

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

In the matter of an application for Leave to Appeal to the Supreme Court against Judgment dated 19/07/2013 delivered by the High Court of the Western Province (exercising civil appellate jurisdiction at Colombo) in appeal WP/HCCA/COL/39/2005(F) D.C. Colombo Case No. 22148/MR.

SC. Appeal No. 27/2014

SC. HC. CA. LA. No. 353/2013
WP/HCCA/COL/39/2005(F)
D.C. Colombo Case No. 22148/MR

IN THE DISTRICT COURT

Loku Yaddehige Ruwan Kulunuguna,

Of No. 244/1,
Jaya Mawatha,
Makola.

Plaintiff

Vs.

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.

Defendant

IN THE HIGH COURT

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.

Defendant-Appellant

Vs.

Loku Yaddehige Ruwan Kulunuguna,
Of No. 244/1,
Jaya Mawatha,
Makola.

Plaintiff-Respondent

**AND NOW BETWEEN
IN THE SUPREME COURT**

Loku Yaddehige Ruwan Kulunuguna,
Of No. 244/1,
Jaya Mawatha,
Makola.

Plaintiff-Respondent-Petitioner

Vs.

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.

But presently at:

Scanwell Customs Brokers Pvt. Ltd.,
No. 67/1, Hudson Road,
Colombo 03.

Defendant-Appellant-Respondent

Loku Yaddehige Ruwan Kulunuguna,
Of No. 244/1,
Jaya Mawatha,
Makola.

Plaintiff-Respondent-Appellant

Vs.

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.

Defendant-Appellant-Respondent

Before : Sisira J. De Abrew, J.
Anil Gooneratne, J. &
K. T. Chitrasiri, J.

Counsel : Sudarshani Cooray for the Plaintiff-Respondent-Appellant
Kamran Aziz with Maduka Perera for the Defendant-
Appellant-Respondent.

Written Submission

tendered on: 23.5.2016 by the Plaintiff-respondent-Appellant
18.5.2016 by the Defendant-Appellant-Respondent

Argued on : 05.10.2016

Decided on : 25.1.2017

Sisira J De Abrew

This is an appeal by the Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff-Appellant) against the judgment of the Civil Appellate High Court (hereinafter referred to as the High Court) dated 19.7.2013 wherein the Judges of the said High Court set aside the judgment of the District Judge dated 2.2.2005. The learned District Judge delivered the judgment in favour of the Plaintiff-Appellant. This court by its order dated 24.2.2014, granted leave to appeal on the questions of law set out in paragraphs 13(a),(g),(h),(i) and (j) of the Petition dated 29.8.2013 which are set out below.

1. Has the High Court without consideration of the evidence led, come to findings of fact contrary to the findings of fact arrived at by the learned trial Judge, particularly in regard to whether it was the defendant who hired the lorry through its wharf clerk, or it was Dong A Lanka (Pvt) Ltd, who hired the lorry from the Plaintiff through their agent or broker who is the Defendant?
2. Has the High Court erred in failing to appreciate that the contract entered into by the Defendant required making payment to the Plaintiff at an hourly rate, and it was not for the Plaintiff but for the Defendant to have taken steps to demount the container and terminate the hire and stop the

running up of hire charges at the hourly rate?

3. Has the High Court failed to appreciate that when the alteration in the hourly rate from Rs.60 to Rs.85 was communicated by letter dated 24.9.1998, produced marked P3 (PPg65-66), the Defendant did not, either by its reply letter dated 29.9.1998, produced marked P4 (p67), or otherwise object to the increase in the hourly rate but acquiesced in the increase?
4. Has the High Court erred in holding that the contract of hiring become impossible of performance by the Defendant and therefore became frustrated when the container which had been mounted on to the Plaintiff's lorry, but not the lorry itself, was detained by the Sri Lanka Customs and the Foreshore Police?
5. Did the High Court err in holding that monies had been paid to the Plaintiff by Dong. A. Lanka (Pvt) Ltd when there was no evidence to prove it?

Facts of this case may be briefly summarized as follows. Padmashantha who is the wharf clerk of the Defendant-Appellant-Respondent (hereinafter referred to as the Defendant-Respondent) on 7.5.1998 requested Niroshan who is the driver of lorry No27-1339 belongs to the Plaintiff-Appellant to transport a container which was at the Colombo Port to the premises of a company called Dong. A. Lanka (Pvt) Ltd at Waliweriya. Niroshan on behalf of the Plaintiff-Appellant agreed to the request at the rate of Rs.60 per hour. As per the said agreement Niroshan took the lorry to Colombo Port and on steps taken by the Defendant-Respondent the container was loaded on to the lorry. Thereafter said Niroshan drove the lorry from the place where the container was mounted to the lorry to the customs clearance point. The custom officers and the officers attached to the Port did not permit the container to be taken away as the custom duties and port charges had

not been paid with regard to the said container. This incident took place on 7.5.1998. As the Defendant-Respondent did not pay the said charges Niroshan had to park the lorry with the container at the Port of Colombo. Niroshan ultimately, on 30.6.2008, complained to the Foreshore Police Station against the Defendant-Respondent stating the above facts and seeking a direction on the Defendant-Respondent to pay his charges. Padmashantha who was apparently summoned by the police made a statement on 3.7.1998 to the police. The Defendant-Respondent or any other witness did not give evidence at the trial. The learned District Judge after trial entered judgment in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment, the Defendant-Respondent appealed to the High Court and the High Court set aside the judgment of the learned District Judge. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellant has appealed to this court. Learned counsel for the Defendant-Respondent tried to contend that there was no contract between the Plaintiff-Appellant and the Defendant-Respondent; that if there was any contract that was between the Plaintiff-Appellant and Dong. A. Lanka (Pvt) Ltd which is the owner of the container; and that the Defendant-Respondent was only acting as an agent of Dong. A. Lanka (Pvt) Ltd. I now advert to this contention. The Plaintiff-Appellant by letter dated 24.9.1998 marked P3, demanded Rs.159,540/- from the Manager of the Defendant-Respondent regarding the said contract. The Plaintiff-Appellant, in the said letter, whilst giving the details of charges due from the Defendant-Respondent, stated that the Defendant-Respondent, in settlement of the charges, had made two payments. One such payment was an advance of Rs.16,500/- paid until 6.7.1998 and the other payment was an advance of Rs.90,000/- paid on 6.7.1988. The Defendant-Respondent, in his letter dated 29.9.1998 marked P4, did not deny the said payments. The said evidence clearly

demonstrates that there was a contract between the Plaintiff-Appellant and the Defendant-Respondent. Learned counsel for the Defendant-Respondent drawing our attention to page 103 of the brief, tried to contend that the payment of Rs.90,000/- had been made by Dong. A. Lanka (Pvt) Ltd and not by the Defendant-Respondent. But when suggestion was made to Niroshan during the cross-examination the said amount of Rs.90,000/- was paid by Dong. A. Lanka (Pvt) Ltd, he clearly denied it. Therefore I cannot accept the said contention and reject it. When I consider all the above matters, I reject the contention that there was no contract between the Plaintiff-Appellant and the Defendant-Respondent.

Learned counsel for the Defendant-Respondent next tried to contend that the Defendant-Respondent was not liable to pay custom and Port dues as the container does not belong to the Defendant-Respondent. I now advert to this contention. The request of the Defendant-Respondent to Niroshan was to transport the container from Colombo Port to Waliweriya. When Padmashantha on behalf of the Defendant-Respondent made the above request to Niroshan, it is implied that he had cleared all the encumbrances regarding the container and would pay any charges that are due to be paid. Therefore I reject the said contention. Further it is interesting to note the following statement in the letter of the Defendant-Respondent marked P4 dated 19.9.1998. "Our company made all the arrangements with customs and a forklift was brought to commence demounting." What does it indicate? If the Defendant-Respondent did not have any interest in the container, why did it make the above arrangements? This shows that the Defendant-Respondent had undertaken to get the container released from the Port and the Customs Department. As I pointed out earlier when Padmashantha made the request to Niroshan, it is implied that he had cleared all the encumbrances regarding the container and that Niroshan could transport the

container in his lorry without any problem. Thus the Defendant-Respondent cannot take up the position that he is not responsible for the breach of contract since the custom and port dues had not been paid by Dong. A. Lanka (Pvt) Ltd. The Plaintiff-Appellant cannot be expected to bear damages due to nonpayment of custom and port charges. If the said charges were paid by the Defendant-Respondent, Niroshan the driver of the lorry could have, without any problem, taken the container to Waliweriya. Under these circumstances, it is not possible for learned counsel for the Defendant-Respondent to argue that the Plaintiff-Appellant could have unloaded the container and gone. It has to be noted here that the Defendant-Respondent in his letter marked P4 admitted that a forklift was brought to commence demounting. This shows that the driver on his own could not have demounted the container and a forklift was necessary for this purpose. Further one should not forget that the contract was to transport the container from Colombo Port to Waliweriya and that when the Custom and Port Authority officers, at the custom clearance point, did not permit the lorry with the container to go out, the journey to go to Waliweriya had already begun. The lorry was stopped at the Customs Clearance Point as the custom and port charges had not been paid. When I consider all the above matters, I reject the above contention of learned counsel for the Defendant-Respondent and I further hold that the container could not be taken out from the premises of Colombo Port due to the fault of the Defendant-Respondent.

Learned counsel next contended that the contract could not be performed as it was frustrated. To support his contention he relied on the judgment in the case of Taylor Vs Caldwell? The decision in the Taylor Vs Caldwell is found in the book titled 'The Law of Contracts by CG Weeramanthry' Vol. 11 page 789' which reads as follows:

“In Taylor Vs Caldwell the defendants had agreed to give the plaintiff the use of a music hall for the purpose of a concert. Before the day of performance the music hall was destroyed by fire and Taylor sued Caldwell for damages for breach of the contract which Caldwell, through no fault of his own, was no longer able to perform. It was held that the contract was not held to be construed as an absolute contract but subject to an implied condition that impossibility of performance resulting from destruction of the subject matter terminated the obligation to perform, where the destruction did not proceed from any fault on the part of the contractor.”

In the present case the container or the lorry was not destroyed. When I consider the facts of this case, I hold that the contract was not frustrated and that the judicial decision in the above case has no application to the present case.

Learned counsel for the Defendant-Respondent relied on the following passage of the book titled ‘The Law of Contracts by CG Weeramanthry’ Vol. 11 page 787 “...the civil law reads into a contract an implied condition that performance will be expected only if it is possible..” In the present case, was the performance of the contract impossible? This question will have to be answered in the negative because if the custom and port charges were paid by the Defendant-Respondent, the Plaintiff-Appellant would have transported the container from Colombo Port to Waliweriya. I therefore hold that the above legal principle does not apply to the present case. In my view, learned High Court Judges have fallen into grave error when they decided that the contract had been frustrated.

Learned counsel for the Defendant-Respondent however contended that if at all the contract between the Defendant-Respondent and the Plaintiff-Appellant

was to pay 60 per hour. But the Plaintiff-Appellant has charged Rs.85/- per hour with effect from 12.6.1988. Therefore the Defendant-Respondent is not liable to pay Rs.85/- per hour. I now advert to this contention. It has to be noted here that the contract between the parties was to transport to the container from Colombo Port to Waliweriya on 7.5.1998. If the Defendant-Respondent had paid necessary custom and port charges, the contract would have been performed on the same day. As I have pointed out earlier, the contract could not be performed due to the fault of the Defendant-Respondent. When the Plaintiff-Appellant quoted charges, the said charges were the charges prevailing at that time. No one can expect the same charges to be quoted one month after 7.5.1988. Therefore it is difficult to contend that enhancement of charges one month after the original quotation is unreasonable. In fact the Defendant-Respondent did not give evidence challenging the above enhancement of charges. When I consider the above matters, I am unable to agree with the above contention of learned counsel for the Defendant-Respondent.

Learned counsel for the Defendant-Respondent next contended that the Plaintiff-Appellant had failed to mitigate the loss that occurred as a result of the breach of the contract. He contended that the driver of the Plaintiff-Appellant could have offloaded the container and come from Colombo Port. But it must be remembered here that what was mounted to the lorry was a container. As I have pointed out earlier, the Defendant-Respondent had admitted that a forklift was necessary to demount the container from the lorry. This shows that he had impliedly admitted that a forklift was necessary to demount the container from the lorry. The above facts demonstrate that the driver of the lorry just could not offload the container. If he offloaded the container on his own, the goods in the container would have got damaged. From the above facts it can be safely

concluded that the contract could not be performed due to the fault of the Defendant-Respondent. When I consider the aforementioned matters, I cannot agree with the contention of learned counsel for the Defendant-Respondent.

For the above reasons, I hold that the learned High Court Judges have fallen into grave error when they set aside the judgment of the learned District Judge. In my view the learned District Judge was correct when he decided the case in favour of the Plaintiff-Appellant.

The first question of law is as follows.

Has the High Court without consideration of the evidence led, come to findings of fact contrary to the findings of fact arrived at by the learned trial Judge, particularly in regard to whether it was the defendant who hired the lorry through its wharf clerk, or it was Dong A Lanka (Pvt) Ltd, who hired the lorry from the Plaintiff through their agent or broker who is the Defendant? I answer this question as follows: It was the defendant who hired the lorry through its wharf clerk.

The 2nd question of law is as follows.

Has the High Court erred in failing to appreciate that the contract entered into by the Defendant required making payment to the Plaintiff at an hourly rate, and it was not for the Plaintiff but for the Defendant to have taken steps to demount the container and terminate the hire and stop the running up of hire charges at the hourly rate? I answer this question as follows: The contract entered into between the parties required making payment to the Plaintiff at an hourly rate. It was for the Defendant to have taken steps to demount the container.

The 3rd and 5th questions of law are answered in the affirmative.

I answer the 4th question of law as follows. The contract was not frustrated.

For the above reasons, I set aside the judgment of the High Court and affirm the judgment of the learned District Judge. I allow the appeal. The Plaintiff-Appellant is entitled to costs of all three courts

Appeal allowed.

Judge of the Supreme Court.

Anil Gooneratne J

I agree.

Judge of the Supreme Court.