

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

M. Razeen Salih,
No. 5, Palmyrah Avenue,
Colombo 3 and
1107, Silam Road,
Bangkok, Thailand.

Plaintiff

**SC Appeal No. 20/2012
SC/SPL/LA No. 57/2011
CA No. 1135/93(F)
D.C. Colombo No. 84831/M**

Vs.

1. Chandana Ukwatta,
No. 28, Ward Place,
Colombo 07.
(legal representative of the late Mr. U.K.
Edmond)
2. McCallum Breweries (Ceylon) Limited,
No. 299, Union Place,
Colombo 02.

Defendants

AND

M. Razeen Salih,
No. 5, Palmyrah Avenue,
Colombo 3 and
1107, Silam Road,
Bangkok, Thailand.

Plaintiff-Appellant

Vs.

1. Chandana Ukwatta,
No. 28, Ward Place,
Colombo 07.
(legal representative of the late Mr. U.K.
Edmond)
2. McCallum Breweries (Ceylon) Limited,
No. 299, Union Place,
Colombo 02.

Defendant-Respondents

AND BETWEEN

M. Razeen Salih,
No. 5, Palmyrah Avenue,
Colombo 3 and
1107, Silam Road, Bangkok,
Thailand.

And presently of A1 Nadera Jewelry and
Watches Company Limited,
P.O. Box 295799, Riyadh.
No. 11351, Saudi Arabia.

Plaintiff-Appellant-
Appellant

Vs.

1. Chandana Ukwatta,
No. 28, Ward Place,
Colombo 07.
(legal representative of the late Mr. U.K.
Edmond)

2. McCallum Breweries (Ceylon) Limited,
No. 299, Union Place,
Colombo 02.

Defendant-Respondents-
Respondents

AND BETWEEN

1. Yuparaet Salih also known as Yuparaet
Ayesha Salih, of No, 23,
Danville Dr., Toronto, Ontario M2P 1H7,
Canada.
2. Yuparat Jamaliya Salih of No. 52,
Longwood Dr., Toronto, Ontario M3B-1T8,
Canada.
(Legal Representatives of the late Mr. M.
Razeen Salih)

Plaintiff-Appellant-
Appellants

Vs.

1. Chandana Ukwatta,
No. 28, Ward Place,
Colombo 07.
(legal representative of the late Mr. U.K.
Edmond)
2. McCallum Breweries (Ceylon) Limited,
No. 299, Union Place,
Colombo 02.

Defendant-Respondents-
Respondents

Before: Justice Murdu N.B. Fernando, PC
Justice A.L. Shiran Gooneratne
Justice K. Priyantha Fernando

Counsel: Dr. Romesh de Silva, PC with Sudath Caldera instructed by
Lucian Perera Associates **for the Plaintiff-Appellant-Appellant.**

Dr. Kanag-Isvaran, PC with Dr. Harsha Cabral, PC with Revan
Weerasinghe instructed by V.W. Kularatne Associates **for the
Defendant-Respondent-Respondent.**

Argued on: 20/03/2024

Decided on: 16/07/2024

A.L. Shiran Gooneratne J.

By Plaintiff dated 03/03/1981, the Plaintiff-Appellant-Appellant (hereinafter sometimes referred to as ‘the Plaintiff-Appellant’) filed this Action No. D.C. Colombo 84831/M against the 1st and 2nd Defendants-Respondents-Respondents (hereinafter sometimes referred to as ‘the Defendants-Respondents’) and sought to recover a sum of Rs. 1,999,200/- together with interest against the Defendants-Respondents.

In paragraphs 3 and 4 of the Plaintiff, the Plaintiff stated that he was the registered holder of 27,508 shares in Ceylon Hotels Limited (‘the said shares’) a company duly incorporated and registered in Sri Lanka, and that the Plaintiff (as ‘the Vendor’) and the 1st Defendant (as ‘the Purchaser’- which term also included his nominee or nominees), made and entered into an Agreement in Bangkok Thailand, dated 05/03/1975, (hereinafter referred to as “the said Agreement”), a copy of which was annexed to the said Plaintiff (marked A), whereby the said parties agreed inter alia,

- (a) for the Vendor to sell the said shares for a sum of Rupees 4,750,000/- of lawful money of Sri Lanka and the Purchaser to purchase the said shares for the said sum of Rupees 4,750,000/-;
- (b) that the purchase price shall be paid in the installments set out in the said Agreement;
- (c) “that the said payment shall be made in Ceylon Rupees to the credit of a Non-Resident Blocked Account in the name of the Vendor in the Chartered Bank Limited, Colombo, Sri Lanka”;
- (d) the said Agreement shall be governed by the laws of Sri Lanka.

In paragraph 5 of the Complaint, the Plaintiff stated that, having made payment of the first installment of Rupees 1,000,000/- by the 1st Defendant in terms of the said Agreement, the Plaintiff executed a transfer of the said shares in favour of the 1st Defendant and/ or his nominee the 2nd Defendant.

In paragraphs 6, 7 and 8 of the Complaint, the Plaintiff stated that the 1st and/ or 2nd Defendants, in breach of the said Agreement, have failed and neglected to make payment in full to the Plaintiff of the said purchase price of Rupees 4,750,000/- and a cause of action has accrued to the Plaintiff to sue the Defendants for the recovery of the balance sum of Rupees 1,999,200/-.

The 1st and 2nd Defendants filed their Answer dated 22/01/1982, and *inter, alia*, in paragraphs 3 and 4 of the said Answer the said Defendants, while denying the averments in paragraphs 6, 7 and 8 of the Complaint, admitted paragraphs 2, 3, 4 and 5 of the Complaint.

In paragraphs 5 and 6 of the Answer, the Defendants stated that, since the Plaintiff was a non-resident for the purposes of the Exchange Control Act (as amended), the said Agreement was subject to the approval of the Controller of Exchange and that, after due inquiry, by letter dated 09/05/1975, the Controller of Exchange

communicated to the Plaintiff and the Defendants approving the sale of the said shares in a sum of Rupees 2,750,800/- to the credit of a Blocked Account in the name of the Plaintiff.

In paragraphs 7 and 8 of the Answer, the Defendants stated that the said sum of money has been duly paid; that the Plaintiff did not appeal against the said decision in terms of the said Exchange Control Act, and that therefore the parties are bound by that decision. The Defendants further claimed that, as the period set out in the statute for the making of an appeal had lapsed, the Defendants acted on the basis that the said decision is final, and, therefore, stated further that the Plaintiff is estopped from making this claim against the Defendants.

The Defendants pleaded for a dismissal of the action.

The trial proceeded with the Defendants issues No. (2) to (6) and the only issue raised by the Plaintiff, issue No. 1;

“Are the Defendants liable to pay the Plaintiff a sum of Rs. 1,999,200/- as the balance sum in terms of the Agreement P1?”.

The following oral and documentary evidence was led at the trial –

The Plaintiff-Appellant called two witnesses, Leopold Justus Perera, Director of Customs, and Herath Mudiyansele Gannilegedera Gunatillake, Acting Assistant Secretary, Ministry of Finance, tendering in evidence –

- a) A certified copy of letter dated 22/12/1980 addressed by the Secretary, Ministry of Finance and Planning, to Mr. Razeen Sally, under the caption “Sale of Shares in Messrs Ceylon Hotels Ltd”, stating, inter alia, that he is directed by the Minister of Finance and Planning to inform that he has no objection to the payment of the notarially agreed price in the above transaction as long as no part of the price is remitted abroad; marked ‘P1’;

- b) Certified photo copies of letters dated 22/01/1985 and 25/02/1986 addressed by Sri Lanka Customs, marked 'P2' and 'P3'.

The Defendants called one witness – Kandasamy Canagasabapathy, Retired Deputy Governor of the Central Bank, formerly Controller of Exchange, and tendered in evidence the following documents –

- a) Exchange Control Form S(NS), "*Application to sell a security held by or on behalf of a person resident outside the Sterling Area (Scheduled Territories),*" dated 12/05/1975; marked 'V1'.

According to witness, Kandasamy Canagasabapathy, V1 was an application submitted on behalf of the Plaintiff-Appellant regarding the sale of the said shares, said to be detailed in an attached schedule, (which was not clear), in Ceylon Hotels Limited, held by "Mohamed Razeen Sally, 1017, Silom Road, Bangkok 5, Thailand"; stated that "Proceeds will be credited to "a Non-Resident Blocked Account opened at The Chartered Bank, Colombo"; is signed by Forbes & Walker Ltd (Brokers) and is dated 12/05/1975;

- b) The reverse of this document states (in print) "Permission granted for the sale of the securities detailed overleaf subject to the condition that the sale proceeds are – credited to" – "a non-resident blocked account in the name of Mohamed Razeen Sally. Permission granted for transfer of 27,508 shares in Ceylon Hotels Ltd by Mohamed Razeen Sally to McCallum Breweries Ceylon Ltd for Rs. 2,750,800/-" Date "12-5-75" marked 'V1A (a)'
- c) Share Transfer dated 12/05/1975 by Mohamed Razeen Sally, in consideration of Rs. 2,750,800/-, to McCallum Breweries (Ceylon) Limited, of 27,508 shares of Ceylon Hotels Limited, marked 'V2'.

The Defendants Respondents closed their case leading in evidence 'V1' and 'V2'.

Having considered the pleadings, the evidence led in Court and the written submissions tendered by the respective parties, the learned District Judge, by Judgment dated 07/09/1993, *inter alia*, held that, in terms of Section 45 of the Exchange Control Act, on the application dated 12/05/1975 (marked V1), the decision of the Central Bank thereon was communicated in writing to the Plaintiff and the Defendants and, in terms of Section 46 of the said Act, a written appeal against the said decision was not made by the Plaintiff to the Minister within 10 days, (if the Plaintiff was dissatisfied with such decision), which, in terms of Section 47 of the said Act, makes the said decision final and conclusive, and that the Defendants were not liable to make any further payment, and dismissed the Plaintiff's action.

Being aggrieved by the said Judgment, the Plaintiff, by Petition of Appeal dated 31/10/1993, appealed to the Court of Appeal. The Court of Appeal by Judgment dated 22/02/2011, affirmed the said order made by the learned District Judge dated 07/09/1993 and, *inter alia*, agreed with the Defendants' case that the failure by the Plaintiff to appeal, in terms of Section 46 of the said Act makes the said decision, referred to in the previous paragraph, final and conclusive and that any further payment or balance payment would be illegal and dismissed the Plaintiff's appeal.

In regard to the evidence led at the trial, the Judgment of the Court of Appeal stated, as follows –

“The evidence of the Plaintiff-Appellant was very brief other than a long line of questions to prove signature in P1 and comparison of P1 with P2 and P3 to identify the signature. In contrast Defendant's evidence was on point to establish issue Nos (2)-(6) and as such version of the Defendant-Respondents becomes more probable. In fact the defence version was supported by statutory provisions, namely, Exchange Control Act. Plaintiff-Appellant does not rely on any statutory provisions but only argue that the above statute has no application to the facts of this case. I am unable to agree with the Plaintiff-Appellant on that argument”.

Being aggrieved by the said Judgment of the Court of Appeal, the Plaintiff-Appellant filed his Petition dated 01/04/2011 in this Court, and prayed *inter alia*,–

- (a) to set aside the Judgment of the Court of Appeal dated 22nd February 2011 marked “X9”;
- (b) to set aside the Judgment of the District Court of Colombo dated 7th September 1993;
- (c) to award costs;

As stated in Journal Entry dated 07/01/2012, this Court having heard the learned Counsel for the Plaintiff-Appellant and the Defendants-Respondents, agreed to the grant of Special Leave to Appeal on the following question of Law –

“Whether the exchange control Act applies to the facts of this case.”

In regard to the above-mentioned question of law, the Plaintiff-Appellant argued and also reiterated in their written submissions filed of record, that *inter alia*,

- there is nothing in the Exchange Control Law which prevents a person in Sri Lanka from making any payment in Sri Lanka to another person. The Exchange Control Act only prevents the **payment of money outside Sri Lanka** that is the remittance of money outside Sri Lanka (Emphasis added).
- there are several phrases in the Exchange Control Act which prevent the payment of money to persons outside Sri Lanka or the remittance of money outside Sri Lanka. However, there is nothing in the Exchange Control Act which prevents a person paying to another any money in Sri Lanka, as is suggested by the topic Exchange Control means, the control of foreign exchange.

It was further contended that in this case, there **is no foreign exchange involved** and the purchase consideration was in Sri Lanka Rupees (Emphasis added). The payment of the part was in Sri Lanka Rupees and the Plaintiff is claiming the balance

in Sri Lanka Rupees to be paid in Sri Lanka to an account of the Plaintiff. The Plaintiff is not asking that the money be paid to a blocked account, the Plaintiff is simply asking for the payment of the balance purchase consideration.

In the circumstances (that is, “as there was no evidence whatever that the Plaintiff resides outside Sri Lanka and that the “Plaintiff’s claim is for money in Sri Lanka Rupees”), “the Plaintiff’s claim is for the money to be paid to the Plaintiff in Sri Lankan Rupees” and there is no law whatever that prevents the payment of money to a person in Sri Lanka. The law only prevents the payment of money outside Sri Lanka.

This position, the Plaintiff-Appellant contended, is consistent with the Exchange Control Act, because the Exchange Control Act as set out above prevents foreign exchange being taken out of Sri Lanka and the Act prevents the Sri Lankan Rupees being converted into foreign exchange.

Accordingly, the Plaintiff-Appellant states that it is clear that there is no prohibition whatever for the Defendant to pay the Plaintiff a sum of Rs. 1,999,200/- prayed for in this case”.

Section 7 and Section 8 of the of the Exchange Control Act reads as follows;

Section 7.

Except with the permission of the bank no person shall in Sri Lanka -

- a) make any payment to or for the credit of a person resident outside Sri Lanka;
or
- b) make any payment to or for the credit of a person resident in Sri Lanka by order or on behalf of a person resident outside Sri Lanka or;
- c) place or hold any sum to the credit of any person resident outside Sri Lanka;
Provided....

Section 8.

1. Except with the permission of the bank no person resident in Sri Lanka shall, subject to the provisions of this section, make any payment outside Sri Lanka to or for the credit of a person resident outside Sri Lanka.
2. Nothing in this section....

The Court of Appeal has quoted Section 7 of the Exchange Control Act and stated that *“The Exchange Control Act was enacted not only to control payment of money outside Sri Lanka. This is a wrong notion. Act includes several parts and considers a variety of restrictions....”*

The manner of payment of the purchase price of the said shares, which, according to Clause 2 of the said Agreement (a copy of which is attached to the Complaint marked A), provides that the purchase price of the said shares should be paid, in the instalments set out therein,

“...in Ceylon Rupees to the credit of a non-resident blocked account in the name of the Vendor in the Chartered Bank Limited, Colombo, Sri Lanka”, and has also stated that the parties to the said Agreement have agreed not to act contrary to the provisions of the Exchange Control Act. (Emphasis added)

For the purpose of clarity, it may be pointed out that section 7 of the Exchange Control Act - refers to ‘any payment’, thereby making it immaterial as to whether the payment is made in foreign or local currency”.

In the absence of a proper explanation to the contrary in regard to such payment, this view appears to be supported by the fact that, if the parties to the said Agreement acted on the basis that they were “resident in Sri Lanka”, in terms of the Exchange Control Act, there would have been no requirement under the Act for the said Agreement to provide that the purchase price of the said shares should be paid to a “blocked account” as mentioned above.

As observed earlier, according to the evidence of Kandasamy Canagasabapathy, an application (V1), submitted on behalf of the Plaintiff-Appellant regarding the sale of the said shares, in Ceylon Hotels Limited, held by “Mohamed Razeen Sally, 1017, Silom Road, Bangkok 5, Thailand”; which stated that “Proceeds will be credited to “a Non-Resident Blocked Account opened at The Chartered Bank, Colombo”, signed by Forbes & Walker Ltd (Brokers), dated 12/05/1975, on behalf of the Plaintiff.

The said application was a clear manifestation of the intent to credit the sale proceeds to “a Non-Resident blocked account” in the name of the Plaintiff-Appellant.

The reverse of this document stated that “Permission granted for the sale of the securities detailed overleaf subject to the condition that the sale proceeds are – credited to” – “a non-resident blocked account in the name of Mohamed Razeen Sally” with an endorsement by the Commissioner of Exchange stating, “Permission granted for transfer of 27,508 shares in Ceylon Hotels Ltd by Mohamed Razeen Sally to McCallum Breweries Ceylon Ltd for Rs. 2,750,800/-” Date “12-5-75” [V1 (a)], and not for the payment in full of the said purchase price of Rupees 4,750,000/. On the same day, by a second agreement dated “12-5-1975” (V2), the Defendant-Respondent duly transferred the said 27,508 shares at the consideration of Rupees 2,750, 800/- which was duly paid by the Defendant-Respondent to the Plaintiff-Appellant.

In terms of Section 46 of the said Act, a written appeal against the said decision was not made by the Plaintiff-Appellant to the Minister within 10 days, (if dissatisfied with such decision), which, in terms of Section 47 of the said Act, makes the said decision final and conclusive.

The term “blocked account” appears in the following provisions of the Exchange Control Act and, as will be observed, there are restrictions in regard to the utilisation

of the funds in such a “blocked account”, which would naturally have been a deterrent to requiring such payment and which could have been avoided. -

“31(1) Where any person applies for the permission of the bank for the making of a “payment” or the placing of any sum to the credit of any person resident outside Sri Lanka, the bank may direct that the sum payable or to be credited shall be paid or credited to a blocked account only. Where such direction is given by the bank such person shall pay or credit such sum to a blocked account.

(4) Any sum standing to the credit of a blocked account shall not be dealt with except with the permission of the bank”.

The Court of Appeal also expressed its agreement with certain submissions of the Defendant-Respondent, including that *“Section 7 of the said Act makes no distinction as regards monies paid outside or inside Sri Lanka if the person concerned is a non-resident, permission of the Controller of Exchange is essential”.*

The Plaintiff-Appellant, *inter alia*, takes up the position that there is no admission that the Plaintiff resides out of Sri Lanka, that there is no admission that the Plaintiff is a non-resident, which in fact is that the Plaintiff is a citizen of Sri Lanka and resident for all purposes in Sri Lanka”.

However, as submitted by the Defendant-Respondent, the Plaintiff constantly asserted the position that the Plaintiff resides outside the shores of Ceylon, by

- (a) signing and or entering the contract between the parties in Bangkok, Thailand,
- (b) being referred to as Mohamed Razeen Salih of Bangkok in the preamble of the Agreement for the sale of shares Annexed to the Plaint and marked as ‘A’,
- (c) having his address for the purpose of communication as 1017, Silom road, Bangkok 5, Thailand,

- (d) providing his address as 1017, Silom road, Bangkok 5, Thailand, to ‘Forbes and Walkers’ that acted as the ‘Plaintiff’s broker’ to make an Application under the Exchange Control Act No. 24 of 1953 to “Sell a security held by or on behalf of a person resident outside the Sterling Area”,
 - (e) providing his address as 1017, Silom road, Bangkok 5, Thailand, in the Agreement to transfer shares dated 12th May 1975.
- (Emphasis added)

This fact is further corroborated by the Plaintiff also including as his address 1017, Silom road, Bangkok, Thailand, in the caption to this action, the caption in the appeal made to the Court of Appeal and the caption of the original action made in the District Court of Colombo. (Emphasis added)

In this regard the Judgment of the Court of Appeal has stated that;

“We have considered the case of both parties and the Written Submissions. It is too late to advert to the fact that an admission was not recorded of the residence of the Plaintiff-Appellant. This fact was never urged in the Original Court and it is somewhat misleading when one looks at the entirety of the plaint especially paragraph 4 and agreement marked ‘A’ with the plaint. Vide terms/conditions of agreement state payment to be paid in Sri Lanka Rupees to the credit of a non-resident block account. A party cannot approbate and reprobate the same transaction,”

with which this Court agrees.

The Judgment dated 07/09/1993 of the District Court of Colombo and the Judgment dated 22/02/2011 of the Court of Appeal, have dealt with the relevant provisions of the Exchange Control Act; the consequences arising from the failure to duly comply with such provisions of the Exchange Control Act; and other relevant matters in this case, as mentioned above, including -

- (i) Section 7 “Payments in Sri Lanka”;
- (ii) Section 8 “Payments outside Sri Lanka”;
- (iii) Section 46 “Appeals”;
- (iv) Section 47 “Finality of decisions”.

As discussed earlier, this Court having considered the relevant provisions of the law and the legal effect of the oral evidence and Documents marked ‘P1’, ‘P2’ and ‘P3’, and the documents marked ‘V1’ and ‘V2’ tendered on behalf of the Plaintiff-Appellant and the Defendant-Respondents, respectively, agrees with and reiterates the findings of the lower Courts, thereby avoiding unnecessary repetition, in regard to the reliefs referred to, by the Plaintiff-Appellant.

In view of what is stated above, this Court holds that the Exchange Control Act applies to the facts of this case.

Accordingly, the Judgment of the District Court of Colombo dated 07/09/ 1993 and the Judgment of the Court of Appeal dated 22/2/2011, is affirmed; and this Appeal is hereby dismissed. No costs.

Appeal dismissed.

Judge of the Supreme Court

Murdu N.B. Fernando, PC J

I agree

Judge of the Supreme Court

K. Priyantha Fernando, J

I agree

Judge of the Supreme Court