

SC/ CHC/04/06

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

In the matter of Appeal under the  
Provisions of Section 753 of the  
Civil Procedure Code

Murughasan Chandrika

No.13, Perumal Kovil Street,

Nagapattinam, 611001 Tamilnadu,

India

Carrying on a business as proprietorship

Under the name style and firm

Rajithi Agencies No.139, Linghi Chetty

Street, Gulam Arcade, Chennai 600 001

India.

**PLAINTIFF**

**Case No:-SC/CHC/Appeal 04/2006**

**Case No:-H.C.Civil 235/2011(1)**

**Nature:-Money**

**Procedure:-Regular**

**V.**

1. Romav Limited

Bucklersbury House,

3, Queen Victoria Street,

London EC4N 8EL

2. Unicorns Clearing And Forwarding  
(private) Limited

2<sup>nd</sup> Floor, Greenlanka Tower,

No.46/46, Navam Mawatha,

Colombo 2.

**DEFENDANTS**

Unicorns Clearing And Forwarding  
(private) Limited

2<sup>nd</sup> Floor, Greenlanka Towers,

No.46/46, Navam Mawatha,

Colombo 2.

**2<sup>nd</sup> DEFENDANT-APPELLANT**

**V.**

1. Murughasan Chandrika

No.13, Perumal Kovil Street,

Nagapattinam, 611001 Tamilnadu.

India.

Carrying on a business as  
Proprietorship under the name  
style and firm-  
Rajithi Agencies,  
No.139, Linghi Chetty Street,  
Gulam Arcade, Chennai 600 001  
India.

**PLAINTIFF-RESPONDENT**

2.Romav Limited

Bucklersbury House,  
3, Queen Victoria Street,  
London EC4N 8EL

**1<sup>st</sup> DEFENDANT-RESPONDENT**

**BEFORE:-PRIYASATH DEP, PC CJ.**

**SISIRA J. DE ABREW, J.**

**H.N.J.PERERA, J.**

**COUNSEL:-**Sujeewa Srinath Tissera for the 2<sup>nd</sup> Defendant-Appellant  
Plaintiff-Respondent absent and unrepresented.

**ARGUED ON:-**30.11.2017

**DECIDED ON:-**03.04.2018

**H.N.J.PERERA, J.**

The Plaintiff-Respondent instituted action against the 1<sup>st</sup> & 2<sup>nd</sup> Defendants claiming damages under three causes of action as prayed for in the prayer 1, 2 & 3 of the plaint.

The Plaintiff's position was that she contracted with the 1<sup>st</sup> Defendant whose agent in Sri Lanka was the 2<sup>nd</sup> Defendant for the carriage of goods more fully referred to in the Bills of Lading marked P2, P4 and P6 at the trial. The 1<sup>st</sup> Defendant contracted with the Plaintiff inter alia that the cargo shall be carried to the Port of Colombo for delivery to the consignees as stated in the Bills of Lading aforesaid whilst the goods shall be released from the custody of the 1<sup>st</sup> Defendant only on presentment of the original Bills of Lading.

On the material dates when the cargo had been carried to the Port of Colombo, the 2<sup>nd</sup> defendant acting on its own behalf and for on behalf of the 1<sup>st</sup> Defendant breached the conditions of the said Bills of Lading and wrongfully and unlawfully released or authorized the release of the said cargo without the original Bills of Lading having been duly presented.

It was further alleged that the Plaintiff was entitled to receive the consideration for the cargo before its release from the vessel and /or the custody of the Sri Lanka Ports Authority and the requirement that the original Bills of Lading should be obtained from the negotiating Bank and presented to the carrier or its agent in order to ensure that the shipper received the money. In consequence of the release of the cargo by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants contrary to the terms of the Bills of Lading and the law the Plaintiff suffered loss and damages in the sums referred to in the plaint.

Since the 1<sup>st</sup> Defendant was absent and not represented an ex-parte trial was held against the 1<sup>st</sup> Defendant.

The 2<sup>nd</sup> Defendant filed answer and took up the position that there was no legal nexus for the Plaintiff to sue the 2<sup>nd</sup> Defendant, that no cause of action accrued to the Plaintiff to sue the 2<sup>nd</sup> Defendant and that the 1<sup>st</sup> Defendant accepted the Plaintiff's consignment for transport subject to

(a) English law shall be the jurisdiction

(b) that the dispute shall be resolved by Arbitration according to FALCA (fast and low cost Arbitration Terms)

At the commencement of the trial the following matters were admitted.

1. Paragraphs 2(a), 2(b), 4, 12 and 20 of the plaint.
2. That the 2<sup>nd</sup> Defendant Company is resident within the local limits of the jurisdiction of the High Court of Western Province-Colombo.
3. That the 2<sup>nd</sup> Defendant as agent of the 1<sup>st</sup> Defendant delivered the consignments set out in the Bills of Lading marked X2, X3 and X4 annexed to the plaint to Nasik Foods of 218-220, 5<sup>th</sup> Cross Street, Colombo 11 the consignee named therein.
4. Receipt of the document marked X5 annexed to the plaint.

The Plaintiff's case, essentially is that the plaintiff was entitled to receive the consideration for the cargo carried by the 1<sup>st</sup> Defendant to the port of Colombo, before it is released from the vessel and/or custody of the Sri Lankan Port Authority.

It is the Plaintiff's position that the Plaintiff made arrangements to ensure payment for the cargo by laying down the condition that it must be released to the Consignee on the presentment of the Bills of Lading that should be collected from the negotiating Bank and presented to the carrier or its agent. Admittedly the cargo in question has been released

to the Consignee by the 2<sup>nd</sup> Defendant, who acted as the agent of the 1<sup>st</sup> Defendant during the relevant time without the presentment of the original Bills of Lading. Admittedly, what has been presented at the time of clearance of the cargo were Bank guarantees which the Plaintiff alleges as having been forged. The main complaint of the Plaintiff is that the 2<sup>nd</sup> Defendant has delivered the goods on forged Bank guarantee, and therefore the Plaintiff was deprived of the consideration it would have otherwise received, if the cargo was allowed to be cleared upon the presentment of the original Bills of Lading.

The learned trial Judge, after trial held with the plaintiff and entered judgment in favour of the Plaintiff as prayed for in paragraphs (a), (b) (c) and (d) of the prayer to the plaint. Aggrieved by the said judgment of the learned trial Judge the 2<sup>nd</sup> Defendant-Appellant has preferred this appeal to this Court.

When this matter was taken up for argument before this Court the main argument of the learned Counsel for the 2<sup>nd</sup> Defendant-Appellant was that the Learned High Court Judge erred in law in holding that the Commercial High Court has the jurisdiction to hear the case and the Arbitration clause in the Bill of Lading has not ousted the jurisdiction of the Court to try the case without reference to arbitration.

The 2<sup>nd</sup> Defendant-Appellant has raised an issue with regard to want of jurisdiction by reason of the Jurisdiction and Law clause in the Bill of Lading. Jurisdiction and the law clause states “English Law and Jurisdiction London Arbitration FALCA (fast and low cost Arbitration) Terms.”

The Learned trial Judge in his judgment has held that the dispute is more closely connected with Colombo than England. He has emphasized the fact that judgment has already been entered against the 1<sup>st</sup> Defendant ex-parte. The 2<sup>nd</sup> defendant’s principal place of business is situated

within the jurisdiction of High Court Colombo. Admittedly the cargo in question has been discharged at the Port of Colombo which too is situated within the jurisdiction. The Bank to which the original documents relating to the cargo have been addressed, and also carries on its business of banking in Colombo within the territorial jurisdiction of the said Court. The Consignee's principal place of business also is situated in Colombo. It is also to be noted that the 2<sup>nd</sup> defendant has admitted paragraph 2 (b) of the plaint. This admission is to the effect that the 2<sup>nd</sup> Defendant is a body corporate which can sue and be sued in its corporate name. The 2<sup>nd</sup> Defendant's registered office and/or principal place of business is admitted to lie within the local limits of the jurisdiction of the High Court of Colombo. As submitted by the Learned President's Counsel for the plaintiff the wrongs for the redress of which the instant action was brought against the Defendants , being the delivery of the cargo wrongfully and unlawfully at Colombo, is sufficient for the Court to be clothed with jurisdiction. I am too of the opinion that the dispute is more closely connected with Colombo, Sri Lanka than England and I agree with the trial Judge that sufficient reason has been shown that that Colombo High Court is clothed with jurisdiction to hear and determine this action.

In *Perera V. Commissioner of National Housing*, (1974) 77 N.L.R.361 Tennekoon C.J observed:-

“A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a ‘patent’ or ‘total’ want of jurisdiction or a *defectus jurisdictionis* and the second a ‘latent’ or ‘contingent’ want of jurisdiction or a *defectus triationis*. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference

must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are *non coram iudice* and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction.”

In the instant case it cannot be said that the Court lacked patent jurisdiction to hear and determine the plaintiff’s action.

Section 5 of the Arbitration Act No 11 of 1995 states:-

“Where a party to an arbitration agreement institutes legal proceedings in a Court another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the Court exercising jurisdiction in respect of such matter.”

It is a pre-condition that the defendant should have objected to the exercise of jurisdiction by court in respect of the matter which the parties have agreed to resolve by arbitration. The defendant has in its answer objected to the exercise of jurisdiction by Court. Therefore it is very material to consider whether the said clause in the Bill of Lading amounted to a valid agreement to arbitrate. The formal requirements of an arbitration agreement are set out in Section 3 of the Arbitration Act

of 1995, which provides that such an agreement should take the form of an arbitration clause in a contract or should consist of a separate agreement. The main question to be considered in this appeal is whether the said clause in the Bill of Lading amounted to an agreement by the parties to submit to arbitration any dispute that may arise from the said agreement. There can be no agreement to arbitrate without a manifestation of consent of parties to submit to arbitration any dispute that may arise from a contract entered into by them. Can it be said that the said clause in the Bill of Lading to the effect that “JURISDICTION AND LAW CLAUSE-English Law and jurisdiction, London Arbitration, FALCA (Fast and low cost arbitration) Terms” clearly manifests the consent of parties to refer the dispute for arbitration? Or that it is a clear and unambiguous manifestation of consent of the parties to resort to arbitration?

Usually stay of local proceedings is sought in favour of a foreign jurisdiction where the dispute arises out of a contract which contains an exclusive jurisdiction clause and Courts generally uphold such clause on the basis that such clauses represent the agreement of the parties. However this may not be true with regard to the exclusive jurisdiction clause found in bills of lading, such as in this case, where one can hardly say that such clauses were negotiated and contractual obligations undertaken between parties of equal bargaining power.

Further it is very pertinent to note that the 2<sup>nd</sup> Defendant has not raised any objection to the continuance of this action. The 2<sup>nd</sup> Defendant could have moved Court to have issue No 18 tried as a preliminary issue. But instead the 2<sup>nd</sup> Defendant has submitted to the jurisdiction of the Court and continued to participate at the trial and proceeded to get a judgment on its merits. Even though an issue has been raised based on the question relating to jurisdiction, the 2<sup>nd</sup> defendant has not objected to the trial being proceeded with. If on the other hand the 2<sup>nd</sup> Defendant

was seriously contesting the jurisdiction of the Court based upon section 5 of the Arbitration Act, No 11 of 1995, he could have taken up the matter as a preliminary objection in terms of section 147 of the Civil Procedure Code at the very commencement of the trial. No such objection had been taken by the defendant at the commencement of the trial.

Section 39 of the Judicature Act No 2 of 1978b states:-

“Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter.

In Pathmawathie V. Jayasekera (1997) (1) S.L.R. 248 it was held that:-

“It must always be remembered by Judges that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties”.

Section 147 of the Civil Procedure Code states:-

When issues both of law and fact arise in the same action, and the Court is of the opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

The Court has the power to dismiss an action on an issue of law without any evidence or admission being recorded.( Cathiravelu V. Dadabhoy 15 N.L.R 389.)

The defendant has failed to move Court to try the said issue as a preliminary issue. The defendant has failed to formulate a preliminary issue relating to the jurisdiction of the Court at the commencement of the trial. His failure to move Court to try the said issue as a preliminary issue on such a vital matter will amount to a waiver of objections in regard to lack of jurisdiction of Court to hear and determine the defendant's action. The defendant is deemed to have consented and submitted to the jurisdiction of the Court and he cannot be permitted to challenge the jurisdiction. (Rodrigo V. Raymond (2002) (2) S.L.R.78.)

In *Elgitread Lanka (Private) Limited V. Bino Tyres (Private) Limited Saleem Marsoof, J* held that the Commercial High Court had the power to dismiss the action or stay proceedings, for the purpose of giving effect to Section 5 of the Arbitration Act. It was also observed in the said case that the discretion to decide whether to dismiss an action or stay proceedings has to be exercised after carefully considering the facts and circumstances of each case. Had the defendant exercised his right to object to the jurisdiction of the Court under Section 5 of the Arbitration Act that would have enabled the Court to consider whether to dismiss the plaintiff's case or to refer the parties to arbitration as agreed upon.

Having regard in particular to the prejudice caused to the plaintiff I am of the opinion that the 2<sup>nd</sup> Defendant was precluded by delay and acquiescence from raising the said objection to jurisdiction and that he had in fact waived it.

English law governs the law of Sri Lanka in diverse areas such as commercial law, banking and international trade law. The British enacted the Civil Law Ordinance in 1852 introducing English law in commercial disputes. English commercial law principles were introduced by Section 3 of the Ordinance "with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land

(maritime matters) life and fire insurance “ in the absence of specific statutory enactments.

Therefore no prejudice is caused to the defendant by the High Court of Colombo exercising jurisdiction in this matter as the governing law applicable in Sri Lanka to the present action is English law.

The 2<sup>nd</sup> defendant has also taken up the position that the plaintiff’s action is prescribed. The defendant is seeking to rely on 4(G) of the terms and conditions of the Bill of lading marked P2a, P4a and P6a.

4(G) reads as follows:-

“The carrier shall be discharged of all liability unless suit is brought in the proper forum and written notice thereof received by the carrier within nine months after delivery of the goods or the date when the goods should have been delivered. In the event that such time period shall be found contrary to any conventions or law compulsorily applicable, the period prescribed by such convention or law shall then apply but in that circumstance only.”

Upon a plain reading of this provision it is very clear that the time bar imposed therein is meant to apply only in circumstances where no other convention or law is applicable. The plaintiff’s action has been filed in Sri Lanka where the provisions of the Prescription Ordinance are compulsorily applicable. The Plaintiff’s causes of actions are based on wrongful delivery of the Plaintiff’s cargo by the defendants in breach of the conditions contained in the Bills of lading marked P2a.P4a, P6a. Therefore under Section 6 of the Prescription Ordinance the period of prescription which is applicable under these circumstances is six years from the date of such breach.

Section 6 of the Prescription Ordinance states:-

No action shall be maintainable upon any deed for establishing a partnership, or upon any promissory note or bill of exchange, or upon any written promise, contract, bargain, or agreement, or other written security falling within the description of instruments set forth in section 5, unless such action shall be brought within six years from the date of the breach of such partnership deed or of such written promise, contract, or agreement, or other written security, or from the date when such note or bill shall have become due, or of the last payment of interest thereon.

The plaintiff has filed this action in the year 2001. It is to be noted that the action has been instituted within six years from the date of the breach that being on or about the 21<sup>st</sup> of June 1999 for two cargos and on or about 5<sup>th</sup> of July 1999 for the third cargo. Therefore I see no merit in the said argument of the learned Counsel for the defendant.

For the above reasons I see no reason to disturb the judgment of the learned High Court Judge. Accordingly the appeal of the 2<sup>nd</sup> Defendant-Appellant is dismissed with costs.

**JUDGE OF THE SUPREME COURT**

**PRIYASATH DEP, PC, CJ.**

**I agree.**

**CHIEF JUSTICE**

**SISIRA J. DE ABREW, J.**

**I agree.**

**JUDGE OF THE SUPREME COURT**