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

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of provinces (Special Provisions) Act No. 10 of 1996 read with Article 154H of the Constitution of the Democratic Socialist Republic of Sri Lanka and Chapter L VIII of the Code of Civil Procedure.

Kekul Kotuwage Don Aruna Chaminda,
No. 17/, Ethgala,
Kochchikade.

PLAINTIFF.

SC/ **Appeal No: 134/2018**
CHC/ 275/13 MR.

Vs

Janashakthi General Insurance Limited,
No. 46, Muththaiya Road,
Colombo. 2.
And
No. 55/72, Vaxhaul Street, Colombo 2.

DEFENDANT

AND NOW BETWEEN

Kekul Kotuwage Don Aruna Chaminda,
No. 17/, Ethgala,
Kochchikade.

PLAINTIFF – APPELLANT.

Vs.

Janashakthi General Insurance Limited,
No. 46, Muththaiya Road,
Colombo 2.
And,
No. 55/72, Vaxhaul Street, Colombo. 2.

DEFENDANT – RESPONDENT.

Before : Prasanna Jayawardena PC, J.
L.T.B. Dehideniya, J
E.A.G.R. Amarasekara, J.

Counsel : J.M. Wijebandera with Shalani Chandrasena and Sharin Shehani for the Plaintiff – Appeallant.
Rajindra Jayasinghe instructed by Heshan Mamuhewa for the Defendant – Respondent.

Argued On : 29.04.2019

Decided on : 09.10.2019

E.A.G.R. Amarasekara, J.

The Plaintiff – Appellant (hereinafter referred to as the Plaintiff) instituted an action in the Commercial High Court of the Western Province against the Defendant Respondent (hereinafter referred to as the Defendant) seeking relief as prayed for in the plaint dated 23.08.2013. The cause of action was based on the refusal of payment on a demand made upon an insurance policy that existed between the parties. Even

though there was no objection but instead an admission with regard to the jurisdiction of the Commercial High Court in the answer as well as at the commencement of the trial, the Defendant during the trial, relying on a purported arbitration clause, withdrew the admission and raised certain issues with regard to the jurisdiction of the Commercial High Court. The Learned High Court Judge pronounced his order on 17/03/2017 dismissing the plaint while answering the said issues in favour of the Defendant. The High Court was of the view that it lacks jurisdiction to hear and determine this matter in terms of Section 5 of the Arbitration Act. Being aggrieved by the said order the Plaintiff filed a leave to appeal application in this court. This court by its order dated 10/09/2018 granted leave to appeal on the following questions of law, which are reproduced in verbatim;

> "a) Has the Learned High Court Judge erred in law in ordering to dismiss the plaint on the basis of lack of jurisdiction after the jurisdiction was admitted by parties by way of pleading as well as by recording admissions?
>
> b) Should not a party be permitted to withdraw from admission of jurisdiction, after submitting to trial?
>
> c) Is the question of jurisdiction raised by issue number 17 and 18 one falls to the categories of latent lack of jurisdiction that is deemed to be waived off by admissions and/or subsequent conduct of parties?
>
> d) Has the Defendant in the circumstances of this case acquiesced and/or waived of the right to object to the jurisdiction?"

Plaintiff in his plaint inter alia stated that,

- The Plaintiff was the registered owner of the vehicle bearing registration number WPKT1690.
- The plaintiff obtained a Comprehensive Insurance Policy bearing number VCSP 2012-5006 from the Defendant Company which was operative from 29th March 2012 to 28th March 2013.
- Plaintiff duly paid agreed premiums as per the agreement.
- While the said policy was valid and in force, the said vehicle met with an accident on or around 8th February 2013 at Anamaduwa.
- As a result of the said accident, total and/or extensive damage was caused to the said vehicle and its accessories. It was determined that it was not possible to restore the vehicle to its original condition and the vehicle was condemned causing a total loss.
- The aforesaid damage/loss which was estimated as Rs.13 million was covered by the insurance policy and the Defendant was bound to indemnify the plaintiff.
- As a result of the said incident, a friend of the Plaintiff died and the Plaintiff suffered injuries and was unconscious.
- The Plaintiff was hospitalized till 19th of February 2013.
- When the Plaintiff recovered consciousness, he informed the Defendant company about the accident and the damage caused.
- When the Plaintiff submitted the insurance claim to the Defendant, the Defendant refused to entertain or admit the claim by letter dated 6th March 2013 for the following purported reasons;
    - That the driver of the vehicle who drove the vehicle at the time of the accident (the Plaintiff) had consumed liquor.

  - That the driver of the vehicle (the Plaintiff) failed to inform the Defendant or the Police about the occurrence of the accident immediately after the accident.
- The reasons given by the Defendant to reject his claim were baseless and had been arrived at without proper investigation or any materials. Thus, the repudiation of the claim was illegal and unlawful.
- The Plaintiff had not consumed any alcohol at the time of the accident.
- The Defendant, in breach of the insurance policy, wrongfully failed and neglected to make due and effective payment.

In the body of the plaint, the Plaintiff marked the insurance policy and its schedule as P2 and P3, but he failed to submit the entire policy along with the plaint even though section 50 of the Civil Procedure Code states as follows;

"*If a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or copy thereof to be filed with the plaint*."

Thereafter, the Defendant filed the answer and admitted;

- The jurisdiction of the court.
- That upon the request of the Plaintiff, the Defendant issued the Insurance Policy bearing number VCSP 2012-5006 for the vehicle bearing the registration number WP KT – 1690.
- That the said insurance Policy was operative from 29th March 2012 to 28th March 2013 and the Plaintiff duly paid the agreed premiums as per the agreement.
- The refusal of the claim made by the Plaintiff.

The Defendant company further averred that;

- The Plaintiff failed and neglected to produce the Insurance Policy with the plaint even though the schedule of the said Insurance Policy was marked as P2 and P3 and annexed to the Plaint.
- On or around 8th February 2013, the Defendant was informed that the said vehicle met with an accident. However, as soon as the accident occurred, the Plaintiff failed to inform the Defendant company or the Police about the said accident.
- The Plaintiff failed to oblige or comply with the terms, conditions and clauses of the Insurance Policy.
- The Defendant came to know that the Plaintiff drove the vehicle having consumed intoxicating liquor which directly or impliedly caused the accident, and thus is not liable to indemnify the plaintiff.
- The Plaintiff failed to produce the Insurance Policy which is the base for the current action and thus, do not comply with the procedure laid down in Section 50 of the Civil Procedure Code.
- The purported declarations and/or statements made by the Plaintiff in support of obtaining a benefit under the said policy are incorrect and/or false.
- The action of the Plaintiff be dismissed.

The contents of the plaint indicate that the plaintiff had averred the vehicle number as well as the policy number. Other than the failure to annex the entire policy with the plaint, there is no material to indicate that the Plaintiff misled the Defendant through his plaint. It can be presumed that the Defendant being the insurer had a copy of the Insurance policy. The Defendant Company had not pleaded that it did not have the

policy with it. In that backdrop, it is clear that the Defendant made the aforesaid admissions in the answer with a knowledge to what such admissions relate. The Defendant company itself had referred to the policy number and the vehicle number in its admissions. As such, by no stretch of imagination it can be presumed that such admissions in the answer were made due to a mistake or a misrepresentation. There is no material to establish or no allegation that there was fraud, duress or undue influence that caused to make such admissions. Hence, it is pertinent to note that the Defendant Company failed to raise an objection to the jurisdiction under Section 5 of the Arbitration Act No. 11 of 1995 on the first occasion it had and instead it admitted the jurisdiction.

Thereafter the matter was fixed for trial and the parties suggested their issues and admissions in writing-*vide pages 128 to 137 of the appeal brief*. Even there, the Defendant admitted the Jurisdiction of the Commercial High Court and his admissions refer to the vehicle number and the policy number. The learned high court judge recorded the admissions of the case as per the suggestions made by the Defendant-*vide page 140 of the brief*. Thus, as per the proceedings dated 03.10.2014 before the learned High Court judge, the following were among the admitted facts.

- The jurisdiction of the court.
- Paragraphs 1,4 and 5 of the Plaint.
- The Defendant issued Policy of Insurance bearing number VCSP 2012-5006 in favour of Dr. D.A.C. Kekuluthotuwage in respect of vehicle bearing number WP KT – 1690.
- The said Policy provided a comprehensive cover and was valid from 29th March 2012 until 28th March 2013.
- The Premiums in respect of the said policy were paid in full.

- The schedule to said policy had been annexed to the plaint and marked as P2 and P3.
- On or around 8th February 2013, The Defendant was informed that the said vehicle had met with an accident.
- The Defendant repudiated and /or rejected the Plaintiff's claim made under the said policy by letter dated 6th March 2013 marked P4 with the Plaint.

Thus, it is clear that the Defendant Company had admitted the jurisdiction of court to hear and determine the action for the second time and those admissions were made with reference to the relevant Insurance Policy including its number. The officers of the Defendant company who instructed to make these admissions including the jurisdiction should have known the contents of the policy. Therefore, there is no material to indicate that these admissions were made for the second time due to any mistake, misrepresentation, fraud, duress or undue influence etc., which could vitiate or dilute the strength of the admissions made. The statements made through an answer and as well as proposed admissions to a court of law have to be considered as responsible statements. Thus, for the second time the Defendant evaded raising an objection to jurisdiction based on Section 5 of the Arbitration Act.

As said before, the Plaintiff had not submitted the entire insurance policy with the plaint and has only annexed its schedules. However, the Plaintiff had submitted the entire insurance policy with a motion dated 9th September 2014. The Defendant objected to the insurance policy being marked in evidence and the learned High Court Judge granted permission under Section 54 of the Civil Procedure Code to receive it in evidence by his order dated 15.12.2015. It appears that the Defendant did not challenge this order in a higher forum. For the sake of argument, even if it is

considered that the defendant was not aware of the document it was being sued upon till the said motion was filed, the Defendant could have raised the objection to jurisdiction based on that document when the court granted permission to receive it in evidence. The Defendant neglected or failed to do so.

The facts related above show that the Defendant admitted the jurisdiction several times on his own or did not object to jurisdiction when it had the opportunity to do so. Thus, there was no reasonable ground to allow the Defendant to withdraw the admissions made in respect of the jurisdiction. The delay in withdrawing the admission, at a much later stage, indicates that it may be due to an afterthought.

Subsequent to recording of admissions and issues, the Commercial High Court proceeded with the trial and recorded evidence on 09.06.2016 and 10.06.2016 and in the midst of the cross examination on 10.06.2016, the Defendant marked conditions No.3 and 7 of P2 (Insurance Policy) as V3 and V4 respectively.V4 is the arbitration clause, and relying on the same the Defendant moved to raise issues as to whether the court is precluded from trying this case in view of the arbitration clause contained in the insurance agreement. (The Plaintiff in his petition to this court has stated that during the cross examination the defendant marked as V1 and V2, the insurance policy agreement and moved to raise issues but that claim seems to be factually incorrect. As per the proceedings of the lower court, what were marked as V1 and V2 are a statement and a copy of a letter respectively). Thereafter, on behalf of the Defendant, the counsel had withdrawn the admission No.1 already made at the commencement of the trial which acknowledged the jurisdiction of the Commercial High Court. Furthermore, the defendant had raised issues No.17 and 18 challenging the jurisdiction of the Commercial High Court and the Plaintiff had raised issue No.19

as a counter issue challenging the ability of the Defendant to object to the jurisdiction at that juncture, when it had already admitted jurisdiction.

The court below had considered them as preliminary issues and the parties filed their written submissions. Subsequently, the Learned High Court Judge pronounced his order dated 17/03/2017 dismissing the plaint on the basis that the High Court lacks jurisdiction to hear and determine this matter due to the existence of the said arbitration clause. Being aggrieved by the said order the Plaintiff prayed for leave to appeal in this court and this court granted leave on the issues of law mentioned above.

Since these preliminary issues were raised relying on Section 5 of the Arbitration Act, it is worthwhile to see what it provides. The said section reads as follows;

'*where a party to an arbitration agreement institutes legal proceedings in a court against 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*' (emphasis added).

It is clear that the bar or limitation imposed by the said section on the trial court is contingent. Unless there is an objection the court has jurisdiction. There is no total prohibition on exercising jurisdiction. The section imposes a prohibition to exercise already existing jurisdiction when there is an objection as per Section 5 of the Arbitration Act and the Arbitration agreement. Thus, there was no total want of jurisdiction and with the admission of jurisdiction the trial court was fully clothed with jurisdiction.

In the case of **P. Beatrice Perera Vs The Commissioner of National Housing 77 N.L.R. 361 at p. 366**, the distinction between **'patent'** and '**latent'** want of jurisdiction was discussed as follows. "……. *Lack of competency may arise in one of two ways. 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 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or 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 judice and the want of jurisdiction is incurable. In 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 or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction. ……"*

Similarly in **Lily Fernando v Ronald (alias R. A. Vanlangenberg) 75 NLR 231** this court held that where in an action instituted in a district court, the defendant has not denied in his answer the territorial jurisdiction of the court, section 71 of the Court

Ordinance precludes him from raising such objection subsequently by moving to amend the answer. In his judgment Weeramantry J held as follows;

"*This is a type of action and a claim for relief which would undoubtedly fall within the jurisdiction of a District Court. It is only on the basis that the cause of action falls outside the territorial limits of its jurisdiction that it is sought to be urged that this particular Court lacks jurisdiction to hear this particular suit. It will be seen then that such, a case is completely different from cases of total and absolute want of jurisdiction in a particular Court or Tribunal, as where a matter exclusively within the purview of the District Court comes before the court of requests or a matter clearly outside the jurisdiction of a Tribunal is brought before it. In such cases, unlike in the present, no amount of submission to the jurisdiction can confer on the court or Tribunal a jurisdiction it altogether lacks. The case before us is rather one where the Court is spared the trouble of satisfying itself of the facts on which its jurisdiction depends, for the party by his conduct is taken to have accepted those facts, thus dispensing with the need for an inquiry into their existence. This would appear to be the principle underlying the section. So also, it would appear that English law by virtue of a similar principle, a defendant is considered to waive an objection to the jurisdiction if, knowing the facts, he enters an unconditional appearance to the writ."*

At this stage it is appropriate to refer to section 39 of the Judicature Act which reads as follows,

"*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;*

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court in having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

However, the above proviso has no relevance to the case at hand since the trial court had jurisdiction at the time of filing the case and it loses the jurisdiction only if and when there is an objection to exercise its jurisdiction using the arbitration clause.

The Court of Appeal in several cases had held that objection to jurisdiction must be taken at the earliest opportunity and if no objection is taken the matter is within the plenary jurisdiction of the court- vide **Jaladeen V Rajaratnam (1986) 2 SLR 201**, **David Appuhamy V Yassassi thero (1987) 1 SLR 253, Paramasothy V Nagalingam (1980) 2 SLR 34,** and failure to take such objection was treated as a waiver -vide **Navaratnasingham V Arumugam and another, (1980) 2 SRI. L.R. 01 (CA), Edmund Perera v Nimalaratne and Others (2005) 3 SLR 68**

This court also held that "*even on restrictive interpretation of section 39 of the Judicature Act the petitioner is estopped in law from challenging the jurisdiction of the Magistrate Court as the petitioner has conceded the jurisdiction of the Court and his failure to object at the earliest opportunity implies a waiver of any objections to jurisdiction*". Vide- **Don Tilakaratne V Indra Priyadarshanie Mandawala** (2011) 2 SLR 260.

In this regard E.R.S.R Coomaraswamy comments as follows'

"*Can a party by admitting expressly or by implication the jurisdiction of a court confer Jurisdiction on the court where none exists? Spencer Bower and Turner say that not even plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal, and the same results cannot be achieved by conduct or acquiescence by the parties. These cases are described as cases of a total or patent want of Jurisdiction.*

On the other hand, where nothing more is involved than a mere irregularity of procedure or, for example, non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive the defect, or to be estopped by conduct from setting it up, no new Jurisdiction is thereby impliedly created and no existing jurisdiction extended beyond its existing boundaries, the estoppel will be maintained and the court will have jurisdiction. These are cases of partial or latent want of jurisdiction. Thus, parties can waive inquiry by the court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained, as where the market value of the property mentioned in the plaint exceeds the limits of the pecuniary jurisdiction of the court, but the parties allow the trial to proceed on the merits, it would be an implied admission that the market value was within the pecuniary jurisdiction of the Court.

In Sri Lanka also, this distinction between a patent want of jurisdiction and a latent want of jurisdiction has been drawn. ……

……It is submitted that the disability laid down by section 39 can only be availed of in case of partial or latent want of jurisdiction and not of a total or patent want of jurisdiction, though the section appears to be absolute in its terms" {**E R S R Coomaraswamy, The Law of Evidence, Volume 1 -2nd Edition, 2012 Reprint, Stamford Lake Publication, pages 131 & 132**}

Moreover, Sections 76 and 75 (d) of the Civil Procedure Code requires with regard to an answer that "*If the defendant intends to dispute the averment in the plaint as to the jurisdiction of the court, he must do so by a separate and distinct plea, expressly traversing such averments"* and there shall contain "*a statement admitting or denying the several averments of the plaint"*. In the case at hand the Defendant had admitted the jurisdiction of court to hear and determine the action in his answer.

Explanation 2 of section 150 of the Civil Procedure Code states that "*no party can be allowed to make at the trial a case materially different from that which he has placed on record"*.

Section 58 of the Evidence Ordinance provides that "*no fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing ,or which ,before the hearing ,they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings"* ; However, the court has a discretion to require the facts admitted to be proved otherwise than by such admission. In the present case the trial court had jurisdiction and any prohibition to exercise the jurisdiction would arise only with the objection to the jurisdiction as per section 5 of the Arbitration Act. The issue is whether a defendant can withdraw his admission of jurisdiction as he wishes at a later stage and object to jurisdiction.

In **Mariammai V Pethrupillai 21 NLR 200** this court held that "*if a party in a case makes an admission for whatever reason, he must stand by it; it is impossible for him*

to argue a point on appeal which he formally gave up in the court below". However, in **Solomon Ranaweera v Solomon Singho 79 (ii) NLR 136** it was held that a mistaken admission in law is not binding on such party.

This court in **Uvais V Punyawathie (1993) 2 SLR 46** expressed as follows;

"*It is sometimes permissible to withdraw admission on question of law but admission of facts cannot be withdrawn. Quite apart from any question of estoppel or prejudice, to permit admission to be withdrawn in these circumstances would subvert some of the most fundamental principles of the Civil Procedure Code in regard to pleading and issues. Section 75 not only requires a defendant to admit or deny several averments of the plaint but and to set out in detail, plainly and concisely the matters of fact and law and the circumstances of the case upon which he means to rely for his defence; sections 46(2) and 148 oblige the court upon the pleadings or upon the contents of the documents produced, and after examination of the parties if necessary, to ascertain the material propositions of fact or law upon which the parties are at variance, and thereupon to record the issues on which the right decision of the case depends; section 150 explanation (2) prohibits a party from making at the trial, a case materially different from that he has placed on record and which his opponent is prepared to meet; the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings."*

As per section 146 of the Civil Procedure Code, parties, when they are in agreement as to what question of fact or law to be decided between them, can state to court the same in the form of an issue. When parties are not in agreement with regard to the issues of law and fact to be decided in the action, the court shall raise issues after ascertaining upon what material propositions of fact or of law the parties are at variance. In the same

manner if certain material propositions of fact and or of law are admitted by the parties before it through their pleadings, answers to interrogatories etc., the court can record them as admissions. Thus, one can still argue that admissions represent the mutual agreement or the meeting of minds of the parties with regard to the undisputed facts or law of the case before court and, as such, fraud, mistake, misrepresentation, duress, undue influence etc., when proved would still be a ground to allow the withdrawal of an admission.

As per Section 58 of the Evidence Ordinance quoted previously in this decision, formal admissions are binding on the parties who made them and need not be proved unless the court in its discretion require them to be proved. Discretion of court has to be used judiciously. It should be used only when the justice demands it and there are reasonable grounds to use it. Fraud, mistake, misrepresentation, duress, undue influence may fall among such grounds. Even a collusive admission (for e.g. Collusive admission with regard to the pedigree in a partition case) may compel a judge to use such discretion.

E.R.S.R Coomaraswamy discusses the formal and informal admission and their effect in the following manner;

"*The admissions contemplated by Section 58 are formal admissions or judicial or express admissions. They must be distinguished from informal or extra Judicial or casual admissions, which are referred to in Sections 17(1), 18 to 21 and 31 of the Evidence Ordinance, and which can be testified to at the trial by witnesses.*

The following points of distinction may be drawn between formal admissions and informal admissions:

(a) *Judicial admissions are in English Law fully binding on the party who makes them. They constitute a waiver of proof and can be made the foundation of the rights of the parties. Extra judicial or informal admissions are however, binding only partially and not fully, except in cases where they operate as, or have the effect of, estoppel, in which case they are fully binding and may constitute the foundation of the rights of the parties.*

Although that is the position in English Law, the proviso to Section 58 provides that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. In view of this proviso and Section 31 of the ordinance, the position seems to be that in Sri Lanka, in the absence of some rule of pleading to the contrary or of the operation of the rule of estoppel, when persons make admissions, they are not concluded by them, and even if they are formal admissions, they can withdraw them for good reason, such as misapprehension of fact or law. The policy of the law favours the investigation of truth by all expedient methods and, therefore, the doctrine of estoppel will not be extended beyond the reasons on which it is founded."

....……

"The effect of formal admissions has been considered in the last subsection. They may bind a party conclusively unless the court acts under the proviso to Section 58. They dispense with the necessity for proof, but they are binding only in the particular litigation for which they are made." {**E R S R Coomaraswamy, The Law of Evidence, Volume 1, 2nd Edition, 2012 Reprint, Stamford Lake Publication, pages 126 &127**}

The facts, provisions of law, decided cases and authorities related above lead this court to following assertions:

1. When there is total or patent lack of Jurisdiction, parties cannot confer jurisdiction on the court or extend jurisdiction it has by agreement, acquiescence, waiver or by conduct etc.
2. When it is contingent or latent lack of jurisdiction it can be cured by agreement, acquiescence, wavier, inaction or by any other manner of conduct which indicates that parties subject themselves to the authority of the relevant court etc.
3. Once latent lack of jurisdiction is cured by agreement, acquiescence, wavier or conduct, such party is estopped from denying the Jurisdiction of the Court.
4. Objection to latent lack of Jurisdiction must be raised at the earliest opportunity. Otherwise the court shall be taken and held to have jurisdiction over the action and no party who ought to have objected at the first opportunity is entitled to object thereafter.
5. However, if it appears in the course of the proceedings that the action, proceeding or matter was intentionally brought in a court in having no jurisdiction and with previous knowledge of the want of jurisdiction of such court, the judge is entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void.
6. Parties are bound by formal admissions they make in an action and they need not be proved again in that action.
7. However, mistaken admissions in law can be withdrawn if the Court decides that the circumstances of the case warrant permitting such withdrawal.
8. As a rule, admissions on facts cannot be allowed to be withdrawn but on certain occasions for good reasons, a court

may, using its discretion, allow to withdraw or require the parties to prove such admitted facts by other means. In such situations the court must act judiciously and such reasons may relate to instances of mistake, misrepresentation, fraud, duress, undue influence, collusion etc. when such grounds caused a considerable influence to make such admission.

9. No party can be allowed to make at the trial a case materially different from that which he has placed on record.
10. Section 5 of the Arbitration Act does not create a total want of jurisdiction in the relevant trial court which generally has the power to hear the action. It bars or creates a limitation on the exercise of jurisdiction when there is an objection to exercise its jurisdiction on the ground that there is an arbitration agreement over the same subject. Thus, the jurisdiction of the court is contingent on whether there is an objection or not.

In applying above principles to the case at hand, this court conclude as follows;

- The Commercial High Court had jurisdiction to hear this case as the case was based on a commercial transaction and the claim was within the monetary jurisdiction of the Court.
- There was no bar or limitation to exercise that jurisdiction as there was no objection to the jurisdiction, based on the arbitration clause, either by way of a motion prior to filing answer or in the answer. Instead, the Defendant admitted jurisdiction in his answer as well as in his proposed admissions, thus in the recorded admissions. As the insurer, the Defendant should have the original or copy of the insurance agreement and, therefore, the Defendant could not have been misled with regard to the contents of the agreement.

- Even for the sake of argument if it is considered that the Defendant did not see the agreement sued upon at the time of filing answer, then the objection to jurisdiction should have been raised at least at the time the court permitted the agreement as evidence but, waiving its right to object, the Defendant proceeded with the trial and, during the cross examination on a subsequent date withdrew the admission of jurisdiction and belatedly raised the issues objecting to jurisdiction.
- Whether one objects or consents to, or subjects himself without objection to a jurisdiction is a matter of fact and not law. The admission of jurisdiction by the Defendant, or subjecting itself to the jurisdiction of the court without objection, was an admission of the factual position that the Defendant did not have any objection to the Jurisdiction of the Commercial High Court.
- As such, the Defendant could not have withdrawn the admission of Jurisdiction at a belated stage.
- The Defendant should have the original of the Insurance policy. The Defendant, not only once but twice, voluntarily admitted Jurisdiction by answer as well as by proposed admissions. Again, the Defendant participated in recording admissions through its attorney- at- law. As such there cannot be a mistake on the Defendant's part.
- The Plaintiff has given the policy number as well as the vehicle number in his plaint even though he failed to attach a copy of the entire policy by inadvertence with the plaint. That defect was cured later on. The Defendant could not have been misled with such inadvertence as it should have the original of such policy. Therefore, there cannot be any misrepresentation on the part of the Plaintiff that influenced the Defendant to make an admission in respect of the Jurisdiction.
- There was no material to establish fraud, duress, undue influence or collusion between the officers of the Defendant and the Plaintiff etc.

- As such, the learned High Court Judge erred in allowing the Defendant to withdraw its admission of Jurisdiction; allowing new issues challenging the Jurisdiction, and answering them in favour of the Defendant.
- The Commercial High Court had jurisdiction from the very inception of the case and exercised it without objection. It is obnoxious to the administration of justice if one is allowed to raise an objection to the jurisdiction at a later stage when it is not a case of patent lack of Jurisdiction.

This court also observes that the Defendant tried to argue that the insurance policy marked by the Plaintiff is not the correct version of the insurance policy. However, it is pertinent to note that the issues relating to the impugned order of the Learned High Court Judge dated 17.03.2013 does not contain such an issue – *vide proceedings dated 10.10.2016 and the order dated 17.03.2013*. This court should not engage on an issue of fact which was not brought before the lower court to adjudicate. Anyway, this court observes that the Defendant had taken such a stance when it objected to P2, the insurance policy being received in evidence- *vide proceedings dated 24.06.2015*, but it has never raised an issue on that basis. On the other hand, if the Defendant takes up the aforesaid position, it cannot also take up the position that this matter must first be referred for arbitration due to an arbitration clause contained therein - *vide issue No.17*.{ It appears that the plaintiff's position was that P2 is the policy given to him by the Defendant – *vide proceedings dated 24.06.2015*}. The Defendant while denying P2 as the correct Policy cannot argue that the matter has to be resolved by Arbitration due to the arbitration clause contained therein. It is well settled law that a party cannot be permitted to blow hot and cold in the same action. – vide **Padmini V Jayaseeli (2004) 3 SLR 13, Hemawathie Sahabandu Vs Gunasekara (2006) 2 SLR 208, Kandasamy Vs Gnanasekaran (1983) 2 SPLR 01 (SC)** *and* **Ranasinghe Vs Premawardena (1985) 1 Sri LR 63 (SC)**. Thus, the Defendant cannot be allowed to approbate and

reprobate and allowed to say that P2 is not the agreement and yet parties must abide by the arbitration clause in P2.

It must be recorded here that even though this court permitted the parties to file written submissions within one month from the date of argument, they have not filed written submissions within the time given which lapsed on the 29th of May. However, this court observes that belatedly the Defendant had tendered written submissions, with a date stamp bearing the date 26.07.2019 on it, when the judgment was in its draft stage. It reached my chambers only on 26.08.2019. No extension for time was moved. As such, this court shall not encourage or entertain such belated filing of submissions. However, in the said written submissions the Defendant's counsel argues that objections to the Jurisdiction are raised as legal issues and can be raised even when it is not pleaded and at any time including in appeal. In this regard he has referred to '**A Commentary on Civil Procedure Code and Civil Law in Sri Lanka' by U.L. Majeed** and to **Farquharson v Morgan {(1984) 63 L.J.K. B 474}**. This is said without referring to whether the lack of Jurisdiction is Patent or Latent. The said submission is only true with regard to a Patent lack of Jurisdiction. In **Baby V Banda (1999) 3 Sri L R 416,** it was held that if the want of jurisdiction is patent and not latent, objection can be taken at any time. The case laws and legal texts quoted above in this judgment clearly indicate that when it is latent want of jurisdiction the objection has to be taken at the earliest opportunity. As this court has addressed the other contentions in the said belated written submission, there is no need to reiterate the matters referred to in said written submissions.

For the foregoing reasons, this court decides to answer the above questions of law on which leave was granted in the affirmative and set aside the order of the learned High

Court Judge of the Commercial High Court of Colombo dated 17.03.2017 dismissing the plaint in Case No: HC (Civil) 275/2013. It is hereby determined that the Commercial High Court has jurisdiction to proceed with the trial and accordingly learned High Court Judge is directed to decide the case on its merits.

The Plaintiff is entitled to the costs of this appeal.

Judge of the Supreme Court

PRASANNA JAYAWARDENA PC, J.

I agree.

Judge of the Supreme Court

L.T.B. DEHIDENIYA, J

I agree.

Judge of the Supreme Court