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

MMBL Teas (Pvt) Ltd.,

No. 300, Galle Road,

Colombo 3.

PLAINTIFF

SC Case No. SC/CHC/35/2008

Case No. HC Civil 191/2002 (1)

Vs

1. **British Ceylon Produce Export (Pvt) Ltd.,**
   No. 351/1, Dewanampiyatissa Mawatha,
   Colombo 10.

2. **Abdul Hafeel Ahamed Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09, Presently of No. 573,
   Sudarma Mawatha,
   Wanawasala,
   Kelaniya.

3. **Najiur Rahman Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09.

DEFENDANTS

AND NOW

MMBL Teas (Pvt) Ltd.,

No. 300, Galle Road,

Colombo 3.

PLAINTIFF-APPELLANT

Vs

1. **British Ceylon Produce Export (Pvt) Ltd.,**
   No. 351/1, Dewanampiyatissa Mawatha,
   Colombo 10.

2. **Abdul Hafeel Ahamed Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09, Presently of No. 573,
   Sudarma Mawatha,
   Wanawasala,
   Kelaniya.

3. **Najiur Rahman Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09.

DEFENDANT-RESPONDENTS

Before: Buwaneka Aluwihare, PC, J.

L. T. B. Dehideniya, J.

M. N. B. Fernando, PC, J.

Counsel: Prof. H. M. Zafrullah instructed by Varners for the Plaintiff-Appellant.

Dinesh de Alwis instructed by Ms. Amandi Jayasinghe for the Defendant-Respondent.

Argued on: 27. 08. 2018

Decided on: 17.12. 2021

Aluwihare PC,J.

Case Briefly Stated;

(1) The Plaintiff-Appellant [hereinafter referred to as the Plaintiff] instituted action in the High Court of Colombo exercising Civil jurisdiction against the three Defendant-Respondents [hereinafter referred to as the Defendants].

(2) Plaintiff instituted the said action seeking judgement in a sum of Rs. 7,300,000/= plus legal interest. Plaintiff's claim against the 1st Defendant was upon a Promissory Note whilst the claim against the 2nd and 3rd Defendants was upon a Guarantee Bond.

(3) The execution of both the promissory note [marked and produced as P3] and the guarantee bond [marked and produced as P4] were not disputed by the Defendants. In the answer, however, they denied payment on P3 and P4 and made a claim in reconvention in a sum of Rs. 15 million. The Plaintiff filing a replication denied the Defendants' claim.

(4) By judgement dated 15th May 2008, the Learned High Court judge dismissed the Plaintiff's case and held further that the Defendants were entitled to the reliefs prayed for in the answer. The present appeal arises from the said judgement.

(5) Both parties had been engaged in the business of exporting tea. It appears that, at the time relevant to the dispute in issue, there existed a business relationship between the Plaintiff and the 1st Defendant.

The Plaintiff's Case

(6) Witness Balasubramanium, a Director of the Plaintiff company testifying stated that;

(a) The Plaintiff company had been set up for the export of tea and was associated with the 1st Defendant company in this venture.

(b) The 1st Defendant company would secure orders for the export of tea and the Plaintiff company would finance the purchase of tea. The export of teas had taken place on letters of credit that was assigned to the Plaintiff's bank, which was instructed to credit export proceeds to the Plaintiff's account. The profits were to be shared equally between the Plaintiff and the 1st Defendant.

(c) The operation had been quite straightforward, according to the witness, upon the letter of credit being submitted to the bank, the 1st Defendant company places a firm order and the Plaintiff Company purchases tea, which is delivered to the 1st Defendant company for blending, packing and exporting.

(d) As far as the impugned transaction was concerned, a letter of credit had been received by the Plaintiff's bank for the export of tea to Iran, and consequently a stock of tea had been purchased by the Plaintiff from the auction and stored in the warehouse of the 1st Defendant company. This consignment of tea, however, had not been shipped due to a complaint by the buyer's agent relating to its inferior quality. As a result, the tea had been lying in the stores of the 1st Defendant.

(e) The witness has alleged, that without any intimation to the Plaintiff, the 1st Defendant had made arrangements to have the consignment shipped to Dubai, without the customary letter of credit being opened. On the Plaintiff making a query, the 2nd and 3rd Defendants had confirmed both verbally and in writing [P1], that the payment would be made once the consignment of tea reach Dubai.

(f) The Plaintiff, however, according to the witness, had not been paid for the said consignment of tea.

(g) The witness had further stated that, as the payment was not forthcoming, he requested for additional security for the payment and consequently the 1st Defendant executed a Promissory Note [P3] in favour of the Plaintiff for a sum of Rs. 7,300,000/= which was the Rupee value equivalent of US $ 81,000, the value of the consignment of tea that was exported to Dubai. In addition, a Guarantee Bond [P4] also had been given, signed by 2nd and 3rd Defendants, assuring the payment. [Both the Promissory Note P3 and the Guarantee Bond P4 are dated 2nd July 2001]

(h) As, even by April 2002, the 1st Defendant company had not paid the Plaintiff company the money due, in respect of the consignment of tea exported to Dubai, a letter [P6] was sent by the Plaintiff company presenting the Promissory Note [P3] and requesting payment. The Defendants, however, had not paid the money due on the Promissory Note, as requested. As such, 'notice of dishonour' [P7] was sent to the 1st Defendant company, with

copies to the 2nd to 3rd Defendants, followed by the letter of demand [P8].

(i) The witness under cross-examination stated that the Promissory Note [P3] was executed nearly 5 months after the consignment of tea was exported, because the export of this particular consignment of tea had been quite contrary to the customary practice as explained in paragraph (c) above.

(j) According to the Defendants, the Promissory Note P3 and the Guarantee Bond P4 were given to raise funds to service the pending export orders, which, however, had been denied by the Plaintiff. The position taken up by the Plaintiff was that the particular consignment was shipped on 'consignment' basis instead of on 'letters of credit' which was the agreed procedure between the parties and also without any intimation to the Plaintiff.

(k) The Plaintiff alleges that it was due to this reason, that they requested for security and the Defendants gave the Promissory Note [P3] and the Guarantee Bond [P4] both of which were executed subsequent to the shipment.

The Defendants' version

(7) Mohamed Abbas, Director of the 1st Defendant Company, in his testimony had taken up the position that they had an arrangement with the Plaintiff company, for the Defendants to obtain orders for tea from Iran and the Plaintiff to supply stocks of tea for export. The witness had

referred to these transactions as "L. C. orders". The arrangement was, for the Defendant company to obtain the orders [for tea] and the Plaintiff to purchase the consignments of tea and export on letters of credit assigned to the Plaintiff's bank and the parties to share the profits equally.

(8) When the third consignment [22,550 kg] was to be shipped, an agent from the Iranian buyer had come down and having examined the tea, had declared that the teas were below the quality they desired.

(9) In order to raise the quality of the teas, the 1st Defendant company had blended the consignment of teas supplied by the Plaintiff with superior quality teas and had obtained a fresh order to have the teas shipped to Iran with a trans-shipment in Dubai. The teas so shipped could not proceed beyond Dubai, due to an import restriction clamped by Iran and the consignment had got stuck in Dubai which was the port of trans-shipment. According to the Defendants' witness, the Plaintiff had given instructions to sell the consignment in issue, in Dubai.

(10) Witness Abbas [Director of the 1st Defendant Company] had written to Seylan Bank on 3rd April 2001 and had put the bank on notice that the Plaintiff company [MMBL Teas] had bought a consignment of 22,500 kg of tea and the said consignment was exported to M/s Al Ashraf General Trading Company in Dubai, for onward transmission to Iran [D34].

(11) It appears that the trade embargo or the ban on importing tea to Iran had come into force in March 2001 [D33]. The probable reason for the teas being sold to a buyer in Dubai instead of being shipped to Iran.

(12) Although it was claimed by the Defendants that they lost their goodwill, credentials and reputation *vis-à-vis* the Iranian buyer in view of the Plaintiff's conduct, namely supplying inferior quality teas, the actual reason for the trade to come to a halt, appears to be the embargo on tea imports to Iran.

(13) The defence witness also admitted that [in his testimony] the Plaintiff demanded a "security" and the Defendants having agreed, gave a Promissory Note for Rs. 7.3 million and executed a Guarantee Bond as well.

(14) The defence witness had also admitted that, although the arrangement between the Plaintiff and the 1st Defendant was to obtain orders on letters of credit of foreign buyers in favour of the Plaintiff company, the impugned consignment of teas was not exported on a letter of credit, but on "consignment basis" and the witness admitted that the teas belonged to the Plaintiff company and that the Defendants did not pay the Plaintiff the value for the 22134 kg of teas that were exported. The excuse given by the witness for such non-payment was that the Defendants did not receive payment.

(15) The position taken up by the Defendants was that the Plaintiff company had no financial strength to do exports and the Plaintiff company sought the assistance of the 1st Defendant company, for the Plaintiff to obtain funds from the [Seylan] bank. It must be noted that this assertion of the Defendants was refuted by the Plaintiff. In the course of the testimony, witness Balasubramanium had stated that the Plaintiff had obtained "packing credit" from the bank in order to finance the purchase of teas.

The Contention on behalf of the Plaintiff

(16) It was the contention of the learned counsel for the Plaintiff that:

(a) The Promissory Note and the Guarantee Bond are autonomous documents and that it is settled law that such instruments cannot be read subject to extraneous terms and conditions.

(b) That the learned trial judge was in error when he held that on the evidence, that there was no consideration; whereas according to the evidence led at the trial in fact "valuable consideration" was in fact present.

(c) Allowing the counter claim [claim in reconvention] of the Defendants was wrong, as the same is not in compliance with Sections 43,44,45 and 46(2) of the Civil Procedure Code.

(17) In terms of section 85(1) the Bills of Exchange Ordinance, a Promissory note is defined as;

> *"A promissory note is* ***an unconditional promise*** *in writing made by one person to another signed by the maker,* ***engaging to pay,*** *on demand or at a fixed or determinable future time,* ***a sum certain in money,*** *to, or to the order of, a specified person or to bearer".*

(18) The learned counsel for the Plaintiff argued that the learned trial judge had misdirected himself in concluding that the terms and conditions in documents P3 [the Promissory Note] and P4 [Guarantee Bond] must be interpreted together with the conditions set out in the document marked P1, a letter sent by the 2nd Defendant, to the Finance Director of the Plaintiff company. The learned Counsel further contended that the Promissory Note [P3] cannot be subjected to extraneous terms and

conditions as they are autonomous documents and in any event the letter P1 is merely a communication sent by the 2nd Defendant to the Financial Director, stating, that the 1st Defendant company would pay for the teas exported, no sooner the shipment reached the destination.

(19) The learned counsel, relied on the decision in the case of **Cebora vs. S.I.P (Industrial Products) Ltd.** [1976] Lloyds Law Reports 271, where it was held that *"For some generations one of those certainties has been that the bona fide holder for value of a bill of exchange is entitled , save in truly exceptional circumstances, on its maturity to have it treated as cash, so that in an action upon it the Court will refuse to regard either as a defence or as grounds for a stay of execution any set off, legal or equitable, or any counterclaim whether arising on the particular transaction upon which the bill of exchange came into existence, or, a fortiori, arising in any other way. This rule of practice is thus, in effect, pay up on the bill of exchange first and pursue claims later."* [page 278-279].

It was contended on behalf of the Plaintiff that, to defeat a claim based on a bill of exchange, the defence must relate to a total failure of consideration, as a mere defect of title in the goods supplied will not amount to a total failure of consideration.

(20) The position taken up by the Plaintiff referred to above, must be viewed in the backdrop of the evidence led in the case and the background to the execution of the Promissory Note [P3] and the Guarantee Bond [P4]

(21) The evidence was that both, the Promissory Note [P3] and the Guarantee Bond [P4] was executed nearly five months after the teas [the consignment in issue] were exported as the Defendants in exporting the consignment, had deviated from the agreed practice.

(22) According to witness Balasubramanium, he became aware of the export [of the consignment of teas in issue] only upon being informed by one of his officers and when he made inquiries from the general manager of the 1st Defendant company, Balasubramanium was assured that the Plaintiff would be paid when the consignment reached Dubai. The witness had further stated, that what was intimated to him was confirmed in writing by P1, which is a letter voluntarily issued by the Defendants, assuring payment.

(23) Both the Promissory Note [P3] and the Guarantee Bond [P4] had been executed about 4 months after the letter [P1]. Witness Balasubramanium testifying further had stated, as the Defendants had defaulted in payment even after nearly 5 months after the teas were shipped, he requested additional security against the payment due. Thus, P1 is merely a communication that explains the circumstances that led to the execution of P3 and P4 and has no bearing on the Promissory Note [P3] or the Guarantee bond [P4].

(24) Hence, I hold that the trial judge misdirected himself in holding that the Promissory Note [P3] and the Guarantee Bond [P4] must be interpreted together with the 'conditions' stated in the letter P1. In fact, there are no conditions in P1, but only an assurance by the Defendants that the monies will be paid. The relevant portion of that letter [P1] is reproduced below;

> "REFERENCE 22,500 KILOS TEA WHICH WE HAVE EXPORTED THIS WEEK, SHALL BE PAID NO SOONER THE GOODS REACHED THE DESTINATION & WE UNDERTAKE TO ARRANGE WITH OUR BUYER TO REMIT THE MONEY DIRECT TO YOUR ACCOUNT WITH SEYLAN BANK CHATHAM ST, BRANCH"

(25) Accordingly, I hold that the conclusion reached by the learned trial judge that P3 and P4 must be interpreted based on the conditions on P1 is erroneous. And further, I also hold, that the findings by the learned trial judge that the Defendants are not liable to pay the Plaintiff due to non fulfilment of certain events referred to in the letter P1, is also erroneous.

(26) The learned counsel argued that in deciding the issues raised in the case the learned trial judge has misdirected himself by treating as a relevant factor the Defendant's claim that the entire shipment consisting of 22500 kg of tea, did not belong to the Plaintiff whereas the issue before court was, the failure to honour the Promissory Note [P3].

(27) The crux of the Plaintiff's case was the failure on the part of the Defendants to honour the Promissory Note [P3] drawn for Rs.7.3 million, which was the value of the teas supplied by the Plaintiff and equivalent to the amount on conversion of 81,000 in US $ terms. The 2nd Defendant in his evidence has admitted this fact and the evidence is reproduced below; [proceedings of 23-11-2007, pages 9 &10]

Q. You confirm that the value of the tea exported is in fact $ 81,000 less 4% commission?
A. yes.
Q. That was the value of the tea of the Plaintiff?
A. yes.

(28) With regard to the observation made by the learned trial judge; *"that the teas belonging to the Plaintiff could not have been sold at any stage"* [due to its inferior quality], it was contended on behalf of the Plaintiff, that the defects in the quality of the goods supplied, do not amount to 'no consideration or a total failure of consideration'. As such, it was argued, that the defects in the quality of teas supplied cannot be used as a defence to refuse payment on the Promissory Note [P3] and the

Guarantee Bond [P4]. It was further contended that the issue raised, in the instant case as to the quality of the tea supplied, is irrelevant and should not have been a factor in determining the liability of the Defendants *vis-à-vis* the Promissory Note and the Guarantee Bond.

(29) To my mind, the quality [of teas] is subjective, in that, the goods may appeal to one buyer and may not be so in respect of another. The fact that by blending a mere 334 kg of tea with a stock of 22,500 kg of tea was sufficient to raise the quality of the teas to such a degree that was acceptable to a buyer is an indication that the state of the teas supplied by the Plaintiff was of certain quality and therefore cannot be treated as a case of total failure of consideration. According to the evidence of witness Mohamed Ishan Abbas, a director of the 1st Defendant company, the buyer rejected the tea because the quality was not 'first class'.

(30) In the case of **Cebora** [*supra*] the court observed "….*bona fide holder for value of a bill of exchange is entitled , save in truly exceptional circumstances, on its maturity to have it treated as cash, so that in an action upon it* ***the court will refuse to regard either as a defence or as grounds for a stay of execution any set off, legal or equitable, or any counterclaim whether arising on the particular transaction upon which the bill of exchange came into existence, or, a fortiori, arising in any other way.*** *This rule of practice is thus, in effect, pay up on the bill of exchange first and pursue claims later.*" [page 278-279] The court went on to hold that, "*...total failure of consideration is of course, in a position: it affords a defence…and must be clearly distinguished from allegations of delivery of goods with defects, when the pay first rule applies."* [page 279]

(31) It was also held in the case of **Brown Shipley & Co Ltd. v. Alicia Hosiery Ltd.** [1966] 1 Lloyd's Law Reports 668, "… *judgment should be given upon that bill of exchange as for cash and it is not to be held up by virtue of some counterclaim which the defendant may assert, even… a counterclaim relating to the specific subject-matter of the contract.*" [page 669]

(32) In the instant case, as referred to above, there had been a clear arrangement agreed between the parties as to the procedure with regard to the export of teas. The 2nd Defendant Abdul Hafeel Ahamed in his evidence admitted the position taken up by the Plaintiff. He had admitted that the previous shipments were based on letters of credit and there were a few other shipments lined up, which too were on letters of credit. He also admitted that, in relation to the first two shipments, the Plaintiff had obtained 'packing credit loans' on the strength of the letters of credit and the Plaintiff did not request the Defendants for funds to effect the shipments nor did the 1st Defendant company finance the shipments. The witness also admitted that when it came to the consignment of teas in issue, they never bothered to inform the Plaintiff that they were exporting the said consignment.

(33) Considering the foregoing, I hold that the Plaintiff was a bona fide holder of the Promissory Note [P3] for value and the Plaintiff is legally entitled to receive the sum stated in P3. Further, based on the ratio in the case of **Cebora** [*supra*] I also hold that there were no 'exceptional circumstances' and as such the Plaintiff was entitled to treat the Promissory Note [P3] as cash, on its maturity.

(34) The 2nd and the 3rd Defendants being directors of the 1st Defendant company, gave the Guarantee Bond [P4] in favour of the Plaintiff on the very day the Promissory Note [P3] was drawn and for the identical sum [Rs 7.3 million]. The Plaintiff asserts that the said amount is the monies due to the Plaintiff for the teas supplied for export.

(35) It was argued on behalf of the Plaintiff that the reason for the Defendants to draw the Promissory Note and the Guarantee Bond was to dissuade the Plaintiff from filing legal action against the Defendants for the recovery of the monies due to the Plaintiff.

(36) The contention of the Defendants was that the Guarantee Bond was prepared in order to "comfort the Plaintiff" and as such the Plaintiff cannot rely on the Guarantee Bond P4 to recover any monies from the (2nd and 3rd) Defendants. This position was flatly rejected by the witness Balasubramanium and the evidence does not disclose that there was a necessity to "comfort" the Plaintiff. There is uncontroverted evidence that the Plaintiff had an arrangement with its bank to obtain "packing credit" to finance business operations and there is no evidence whatsoever to suggest that the Plaintiff was facing any financial difficulty to run its operations.

(37) When one considers the evidence placed before court and the execution of the Promissory Note [P3] and the Guarantee Bond [P4] on the same day for the identical sum, which in turn is the value of the consignment of teas supplied by the Plaintiff to the 1st Defendant company for export, it is clear that consideration was present in this case.

(38) The learned counsel for the Plaintiff contended that, it is settled law, with regard to Guarantee Bonds, that the 3rd party normally does not

personally provide consideration, and the Guarantee Bond is enforceable at the request of the beneficiary of the bond.

(39) In this context, the position taken up by the Defendant does not appear to have any merit and I hold that both the 2nd and 3rd Defendants are under a legal duty to honour the Guarantee Bond P4.

Counter Claim by the Defendants

(40) The Defendants made a claim in reconvention [cross claim] for an award of Rs.15 million as damages, which the learned High Court Judge upheld. The counter claim was on the basis that, the Plaintiff failed to purchase and provide stocks of 'quality' tea on a timely basis, when the 1st Defendant received export orders and as a result the Defendants sustained a loss both in reputation and goodwill from the perspective of the foreign buyers.

(41) It was the contention of the learned counsel for the Plaintiff that there was no legal basis for the award of damages and the claim ought to have been disallowed *in limine*. The learned counsel based his argument on two grounds;

(i) That the entire award of damages for the claim in reconvention has been made without proof of such claim being established in court,

And

(ii) That the damages for loss of goodwill, credentials and reputation cannot be awarded in the law of contract and that these are heads of liability where damages are claimed in the law of delict.

(42) With regard to (i) above, i.e., the Defendants' 'claim in reconvention' for damages, the Plaintiff filed a replication denying the claim and had

taken up the position that the claim in reconvention is baseless and a mere afterthought on the part of the Defendants. The Plaintiff's assertion was that the said claim was made in order to avoid liability on their part.

(43) As referred to earlier, the learned trial judge had held that the Defendants proved the counter claim mainly on the basis that the evidence placed by the Defendants *"has not been subjected to any cross examination. Therefore, this court has no option other than to accept the said evidence in respect of the loss caused"*. In stating so, I presume that the learned trial judge had relied on the rationale in the often-quoted decision in **Edrick de Silva vs. Chandradasa de Silva** [1967] 70 N.L.R 169.

(44) I am, however, of the view that, failure to challenge evidence by cross examination by itself may not be sufficient to hold that a particular fact had been proved within the meaning of Section 3 of the Evidence Ordinance. It might, however, be a factor to be taken into account in accepting such evidence. Once the evidence is received, independent of such reception, the court should give its mind to the evidence so received, and consider whether such evidence is sufficient to establish the fact, sought to be proved.

(45) In the case of **Edrick de Silva** [*supra*], their Lordships observed, [at page 174] *"But where the* ***plaintiff has*** *in a civil case* ***led evidence sufficient in law to prove a factum probandum,*** *the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional " matter before the Court ", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted.* [emphasis added].

(46) From the pronouncement in **Edrick de Silva,** [supra]it is abundantly clear that the judgement does not detract from the legal requirement that a party seeking to establish a fact must provide sufficient evidence to satisfy court and the dictum in the said case can be applied only in instances where **the party has led evidence sufficient in law to prove the fact** and not otherwise.

(47) Section 3 of the Evidence Ordinance defining proof states; *"a fact is said to be proved when, **after considering the matters before it,** the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."* Thus, in the light of the submissions made on behalf of the Plaintiff, it would be necessary to consider, whether the evidence placed before the court by the Defendants was ***sufficient in law*** to establish that they were entitled to the damages claimed, within the meaning of Section 3 of the Evidence Ordinance.

(48) Based on the assertions of the Defendants, the learned trial judge had considered damages under three heads;

(1) the loss caused to the Defendants as a result of their stores being used to store the stocks of tea purchased for exports.
(2) loss caused due to the cancellation of a consignment of tea and
(3) loss of goodwill and reputation.

(49) In the answer filed, the Defendants are silent with regard to sustaining any loss due to the use of their stores to stock tea. That was the arrangement arrived at between the parties. The only issue raised by the Defendants with regard to storage is issue No. 19 which reads as "Was the said stock of tea kept in the warehouse of the Defendants for

a period exceeding 6 months due to the aforesaid reason". There is, however, no 'issue' raised by the Defendants to the effect that the Defendants had sustained any loss or damages as a result of the tea lying in their stores.

(50) According to witness Balasubramanium, storage charges were paid after the export proceeds were received and he had gone onto say that in respect of the consignment of tea in issue, export proceeds were never received by the Plaintiff and therefore storage charges were not paid. [proceedings of 10th March 2005]

(51) The 2nd Defendant had admitted the above position taken by witness Balasubramanium and had, in paragraph 76 of his affidavit averred that *"The **undertaking** given by us [**Defendants**] was that the full proceeds of export will be remitted first to the Plaintiff's account at Seylan Bank Limited and then the profits realized, the amount paid by us [Defendants] to upgrade the stale tea, the cost of packing materials, labour charges, containerizing, transport and **storage charges** were to be reimbursed by the Plaintiff.*" [emphasis added]. Thus, it is clear by their own admission that the reimbursement of storage charges was contingent upon the remittance of sales proceeds to the bank account of the Plaintiff, which never happened in the instant case.

(52) In the answer, the Defendants have averred that, a loss was caused due to the Plaintiff not having adequate tea stocks for export when needed and as a result, stocks had to be purchased at higher prices and in addition the stocks of teas offered for export got rejected due to the Plaintiff supplying inferior quality teas [Issues No. 30 and 31].

(53) With regard to the first aspect referred to above i.e. the Plaintiff not having adequate stocks, the 2nd Defendant's position was that the

Defendants made 'no' profits because the Plaintiff did not have adequate stocks and the Plaintiff had to pay higher prices to purchase tea. [paragraphs 22 and 23 of the 2nd defendant's affidavit]. The 2nd Defendant, however, does not speak of any 'loss' being caused to the Defendants as a result.

(54) In paragraph 52 of the affidavit of the 2nd Defendant, he takes up the position that the Iranian buyer demanded compensation in a sum of US$ 21,690.00/-. Apart from the testimony, the Defendants have not produced any evidence to establish that the Iranian buyer had made such a demand. Although the Defendants had produced a series of written communications between the said buyer and the Defendants relating to the shipment of teas, there isn't a single communication with regard to claiming damages. All what the Defendants have produced, is a letter which they claim, they sent to the Iranian buyer, allegedly containing two cheques, each drawn for Rs. 867,600/ the Rupee equivalent of US $ 21,690/-. Copies of the two cheques have also been marked and produced as D29 and D29A respectively. Both are cash cheques, drawn on the same day for the identical amount, i.e., Rs.867,600/-

(55) The Defendants did not produce any acknowledgment from the Iranian buyer with regard to the receipt of any money paid as damages. It appears highly unusual that in settling damages to an overseas business partner, payment is made in Sri Lankan rupees. It is also unusual that the payment is made by way of cash cheques and each drawn on the same day for the identical amount.

(56) Although the 2nd Defendant had claimed that the Defendants lost an estimated profit of Rs. 1,353,000/- due to the cancellation of the 5th consignment owing to the Plaintiff's failure to purchase teas, it is

apparent that the trade with Iran had come to a standstill due to the ban of tea imports into that country, which had come into effect from 1st March 2001 and which had lasted for three years [D33].

(57) According to the 2nd Defendant the consignment of 22500 kg that is in issue was shipped on the 8th of February to Dubai and when the shipment reached Dubai the Iranian ban on tea imports had come into effect. [Paragraphs 72 and 73 of the affidavit of the 2nd Defendant]

(58) Upon consideration and evaluation of the evidence placed by the Defendants to substantiate their claim for damages, I am of the view that the Defendants have failed to establish that they had sustained any damages due to the acts of the Plaintiff, within the meaning of Section 3 of the Evidence Ordinance and I uphold the argument of the learned counsel for the Plaintiff that the entire award of damages for the claim in reconvention has been made without proof of such claim being established in court. [Paragraph 44 (i) of this judgement]

(59) Accordingly, I set aside the findings of the High Court in relation to the issues referred to below and answer the said issues in the following manner: -

Issue No.1- Not proved
Issue No.2-Yes
Issue No.6-Yes
Issue No.14-Yes
Issue No.23-Not proved
Issue No.25- Not proved
Issue No.26-Not proved
Issue No.28-Not proved
Issue No.29-No
Issue No. 30-not proved

Issue No31. Not proved

Issue No.32-No

Issue No.33-Plaintiff is entitled to the relief as prayed.

Issue No.34 (c) Does not reveal a cause of action against the Plaintiff

Issue No.35. Yes

The findings of the learned trial judge in relation to other issues, which are not contentious, are to remain undisturbed.

The learned High Court judge is directed to enter decree accordingly.

The Appellant is entitled to the costs of this appeal

Appeal allowed.

JUDGE OF THE SUPREME COURT

L.T.B DEHIDENIYA J.

I agree

JUDGE OF THE SUPREME COURT

MURDU FERNANDO PC, J.

I agree

JUDGE OF THE SUPREME COURT