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

In the matter of an appeal from the Judgment of the Commercial High Court of the Western province, holden in Colombo, under and in terms of section 5 (1) of the High Court of the Provinces (Special provisions) Act No. 10 of 1996 read with the provisions of Chapter LVIII of the Civil Procedure Code

Suntel Limited,
No. 110, Sri James Peiris Mawatha,
Colombo 2.

S.C. (CHC) Appeal No. 53/2012
CHC No. 282/2001 (1)

Plaintiff

Vs.

Electroteks Network Services (Private) Limited,
No. 429D, Galle Road,
Ratmalana.

Defendant

AND NOW BETWEEN

Dialog Broadband Networks (Private) Limited,
No. 475, Union Place,
Colombo 2.

Plaintiff-Appellant

Vs.

Electroteks Network Services (Private) Limited,
No. 429D, Galle Road,
Ratmalana.

Defendant-Respondent

Before: Buwaneka Aluwihare PC. J
Sisira J. de Abrew J
Nalin Perera J.

Counsel: K. Kang-Isvaran PC with Avindra Rodrigo, Lakshmanan Jeyakumar and Aruna De Silva instructed by M/S F.J & G. de Saram for the Plaintiff- Appellant

Thishya Weragoda with Pulasthi Rupasinghe, Iresha Seneviratne, Chinthaka Sugathapala & Lilanthi de Silva for the Defendant-Respondent

Argued on: 18th and 19th of October 2016

Decided on: 12 December-2018

Aluwihare PC. J,

This is an appeal preferred against a judgment handed-down by the Commercial High Court.

The Plaintiff-Appellant challenges the judgment on the following grounds;

1. That the judgment is not a judgement within section 187 of the Civil Procedure Code;
2. That the Defendant-Respondent's claim for damages for loss of reputation and Goodwill cannot be sustained in law;
3. That the Defendant-Respondent carries out an illegal business and therefore not entitled to damages.

At the outset, I wish to note the disinclination to proceed on the question of illegality. A perusal of the brief demonstrates that the Plaintiff-Appellant had not strenuously pursued this claim in the lower court. I am hesitant to allow the Plaintiff-Appellant to raise this ground for the reason that the trial judge did not have the benefit of hearing it to the full extent.

This being a direct appeal, there are no specific questions of law on which leave has been granted. Therefore, I intend to examine the judgment in its entirety without solely limiting myself to the grounds raised by the Plaintiff-Appellant.

The Plaintiff-Appellant, originally incorporated as Telia Lanka (Private Limited) and thereafter named as Suntel (Private Limited), instituted action in Commercial High Court for the recovery of Rs. 68, 765, 407/91 from the Defendant-Respondent. This sum was due pursuant to a series of agreements entered into between the Plaintiff – Appellant and the Defendant - Respondent for the provision of some Telephone lines.

Pursuant to the framework agreement dated 29th May 1998 the parties agreed to the provision of one "E1 link". This framework Agreement was in two parts signed in the same month and are marked D2(ii)(iii) by the Defendant- Respondent and P4, P5 by the Plaintiff – Appellant. It is common ground between the parties that one E1 link carries 30 simultaneous telephone connections. Although under D2 (ii)(iii)/P4, P5 parties first commissioned only one E1 link, this number was progressively increased to two E1 links in October 1998 (D2(iv)(v)/P6,P7), ten E1 links in January 1999 (D2 (vi)(vii)/P8,P9), twenty E1 links in August 1999 (D2 (viii)(ix)/P10,P11) and twenty-two E1 links in October 1999 (D2 (x)/P12).

The Agreements, the alleged breach of which constitutes the cause of action in this case, are the Agreements entered into by the Parties in August 1999 and October 1999. In terms of the agreement marked D2 (ix)/P11, the Plaintiff-Appellant agreed to;

1. Provide the required number of E1 links to the Defendant-Respondent free of charge;
2. Commission and upkeep the links
3. Provide and install at its cost any special equipment to provide high quality service
4. Maintain the said special equipment
5. Provide uninterrupted telecommunication facilities and guarantee quality to be on par or above the industry standards.

In terms of the same agreement, the Defendant-Respondent agreed to;

1. Connect the new links to their existing system immediately.
2. Provide free of charge the space, electric outlets, power supply and airconditioned room to maintain the equipment.
3. Provide sufficient security for the said Equipment and shall bear any loss for unauthorized tampering with the same.
4. Ensure that Rs. 4,000,000 worth outbound traffic per month (call charges only) from all twenty E1 links combined would be diverted through the Suntel Network, in the first two years of operation.

In October 1999, by the agreement marked D2 (x)/P12, the aforementioned clause 4 of the Defendant-Respondent's obligations was amended as follows;

"*ENSPL shall ensure the sum of Rs. 20,000,000 worth of outbound traffic per month from 22 E1 links combined will be diverted through the Suntel network in first two years of operation.*"

Thereafter, the parties proceeded with the installation and operationalized the system. The Plaintiff-Appellant forwarded monthly invoices and the Defendant-Respondent settled them from time to time.

As this state of affairs continued, on 15th June 2000, the Defendant-Respondent informed the Plaintiff-Appellant through a letter marked "D4" that they have only received fifteen E1 links from the promised total of twenty-two. In view of this, the Defendant-Respondent suggested a modification of the minimum monthly commitment—to pay only 2/3rd of the monthly payment. At the bottom of the letter there was space reserved for the signature of the Plaintiff-Appellant, to sign and return if they agreed to the modification of the contract. However, this letter was never signed by the Plaintiff-Appellant.

On 20th July 2000 the Plaintiff-Appellant sent a telefax "P15", informing the Defendant-Respondent that the Respondent had only activated 14 E1 links and that 08 more links were available for commissioning at the Respondent's end.

It is important to note that the parties continued to charge and pay Rs. 20, 000,000 as agreed amidst the exchange of these letters.

In August 2000, the Plaintiff- Appellant brought to the attention of the Defendant-Respondent that their account balance stood at Rs. 75, 554, 382/99. On 11th September 2000, through the letter marked "P18", the Plaintiff Appellant again informed the Defendant-Respondent to settle in full their outstanding payments before 14th September 2000 to avoid disconnection of service.

The Defendant-Respondent responded to this with a letter dated 13th September 2000 marked "D7." In the said letter they disputed the amount in the invoice and informed the Plaintiff Appellant that there was only one invoice to be settled. Consequently, the Defendant-Respondent made a payment of Rs. 20,000,000 on 25th September 2000. This payment was brought to the attention of the Plaintiff-Appellant via letter dated 25th September 2009 marked D9 (d) and was also duly noted in the Plaintiff-Appellant's accounts as shown in "P19".

However, even upon making this payment, the Defendant-Respondent had an outstanding balance of Rs. 69, 309, 219/95 to be settled as at September 2000. On account of this outstanding amount, the Plaintiff-Appellant terminated the service agreement on 26th September 2000.

When the Plaintiff-Appellant instituted action in the Commercial High Court to recover the said 69, 309, 219/95 rupees, the Defendant-Respondent made a counter-claim on the basis that the Plaintiff Appellant had only provided 415 lines to the Defendant – Respondent (*vide* paragraph 11 (ඵ) of the Answer dated 30th May 2002), and that the Defendant-Respondent was only required to pay 2/3rd of the minimum monthly commitment of 20, 000, 000 rupees. They further claimed in reconvention a sum of Rs. 41, 040, 185/12 rupees which they claimed was an overpayment. In addition, the Defendant-Respondent claimed damages estimated at Rs. 4180 million as the second claim in reconvention.

When the trial was in process, the Plaintiff-Appellant withdrew their claim due to the non-availability of a material witness. Thereafter, the trial proceeded on the Defendant-Respondent's counter claim and on 24.02.2012 the learned High Court Judge delivered the judgment in favour of the Defendant-Respondent.

The key question which needs to be decided in this case is whether the Plaintiff-Appellant provided only 415 lines to the Defendant-Respondent in violation of the Framework Agreement. The learned trial judge decided in favour of the Defendant-Respondent relying primarily on the document marked "D4" which is a letter dated 15th June 2000 sent by the Defendant-Respondent to Plaintiff-Appellant informing, *inter alia*, that they had received only 415 lines as at May 2000.

The learned High Court judge has remarked: "*But it is abundantly clear that the Document marked P4 is indicative of the fact that the supply of the said telecommunication lines were only 415 and not 660. If the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" (*vide* p. 866 of the brief)

This is the only reason given by the learned judge for deciding that the Plaintiff-Appellant breached the contract by providing only 415 lines. There is a striking absence of any evaluation of the competing evidence. In its place, there is a reproduction of witness accounts, and a verbatim reproduction of issues and admissions made by the parties. Since the impugned judgment does not contain any reasons for disregarding other evidence, it is incumbent upon this Court to verify whether the decision is in fact supported by the evidence made available by the parties.

Prior to delving into the issue, I consider it necessary to clarify certain peripheral concerns which although peripheral, hold much significance for the proper evaluation of evidence.

As per the Agreement marked "D2 (ix)/P11 and D2 (x)/P12" the Defendant-Respondent undertook mainly two obligations. To quote the exact words in the Agreement

"Clause 2 (1) ENSPL shall connect the ten new E1 links to the existing system immediately"

"Clause 2 (4) ENPSL shall ensure that a sum of Rs. 4, 000, 000 /= (Rupees Four Million) worth of outbound traffic per month (Call Charges only) from all twenty E1 links combined (The ten new E1 links and the existing ten E1 links) would be diverted through the Suntel Netwrok, in the first two years of operation"

This Clause 2 (4) was amended subsequently to read as follows;

"*ENSPL shall ensure that a sum of Rs. 20, 000, 000/- (Rupees Twenty Million) worth of outbound traffic per month from 22 E1 links combined will be diverted through the Suntel network in first two years of operation*"

The amendment is significant mainly for the reason that it increased the minimum monthly commitment from Four Million to Twenty Million.

Thus, as apparent from the Agreement, the Defendant-Respondent had an obligation to "immediately connect the links to the existing system" and pay a minimum monthly commitment of Rs. 20, 000, 000 as call charges. Furthermore, the Defendant-Respondent also agreed that "*in the event that the actual call charges in respect of the Contract in any particular month is less than the minimum monthly call charge, we hereby agree to pay the minimum monthly call charge in lieu of the actual call charge for the relevant month.*"

In terms of the Agreement the minimum monthly commitment was agreed in respect of "call charges." There is no ambiguity in this regard. There is nothing in the agreement to suggest that the minimum monthly commitment is used interchangeably to refer to the 'rental'.

With that I now turn to consider whether the evidence supports the findings made by the learned High Court judge.

At the trial, Defendant-Respondent sought to establish its case on two grounds; firstly, they contended that the Plaintiff-Appellant provided only 415 telephone lines; Secondly that there were irregularities in the Plaintiff-Appellant's accounts. During the appeal, they raised an additional ground—as an extension of the first ground—that the Plaintiff-Appellant agreed to modify the minimum commitment. To the extent possible, and for the sake of clarity, I will address the questions before us without deviating too much from the aforesaid structure.

The Defendant-Respondent's first argument relied on two factors. Firstly, they drew attention to the letter "D4", sent by them in June 2000, informing the Plaintiff Appellant that they had provided only 415 lines. It was solely based on "D4" that the Learned High Court Judge entered the judgment in favor of the Defendant-Respondent. However, in so doing, the learned High Court judge appeared to have overlooked several material documents filed by the Plaintiff-Appellant. Of particular interest is the failure to consider "P14" which is a telefax sent by the Plaintiff-Appellant to the Defendant-Respondent on 27th October 1999, informing that twenty-two E1 links in total had been activated as at October 1999 and were available for immediate commissioning. Another telefax informing the same, was sent in July 2000. The second telefax is marked "P15".

During cross examination, Mr. Abeywardena—the witness for the Defendant-Respondent—disputed receiving "P15" (*vide* p. 697 of the brief). However, they have at no point disputed "P14" which is the first letter sent by the Plaintiff-Appellant in October 1999 stating that "*only 14EI' s are in operation and 08E1's terminated have not been activated at your end*". This is significant because "P15" makes clear reference to the telefax dated 27th October 1999 ("P14").

Even if one were to disregard "P15", a cursory glance at "P14" unequivocally indicates that the Plaintiff-Appellant has in October 1999 brought to the attention of the Defendant Respondent that 08 E1 links were awaiting commissioning at their end. Nevertheless, no weight has been given to "P14" in the judgment, despite the fact that it stood uncontroverted by the Defendant-Respondent.

During cross examination Mr. Abeywardena also took up the position that the Plaintiff-Appellant did not provide the necessary infrastructure for commissioning the twenty-two E1 links (*vide* pp. 694-696). At this point, he was questioned as to why he waited till June 2000, if it was apparent very early on, that the necessary infrastructure had not been provided. However, over and above the assertion that the Plaintiff-Appellant knew about the lack of infrastructure, Mr. Abeywardena failed to provide a sufficient explanation for this lapse. Neither has he produced any other proof to substantiate the said fact.

Secondly, the counsel for the Defendant-Respondent while Cross examining Mr. Thygaraja Prabhath—sole witness for the Plaintiff-Appellant, sought to reinforce the position with regard to 415 lines by referring to a rental charge of Rs. 91, 300 in August 2000.

> *"Q: Now there, they are charged the monthly rentals, correct?"*
> *A; Correct*
> *Q: And the monthly rentals are for the telephone lines that have been provided by you?*
> *A; Yes*
> *Q: and how many telephone lines now there are look at the monthly rental is 91, 300 correct?*
> *A: Yes*
> *Q: now that is at 220 is how much, how many links, how many lines? Now look at the detailed bill you have charged per line 220 correct?*
> *A: yes*
> *Q: So that is 220/- rupees right?*
> *A: yes*
> *…….*
> *Q: now 91, 300 divided by 220 comes to 415?*
> *A: Correct"*
>
> *(vide pp. 849, 850 of the brief)*

Accordingly, the Defendant-Respondent sought to argue that the reason why the appellant charged 91, 300/- was because they had only provided 415 lines. The simple math they put forward was that 91, 300 divided by 220 is 415. While there is no doubt as to the accuracy of this calculation, what the Counsel for the Defendant-Respondent failed to appreciate was that the said sum of 91, 300/- was the amount charged for the rental in respect of the activated lines.

In fact, Mr. Thyagaraja consistently maintained that the rental is charged only for the number of activated lines.

> *"Q: Therefore, I am suggesting to you that you did not at any stage supply more than 415 telephone lines?*
> *A: 415 that was in service when it is in use only it is charged for the rental […]*
> *….*
> *Q; I am suggesting to you that you rented or you made available to the defendant only 415 telephone lines?*
> *A: Once the telephone lines are made active and provided when it is used in the service […] so only after that the bill will reflect the rental component. What I was referring is that we have installed the infrastructure and extended the E1facilities to the defendant's premises but it was not in service. Only the 14 were in service others were at his door steps but it was not used because of that it was not coming into the picture.*
> *Q: Now witness, when you rent a telephone to a consumer whether he uses or charge, he has to pay yearly rental is that correct?*
> *A: If he is not using, it is not charged.*
> *Q: The consumer has to pay the rental correct?*
> *A: Once we complete our installations when the customer starts using … that is after commissioning and putting in to service, it is not using still it is charged. But before putting it in to service it is not charged" (vide pp. 950,951 of the brief)*

The evidence of Mr. Thyagaraja remains consistent. His credibility has not been doubted by the learned High Court Judge nor is there any observation to the effect that there were

contradictions in his position. Yet this position has been rejected by the learned trial judge without giving any reasons.

In any event, the charge of 91, 300 /- rupees cannot conclusively prove that the Plaintiff-Appellant had failed to provide all twenty-two E1 links. As clearly stated in the Agreement, the onus to connect the lines to the system remained with the Defendant-Respondent. Thus, at the most, activated 415 lines could only mean two things;

> either the Plaintiff-Appellant did not provide the requisite number of links and therefore the Defendant-Respondent could not activate them; or
>
> the Plaintiff-Appellant provided the requisite number of lines but the Defendant-Respondent did not activate them.

It does nothing beyond confirming that 415 lines were in operation. Regrettably, the learned High Court Judge misdirected herself in assuming that 415 activated lines is synonymous with non-provision of twenty-two E1 links. She had no basis when she concluded that "*Further the above witness was also encountered by the Counsel for the Defendant regarding D3 which clearly indicates the fact that the plaintiff had supplied only 415 telephone lines to the defendant*" (*vide* page 14 of the Judgment)

Where this is the case, the only factor which lent credence to the Defendant-Respondent's version then was the letter "D4." It was through "D4" that the Defendant-Respondent first brought to the attention of the Plaintiff-Appellant that they had received only 415 lines. In contradistinction to this, there is "P14" which indicates that in October 1999 the Plaintiff-Appellant had activated twenty-two E1 links and made them available for commissioning. Thus, it was incumbent on the learned High Court Judge to note her reasons for rejecting "P14", if she in fact decided to reject it.

On page 10 of the judgment, the learned High Court Judge has stated: "*The plaintiff by purported Fax dated 20th July 2000 has admitted that till then only 14 E1 links were in operation. The said fax has been marked D5.*"

This document marked "D5" is an identical copy of "P15". The document "D5" / "P15" establishes two factors that are relevant for the case;

Firstly, that the plaintiff-appellant had sent a fax in October 1999 informing that they have activated twenty-two E1 links on their end and that those lines were available for commissioning; (this fax is the document marked "P14")

Secondly, that on 20th July 2000, the plaintiff-appellant informed that only fourteen E1 links were in operation.

If the learned High Court judge relied on "D5" to state that "only 14 EI links were in operation", she could not have overlooked the other portion of the same document which refers to the fax sent in October 1999 (which is marked "P14"). The document marked "D5/ P15" must be accepted as a whole and not in a piecemeal manner. The learned High Court Judge could not reprobate and approbate portions of one single document.

By relying on "D5/P15", she opened herself to three irresistible findings;

Firstly, that both as at October 1999 and July 2000, only fourteen E1 links were in operation,

secondly, that at both points of time, the Plaintiff-Appellant had activated twenty-two E1 links from their end and

thirdly, that at both points of time the Defendant-Respondent has failed to connect the remaining eight E1 links to their system.

On the other hand, even if the learned High Court Judge rejected "P15", it would still leave "P14" as an outstanding uncontroverted document which discloses that the Plaintiff-Appellant has taken steps to activate twenty-two E1 links as early as in October 1999. In my view, these were findings which had a material bearing on the Defendant-Respondent's case. Yet no regard has been had to these positions in the impugned judgment.

I also observe certain contradictions in the Defendant-Respondent's version. At paragraph 11 (ඌ) of the Answer dated 30th May 2002, the Defendant-Respondent had taken the position that the Plaintiff-Appellant had provided as at September 2000 only 415 lines. At the same time, in paragraph 11 (ඊ) they have alleged that the Plaintiff-Respondent had provided fifteen E1 links. The letter marked "D4" also refers to the fact that only fifteen EI links had been received by them. However, when giving evidence, the

witness had taken the position that only fourteen E1 links were provided. (*vide* pp. 691-696).

> Considering the fact that one E1 links carries 30 simultaneous telephone lines – which is a fact admitted by both parties—this contradiction cannot be overlooked. If the Plaintiff- Respondent allegedly provided only fourteen E1links, then, the Defendant-Respondent ought to have been able to use 420 lines. On the other hand, if fifteen E1 links were provided, then the number of activated telephone lines should come up to a total of 450. In fact, based on the evidence made available by both parties, 415 lines could only have arisen from 13.888 E1 links. Whether the Plaintiff-Appellant could provide decimals in a package which guarantees 30 simultaneous links or whether activation of all 30 links happened in one go, is a question which the learned High Court Judge ought to have given her mind to.

Furthermore, there is also the peculiar act of the Defendant-Respondent continuing to pay approximately 20, 000, 000/- in the months of January 2000, June 2000, and in August 2000. This is demonstrated in "D10" which is a document marked by the Defendant-Respondent himself. The Defendant-Respondent's proposal to vary the minimum commitment came in June 2000. If there was in fact a shortcoming in relation to the number of telephone lines, the dispute with regard to the minimum commitment should have arisen earlier. At the very least, the Defendant-Respondent had the opportunity to pay 2/3rd of the payment as suggested by them post June 2000. However, as per their own document "D10", the payments appeared to have been made taking the Rs. 20, 000, 000 as the basis. The learned High Court Judge has also concurred in this view; "*It is categorically stated by the Defendant that it has paid a sum of Rs. 200, 000, 000/- from September 1999 to September 2000 for the telephone services provided by the Plaintiff […]*" (*vide* p. 10 of the Judgment).

Nevertheless, these contradictions have escaped the scrutiny of the learned High Court Judge. It appears that she has only mechanically noted them down without giving her mind to their veracity or consistency. The totality of Defendant-Respondent's evidence does not support the position taken in "D4". In those circumstances, the finding in the judgment that "*if the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" remains unsubstantiated.

As I noted at the very outset, the Defendant-Respondent raised in appeal that the Plaintiff-Appellant agreed to reduce the minimum monthly commitment. They sought to establish this by referring to a credit note passed by the Plaintiff-Appellant in August 2000. As per "P19", there is a credit note worth Rs. 11, 865, 134/95 passed by the Plaintiff-Appellant on 07th August 2000. The credit note is explained as "*credit note passed in our books to reduce the disputed amount of LKR 31, 865, 134/95 to LKR 20, 000, 000 as agreed with you.*"

The Defendant-Respondent took the position that the words "agreed with you" is proof of the fact that the Plaintiff-Appellant agreed to the modified minimum monthly commitment. However, this position has not been accepted by the Plaintiff-Appellant. Furthermore, there is no evidence that the Plaintiff-Appellant signed and accepted the modification proposed via "D4". This fact was also admitted by Mr. Abeywardena (*vide* pp. 701, 702 of the brief). In his evidence he conceded that if the Plaintiff-Appellant had agreed to his terms, a total of Rs. 31, 865, 134/95 should have been reduced from the bill. (*vide* p.702). At the same time, he also stated that the Plaintiff-Appellant had allegedly communicated to reduce a sum of Rupees 10 million in lieu of 31 million through a purported letter marked "D15" (*vide* p. 703 of the brief) Regrettably, this letter does not form a part of the brief. Therefore, I am unable to ascertain the veracity of that claim. In any event, I observe that there is still a discrepancy in that position. The Credit note is ostensibly made corresponding to a sum of Rs. 20, 000, 000 while Mr. Abeywardena alleged that the Plaintiff-Appellant purportedly agreed to a sum of Rs. 10 million.

The second ground which the Defendant-Respondent alleged was that there were irregularities in Plaintiff-Appellant's accounts. Mr. Abeywardena has asserted in his affidavit that the Plaintiff-Appellant company charged them an extra Rs. 27, 061,026/34 in July 2000. However, in cross examination, Mr. Abeywardena admitted that on the face of the August invoice this amount was later credited to their account on 07th August 2000. (*vide* pp. 707-709). Irrespective of this, Mr. Abeywardena had conceded that even if all alleged extra charges were deducted, the Defendant-Respondent would still not have been able to cover the amount they were due to pay.

The final line of argument taken by the Defendant-Respondent is that the termination was unjustified for being premature. They contend that the September bill had the 6th of October 2000 as the final date for payment and that the Plaintiff-Respondent terminated the contract on the 26th of September in violation of the contract. I am unable to agree with this contention.

The agreement was terminated on account of the failure to settle in full the total of Rs. 69, 309, 219/95 which had been long overdue. In terms of clause 11 (a) of the Agreement, the Plaintiff-Appellant had the right to disconnect the services "*when any service dues have not been paid upon it becoming due and payable in terms of Clause 5.2 and clause 6 above in respect of this Service or in respect of any other service given to the subscriber in pursuance of any other agreement.*"

The first notice in this regard came in August 2000 where the Plaintiff-Appellant brought to the attention of the Defendant-Respondent that they have an outstanding balance of some 75 million rupees. The second reminder came on 11th September 2000. This letter also gave an ultimatum to the Defendant-Respondent to 'settle in full' the outstanding amount by 14th September 2000 or to risk discontinuation of service. Nevertheless, by 25th September the Defendant-Respondent only paid some 28 million rupees. The payment had been made after the 14th September which indicates that the Plaintiff-Appellant had granted a further grace period to the Defendant-Respondent to uphold their end of the bargain.

Therefore, when the Defendant-Respondent only paid 28 million which does not come up to even ½ of the due amount, the Plaintiff-Appellant may have apprehended a real likelihood of defaulting. In those circumstances, they resorted to discontinue the services as notified.

In the totality of the aforementioned circumstances, it is my considered view that the learned High Court judge misdirected herself when she decided in favour of the Defendant-Respondent. "D4" alone is insufficient to substantiate that the Plaintiff-Appellant has failed to provide twenty-two E1 links. There are apparent contradictions and infirmities in the Defendant-Respondent's case, which when taken together, have the force of vitiating the position taken in "D4". Confronted with these, it is difficult to

hold that the Defendant-Respondent has proved the case on a balance of probabilities. In the result, no question of damages could arise.

Nevertheless, in the interest of justice, I will proceed to briefly examine the second ground of appeal raised by the Plaintiff-Appellant.

Learned President's Counsel appearing for the Plaintiff-Appellant contended that both the Roman Dutch Law as well as the English Law, clearly lay down the principle that in a claim for damages for breach of contract, no compensation for loss of reputation can be considered.

The Plaintiff-Appellant placed great reliance on the decision ***Seabridge Shipping Ltd. v Ceylon Petroleum Corporation (2002) 1 SLR 126***, to substantiate that the Respondent is not entitled to claim damages for the goodwill and reputation for breach of contract. In the said case, the Court of Appeal followed the following position found in Anson's Law of Contract:

> "*Damages cannot, in principle, be recovered in a contractual action for injury to reputation . . .*
>
> *An exception, however, exists in the case of a banker who refuses to pay a customer's cheque when he has in his hands funds of the customer to meet it. If the customer is a tradesman, he can recover in respect of any loss to his trade reputation by the breach.*"

They further submitted that the Roman Dutch Law position as illustrated in **Justice Weeremantry's The Law of Contracts (Vol. I, page 890)** is identical: "*Loss of reputation would thus not be treated as a natural result of breach of contract, nor would damages be awarded in contract for injury to the plaintiff's feelings.*"

However, it is the contention of the Defendant-Respondent that the position taken in Anson's law of contract as quoted in Seabridge case has changed ever since. He drew our attention to a more recent edition of Anson's Law of Contract where it is stated that;

> "*Although damages cannot be recovered in a contractual action for injury to reputation per se, they may be where the loss of reputation*

caused by the breach of contract causes financial loss" **(Anson's law of contract, 30th Edn pp. 568-569)**

He further cited the case ***Malik v Bank of Credit and Commerce International SA (1997) 3 All E R 1*** where it was held that;

> "*[the] fact that the breach of contract injures the plaintiff's reputation in circumstances where no claim for defamation would lie is it by itself a reason for excluding from the damages recoverable for breach of contract compensation for financial loss which on ordinary principles would be recoverable. An award of damages for breach of contract has a different objective: compensation for financial loss suffered by a breach of contract, not compensation for injury to reputation*".

There was a further contention that pure Roman Dutch Law never existed in Sri Lanka and that to a great extent, its remnants have been modified and influenced by the infiltration of English law principles. I observe that this position is supported by Justice Weeramantry's treatise which notes that;

> "***The superior development of the subject of contractual damages in English Law has hence resulted in the superimposition of English principles on the Roman-Dutch Law.***" (The Law of Contracts (Vol. I, page 888))

Hence there is no necessity for us to embark on a voyage of discovery to determine the applicable law. The question in narrow terms is to see whether 'patrimonial loss' in Roman Dutch Law or 'damages for contractual breach' in English Law allows damages for reputation and loss of Goodwill.

There is no doubt that a cause of action in respect of injury to reputation lies in the law of delict. The law of delict provides for damages, where the necessary ingredients are present, whether or not the said reputational injury has caused a financial loss. There is no requirement to prove actual damage. On the other hand, an award of damages for breach of contract has a different objective. To quote the words in ***Malik v Bank of Credit and Commerce***, this objective is "*compensation for financial loss suffered by a breach of contract.*"

As often seen in matters involving commercial entities, the distinction between damage to reputation and financial loss can become blurred. Damage to the reputation of professional persons, or persons carrying on a business, frequently causes financial loss. There is no question that, a "supplier who delivers contaminated meat to a trader can be sued for loss of commercial reputation involving loss of trade" [*vide* Malik v Bank of Credit and Commerce].

Thus, in so far as a commercial entity is concerned, **financial losses** incurred by loss of reputation caused by a breach of contract is a 'patrimonial loss' and not a compensation for 'pain or suffering'. There is no punitive element involved. This also accords with the principle in Roman Dutch Law as found in Justice Weeramantry's The Law of Contracts (Vol. I, page 889)

> *"[…] the true damnum in contract is compensation for patrimonial loss. Hence an important difference between contractual and tortious damages is that the former are awarded with the object of giving compensation for loss suffered and are not influenced as tortious damages are by the consideration that the wrongdoer should be punished nor do they concern themselves with the mental or bodily suffering of the injured party."*

The question therefore is one of evidence as oppose to principle. The claimant must prove that the breach of contract which caused a reputational loss and damages to Goodwill gave rise to a financial loss. This was also the position taken in ***Hatton National Bank v Tilakaratne (2001) 3 SLR 295***.

Mr. Abeywardena had stated in his affidavit;

> "*[the defendant] had entered into contract with several satellite service providers as such as Lockheed Martin International and other International Telecommunication Service providers;*
>
> *Had entered into contract for leasing optic fiber international links from Germany where the satellite circuits end to London and New York*
>
> *Purchased and installed 03 Nos. international gateway switches in the United Kingdom with the capacity of 160EI links (4800 telephone circuits)*

Purchased and did the setting up of several satellite earth stations to receive satellite signals for international communications with associated transmission and switching equipment

I state that the defendant was compelled to make payments to such Satellite and Telecom providers and maintain such telecommunication system at heavy costs notwithstanding the termination of services by the plaintiff as International agreements with US companies cannot be terminated arbitrary without paying heavy damages.

I state that the defendant was equipped to carry heavy international telecommunication traffic to Sri Lanka through the plaintiff's telecommunication system" (paragraphs 30-33)

The hardships which are alleged by the Defendant-Respondent does not follow that they have suffered any financial losses by the alleged damages to their Goodwill. There is nothing which indicates that other trader/service providers were not inclined to continue their relationships with the Defendant-Respondent. Neither is there any evidence to suggest that the Defendant-Respondent missed out on other contractual opportunities or business prospects because of the alleged breach of contract. In fact, the only basis as alluded by the Defendant-Respondent, for calculating damages for loss of Goodwill is "*whether a third-party purchaser would pay Rs. 2,000,000,000 over the Net Asset Value of the Respondent to purchase the Respondent in open market as a going concern, considering that the Respondent has an earning potential of over Rs. 18, 000,000,000 in 15 years at the lowest estimations*".

This Court is therefore invited to make a highly technical opinion on business valuation, for which we have neither the expertise required nor any evidence towards this end.

In the absence of cogent evidence, other than the Defendant-Respondent's mere say so, a claim of reputational loss and damages to Goodwill causing financial loss arising out of the breach of contract cannot be sustained. In fact, what the Defendant-Respondent attempts to claim under the purported damage to Goodwill is not a financial loss but compensation for purported 'injury or suffering'. As I indicated earlier, claims involving

pure injury and suffering cannot be deemed patrimonial loss. They are in fact damnum injuria for which the legal remedy lies in the law of delict.

In those circumstances, I hold that the learned High Court Judge erred when she allowed the Defendant-Respondent's claim for 2,000,000,000 rupees for damages to Goodwill. I also take it upon on me to observe that there is a glaring failure on the part of the learned High Court Judge to address her mind to the question of damages. There is nothing in the impugned judgment which indicates that the learned High Court judge deliberated, let alone called for evidence, to ascertain the said claim.

This overall paucity of reasons and loose ends apparent on the face of it, renders the the Judgement to be violative of section 187 of the Civil Procedure Code. The said section reads;

"*The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively*"

It has been established in a series of judgements that failure to comply with the mandatory requirements in Section 187 of the CPC vitiates the judgment. (*vide* ***Dona Lucihamy v. Ciciliyanahamy*** 59 NLR 214, ***Warnakula v Ramani Jayawardena*** (1990) 1 SLR 206, ***Sobanhamy v Somadasa*** (2005) 3 SLR, ***Perera v Calderla*** (20070 1 SLR 165)

In ***Warnakula v Ramani Jayawardena*** (1990) 1 SLR 206, a District Court judgment was vitiated by the Court of appeal for failing to consider the evidence.

> "*The learned counsel for the plaintiff-appellant submitted to court that the learned District Judge had failed to consider and analyse the evidence. He further submitted that the learned District Judge had failed to give reasons for the findings and he had totally failed to consider the complaints and the documentary evidence produced in this case.*
>
> *There is force in the submission of counsel. The learned District Judge had failed to evaluate and consider the totality of the evidence. His judgment was not in compliance of section 187 of the Civil Procedure Code. He has given a very short summary of the evidence of the parties and witnesses*

and without giving reasons he had stated that he prefers to accept the evidence of the defendant-respondent as it was satisfactory and thereafter proceeded to answer the issues."

The case before us raises issues similar to the ones in the ***Waranakula*** case. The learned High Court judge has only given bare answers to the issues raised. We may assume that the learned Trial Judge was satisfied that the claim of the Defendant-Respondent deserved to be decreed. But the judgment of the learned Trial Judge was not final: it was subject to appeal and unless there was a reasoned judgment recorded by the Trial Judge, an appeal against the judgment may turn out to be an empty formality.

Appellate Courts generally attach great value to the views formed by the Judge of First Instance who had seen the witnesses and noted their demeanor. How the Judge who tried the suit, reacted to the evidence of a witness may not always be found from the printed record. It is for this reason that a judgment revealing the trial judge's thought process becomes an essential attribute of a trial. A mere order deciding the matter in dispute not only prejudices the rights of the parties but whittles down the importance attached to the judicial process. (*vide*. ***Swaran Lata Ghosh vs H. K. Banerjee And Another 1969 AIR 1167***) It colors the decision as one of whim or fancy instead of judicial approach to the matter in contest.

In the present case, it is apparent that the learned High Court judge has failed to review and examine evidence germane to each issue. There is unequivocal acceptance of the Defendant-Respondent's position, to the complete exclusion of the Plaintiff-Appellant's position, notwithstanding the infirmities I have discussed above. In the absence of cogent reasons which suggested themselves to the trial judge, her conclusion "*If the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" is unacceptable and unconvincing. There is also nothing in the judgment to indicate that the learned judge has given her mind to the question of damages.

For the foregoing reasons, I hold that the judgment by the learned High court judge does not comply with section 187 of the Civil Procedure Code. I also hold that the learned High Court Judge has failed to appreciate the facts and evidence of the case and erred in concluding that the Defendant-Respondent was entitled to reliefs prayed in their

counter-claim. Accordingly, I set aside the judgment given by the learned High Court judge.

Appeal allowed.

Judge of the Supreme Court

Justice Nalin Perera

I agree

Chief Justice

Justice Sisira de Abrew.

I agree

Judge of the Supreme Court