judge does not appear to be what may be called a considered order, because he has given no reasons for it. Indeed, the respondent's counsel expressed his belief that orders under sections 416 and 417 of the Code were usually made by District Courts as a matter of course. If that is the practice, the sooner it is discontinued the better. The provision of section 416 or 417 may in many cases be oppressively invoked by a defendant. A discretion no doubt is given to the Court, but the exercise of it should be sound and reasonable.”

In the case of *Senanayake vs. De Croos* - (1940) 41 NLR 189 the court observed that “Section 416 is general in its terms and it is desirable that in

applying it, the Court should proceed in the exercise of its discretion on definite principles. Litigants would otherwise be encouraged to make applications of this nature in the great majority of cases. In making his order the Judge appears to have been influenced by the poverty of the plaintiffs which he stresses. But the poverty of a plaintiff is a misfortune, not a fault; and he will not be compelled to give security merely because he is a pauper. That, at any rate, is a principle on which Courts in England act. *Cowell v. Taylor* [ 31 Ch. D. 34.]; *Cook v. Whellock* [ 24 Q. B. D. 658.]; *Rhodes v. Dawson* [ 16 Q. B. D. 548.].

In the case of *Alahakon Vs. Tampo* (2002) 3 SLR 299 the Supreme Court observed that “Two questions arise. Did the circumstances justify the exercise of that discretion, and, if so, was the amount ordered reasonable? Learned counsel for the defendant sought to justify the order of the Court of Appeal on the basis that it was common knowledge that in a matter of this nature legal fees would exceed Rs. 10,000 for a day at the trial, and would range from Rs. 30,000 to Rs. 50,000 for each appeal. On the assumption that 15 to 20 dates of trial would be required, he submitted that Rs. 300,000 was a fair assessment. He also contended that an order under section 416 could only be made once, that thereafter the Judge was functus, and accordingly, the Judge must assess the costs likely to be incurred assuming the maximum number of dates of trial, two appeals, and even a possible retrial. This would be an oppressive use of section 416, resulting in a possible denial of the plaintiff's right to his day in court. The power conferred by section 416 is one to which section 4 of the Interpretation Ordinance (cap. 2) applies, and may be exercised, from time to time, as the interests of justice require; the Judge is not bound to estimate all likely costs in one attempt. I will assume that section 416 does extend to costs of appeal, although I doubt this. I cannot agree with learned counsel that "incurred" costs must be construed as meaning or including all costs

actually incurred. It is "security" which is required to be furnished, in order to create a fund from which an order for costs made by the court could be satisfied, if such costs are not directly paid by the plaintiff. Accordingly, "incurred" costs means that amount of costs which the court may finally award, regardless of what the party may actually spend. Counsel conceded that, having regard to the amounts prescribed in the second schedule to the Code, costs awarded by the trial court could not exceed Rs. 40,000; and that even if costs in appeal were included, a sum of Rs. 70,000 would still be on the high side. The Court of Appeal was clearly wrong in ordering a prohibitively higher amount”.

On other hand in Section 417A of the Civil Procedure Code contained express prohibition against awarding of payment of security for costs a sum exceeding the aggregate of the sum stipulated in subsections (a) and (b). Section 417A reads thus;

417 A. The security for payment of costs fixed by order made under Section 416 or 417 shall in no case exceed the aggregate of the following:

- (a) The total costs that can be ordered in an action of that category, at the rate prescribed for the purpose of Section 214; and
- (b) Five hundred thousand rupees to meet incidental expenses, such as expenses that may be incurred in procuring the evidence and attendance of witnesses living abroad.

Section 214 Of the code reads thus;

214. All bills of costs, whether between party and parties, or between registered attorney and client shall be taxed by the registrar of the court in either case according to such rates as may be prescribed. If

either party is dissatisfied with this taxation, the matter in dispute shall be referred to the court for its decision, and the decision of the court (except when it is the decision of the Court of Appeal) be liable to an appeal to the Court of Appeal.

Hence, it is crystal clear that in terms of Section 417A (b) the court has no discretion to exceed the amount prescribed therein, in making order in relation to the incidental expenses, such as expenses that may be incurred in procuring the evidence and attendance of witnesses living abroad. It should be an amount within five hundred thousand rupees. It is clear that the security for payment of costs for incidental expense should not exceed five hundred thousand rupees under any circumstances.

The next question to be dealt with is regarding the cost that can be awarded under Section 417A (a). It seems that the security for payment of costs under this subsection has to be made at the rate prescribed under Section 214 of the Code. According to Section 214 the bill of costs has to be taxed by the Registrar of the court according to the rates prescribed for the purpose. Therefore, in the present case before us, it is imperative on the part of the Respondent to initially have the Registrar of the court to tax the total costs as estimated by the Respondent in terms of Section 214 of the Code. Under the said category, the Respondent in paragraph 7 of his petition dated 22.08.2014, has sought costs of Rs. 1,100,000/-.

In paragraph 11 of the said petition the Respondent has averred that the affidavit of Mr. K. C. M. Perera, the Deputy Manager (credit) of the Respondent Bank, has filed with the said petition. The Respondent, with the said affidavit dated 13.03.2015, has produced a gazette notification extraordinary bearing No 994/7 dated 24.09.1997 containing Regulations made by the Acting

Minister in charge of the subject under Section 840 of the Civil Procedure Code read with Section 214 of the said Code marked as 'DP 1'. Said Regulations has been cited therein as 'the Civil Procedure (Costs) Regulations, 1977'.

In paragraph 13 of the said affidavit, it is averred that if the costs estimated to Rs. 1,100,000/- are taxed at the prescribed rate for Taxing Costs set out in the said regulations (marked 'DP 1') made under Section 214 of the Civil Procedure Code for an Action exceeding Rs. 2,000,000/- in value, such taxed costs will be as follows at the specified rate;

- (a) For drafting of pleadings and appearance in court up to the date of trial Rs. 20,000/-,
- (b) For steps in preparation for trial (including listing of witnesses and documents and summons to witnesses) Rs. 7,500/-,
- (c) For Appearance at the trial, on the basis of eight dates estimated by the Respondent:  $\text{Rs. } 7,500/ \times 8 = \text{Rs. } 60,000/-$ ,
- (d) For written submissions Rs. 7,500/-,
- (e) For two incidental applications:  $\text{Rs. } 10,000/ \times 2 = \text{Rs. } 20,000/-$ .

According to the Respondent's own estimate according to the said Regulations marked 'DP 1' the total amount of the security for payment of costs in terms of Section 417A (a) shall be Rs. 115,000/-. The Respondent's contention was that the aforesaid rates of taxing of costs which set out in the said Regulations made on 22<sup>nd</sup> September 1997 came to effect approximately 18 years ago, therefore it is just and equitable to enable the Respondent to recover taxed costs in line with current actual costs. I am not inclined to agree with the contention of the Respondent as the law on the matter in issue is crystal clear.

Even the learned President Counsel for the Respondent, in paragraph 74 of his written submissions tendered to the Commercial High Court dated 09.09.2015 has conceded that on account of costs which have been incurred as prayed for and likely to be incurred as provided for by Section 416 and the corresponding taxed costs for the actual costs as referred to in Section 417A (a) is Rs. 115000/- and the maximum sum which may be ordered as security for incidental expenses, in terms of Section 417A (b) is Rs. 500,000/. I regret to note that the learned High Court Judge has failed to consider the above paragraph of the written submission tendered to court by the learned President Counsel for the Respondent.

The relevant Sections 416 and 417A has been judicially interpreted by this Court. It has been held that an order for security for payment of costs should not be made as a matter of course and that one of the considerations to which the Court should direct its attention is whether claiming security for the payment of costs has been selected by the party in order to harass the opposing party or to make the recovery of costs difficult to him.

Another matter which should be most carefully considered is whether the provisions of section 416 had been oppressively invoked by the Respondent, to which the learned High Court Judge appears to have absolutely not directed his attention. I am satisfied that the learned High Court Judge has erroneously exercised his discretion and hence the said order is erred in law.

In the said circumstances, I hold that in terms of Section 416 and 417A to be read with Section 214 of the Civil Procedure Code and the Regulations marked DP 1, the Respondent is entitled to an order from court directing the Appellant to deposit a sum of Rs. 115,000/-, maximum of costs, likely to be

incurred by the Respondent and also a sum of Rs. 500,000/- to meet the incidental expenses which also is the maximum amount that could be claimed under that category. The Appellant is directed to deposit the said amount of Rs. 115,000/- and Rs. 500,000/- to the credit of the case within one month from the date of pronouncement of this order in the Commercial High Court holden in Colombo. In the circumstances the order of the learned Commercial High Court Judge dated 10.12.2015 is hereby set aside and the appeal of the Appellant is allowed with costs. The Registrar of this court is directed to send the main record to the Commercial High Court holden in Colombo. Learned High Court Judge is directed to hear and conclude the matter expeditiously according to law.

*Appeal allowed.*

Judge of the Supreme Court

PRIYANTHA JAYAWARDENA, PC, J.

I agree.

Judge of the Supreme Court

NALIN PERERA, J.

I agree.

Judge of the Supreme Court