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

In the matter of an appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006.

SC Appeal No: 166/2014
SC/HCCA/LA No: 574/2012
WP/HCCA/Colombo/303/2003(F)
DC Colombo Case No: 17815/MR

K.D.A. Hettiarachchi,
Premasiri Super Market,
243, R.A. De Mel Mawatha,
Colombo 3.

PLAINTIFF

Vs.

Ceylinco Insurance Company Limited,
15A, Alfred Place, Colombo 3
With its registered office at
2, Hyde Park Corner, Colombo 2.

DEFENDANT

And between

Ceylinco Insurance Company Limited,
15A, Alfred Place, Colombo 3
With its registered office at
2, Hyde Park Corner, Colombo 2.

DEFENDANT – APPELLANT

Vs.

K.D.A. Hettiarachchi,
Premasiri Super Market,
243, R.A. De Mel Mawatha,
Colombo 3.

PLAINTIFF – RESPONDENT

And now between

K.D.A. Hettiarachchi,
Premasiri Super Market,
243, R.A. De Mel Mawatha,
Colombo 3.

PLAINTIFF – RESPONDENT – APPELLANT

Nadira Gishani Hettiarachchi Piyasena,
62/B/5, Vajira Road,
Colombo 5.

SUBSTITUTED – PLAINTIFF – RESPONDENT – APPELLANT

Vs

Ceylinco Insurance Company Limited,
15A, Alfred Place, Colombo 3
With its registered office at
2, Hyde Park Corner,
Colombo 2.

DEFENDANT – APPELLANT – RESPONDENT

Before: **S. Thurairaja, PC, J**
Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Dr. Sunil Cooray with Sudharshini Cooray for the Plaintiff – Respondent – Appellant

Harsha Amarasekera, PC with Shehan Gunewardena for the Defendant – Appellant – Respondent

Argued on: 21st October 2024

Written Submissions: Tendered by the Plaintiff – Respondent –Appellant on 2nd February 2015 and 21st September 2020

Tendered by the Defendant – Appellant – Respondent on 3rd August 2015 and 5th November 2024

Decided on: 25th February 2025

Obeyesekere, J

This appeal arises from a judgment delivered on 21st November 2011 by the Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate jurisdiction [**the High Court**] by which the High Court set aside the judgment of the District Court and allowed the appeal filed by the Defendant – Appellant – Respondent [**the Defendant**]. Leave to appeal was granted by this Court on 15th September 2014 on two questions of law, one raised by the Plaintiff – Respondent – Appellant [**the Plaintiff**], and the other by the Defendant, to which I shall advert to during the course of this judgment.

Facts in brief

The Plaintiff entered into an agreement on 4th November 1993 [**P1**] with M/s T.F.N. Pinto and Sons [**the Contractor**] for the construction of a building for the Plaintiff at premises bearing assessment No. 316, Galle Road, Colombo 3. The Form of Tender tendered by the Contractor together with the Conditions of Contract and several other documents referred to in P1 formed part of P1. While the Form of Tender was marked as **P1a**, the

Plaintiff did not read in evidence the Conditions of Contract between him and the Contractor referred to in P1.

M/s Design Team Three (Private) Limited [**Consultant**] was the architect of the said building and in addition to its primary responsibility for the design, served as the Consultant to the project and was responsible for approving the payments due to the Contractor.

The total value of the work that was to be performed by the Contractor, as set out in P1 was Rs. 24,416,118. Although the evidence does not expressly bear it out, it appears from the reference to a bill of quantities and schedule of rates and prices in P1a that P1 was a measure and pay contract. The Contractor was required to complete the building within a period of 18 months from the date of P1. The Plaintiff had paid the Contractor a sum of Rs. 4,892,000, being 20% of the contract sum, as an advance payment for the mobilization of the work. The parties had agreed that the said mobilization advance shall be recovered by deducting 20% from each interim payment made to the Contractor. The parties had also agreed that the Plaintiff shall be entitled to retain 10% from each interim payment as retention money, with the Contractor entitled to the payment of such sums retained only at the end of the defects liability period, which according to P1 was six months from 4th May 1995.

Having commenced and proceeded with the construction, the Contractor had faced liquidity issues by early 1995 and had suspended work. The Contractor had thereafter made a request to the Plaintiff that a sum of Rs. 1,223,055.92 being the moneys retained as at that point in time in terms of P1 be paid to improve its cash flow thereby enabling it to re-commence work. This request of the Contractor had been approved by the Consultant. The Plaintiff, knowing fully well that releasing the said money to the Contractor would result in him losing the control he had over the Contractor in ensuring that any outstanding work is completed and/or the defects are remedied by the Contractor during the defects liability period, had requested that the said sum be secured by a performance bond. At the request of the Contractor, the Defendant had issued a "Combined Performance Bond" on 7th February 1995 [**P4**] for the said sum of Rs. 1,223,055.92 on behalf of the Contractor.

I must perhaps at this stage observe that the aforementioned sum of money so retained by the Plaintiff belonged to the Contractor as these are monies deducted from payments for the work done by the Contractor but retained by the Plaintiff as security to ensure the completion of outstanding work and/or rectification of any defects in the building that may arise during the defects liability period. Exchanging the moneys so retained with a guarantee issued by a bank or an insurance company is not unusual in the field of construction as both mechanisms, i.e., cash or guarantee not only seek to assure the employer [in this case the Plaintiff] that any loss suffered by him during the defects liability period are well secured but also provides the contractor with the much needed capital and improves its cash flow. Therefore, the identical purpose would be achieved, whether it be a cash security or a guarantee equivalent to such amount, provided the employer is able to secure a guarantee that permits him to receive payment on demand.

Pursuant to the furnishing of P4, the Plaintiff had released the said sum of money retained by him in two instalments of Rs. 611,527.96 each, on 2nd March 1995 [**P2**] and 22nd March 1995 [**P3**]. In spite of the said sums being paid and the Plaintiff having granted the Contractor an extension of time until 15th October 1995, the Contractor had failed to re-commence and/or complete the work, as agreed, and had abandoned the site. By letter dated 26th October 1995 [**P7**], the Plaintiff had informed the Contractor of his default. On the same date, the Plaintiff had informed the Defendant as well of the default of the Contractor [**P5**] and demanded that the said sum of Rs. 1,223,055.92 be paid. Pursuant to correspondence exchanged between the parties to which I shall refer to later, the Defendant had failed to honour the demand made on it in terms of P4.

It is this failure on the part of the Defendant that culminated in action being filed by the Plaintiff. In order to give context to the final determination that I will arrive at, and being mindful that the nomenclature attached to P4 does not necessarily reflect its true character and that it is difficult to generalise guarantees in view of the differences in wording from one guarantee to another, I shall consider at the outset whether P4 was a performance bond in its true sense payable on demand or whether P4 was a conditional guarantee where the liability of the Defendant was contingent upon the Plaintiff satisfying the Defendant that the Contractor was in default and the extent of such default and the damages suffered as a result of such default, prior to receiving payment under P4.

Bonds and Guarantees

In construction contracts, different types of security bonds and guarantees [which terms are used inter-changeably] are taken out by the contractor, usually with a bank or insurance company, for the benefit of and at the request of the employer, in a stipulated maximum sum of liability and enforceable by the employer in the event of the contractor's default, repudiation or insolvency. The structure of a performance bond can be moulded to support a number of different kinds of potential payment obligations. These bonds range from advance payment bonds or mobilisation bonds to secure the advance payment that is made to a contractor to enable the contractor to mobilise the work, to bonds that would secure the timely performance by the contractor as well as bonds that ensure the due completion of the works and bonds that ensure that all defects that occur during the defects liability period are rectified. The essential purpose of all these bonds is therefore to provide the employer with financial security in the form of cash payable by the bank for the contractor's failure to perform his obligation under the construction contract. In order to achieve this purpose, it is the responsibility of the employer to ensure that the relevant bond is worded accordingly.

There are broadly two types of guarantees.

The first type is a conditional guarantee whereby the guarantor or the surety becomes liable upon proof of a breach of the terms of the principal contract by the contractor and the beneficiary sustaining damages as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default and the beneficiary establishing the quantum of damages suffered by it.

The second type is an unconditional or an 'on-demand' payable guarantee which is worded in such a manner that the guarantor will become liable immediately upon a demand being made upon him by the beneficiary with there being no necessity for the beneficiary to prove any default in performance by the principal under the principal contract. It is these types of guarantees that are typically called performance bonds or demand guarantees. Under such bonds, the employer does not have to demonstrate that it has suffered any loss at the time at which the demand notice is issued, unless of course

the guarantee itself stipulates the form of the demand and/or the documents that must be submitted with the demand.

On-demand bonds provide instant and easily accessible redress to employers, are seen as payment instruments and performs the role of an effective safeguard against non-performance, inadequate performance or delayed performance. As pointed out by Lord Denning in **Edward Owen Engineering Limited v Barclays Bank International Limited and another** [1978 Q.B. 159; at pages 170, 171], "*these performance guarantees are virtually promissory notes payable on demand. So long as the Libyan customers make an honest demand, the banks are bound to pay: …All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice*."

In determining whether a bond is conditional or otherwise, Court is concerned not with the nomenclature attached to it but with the contractual construction or interpretation of the bond or guarantee itself. While there are many variations of the two standard types of bonds, a great deal depends on the needs and the intention of the parties, with the wording of the guarantee reflecting such needs and intentions.

The underlying legal distinction between the two types of bonds has been explained in **Paget's Law of Banking** [15th edition; page 988] as follows:

> "*The essential difference between a guarantee in the strict sense (i.e. a contract of suretyship) and a demand guarantee is that the liability of a surety is secondary, whereas the liability of the issuer of a demand guarantee is primary and triggered by demand. A surety's liability is co-extensive with that of the principal debtor and, if default by the principal debtor is disputed by the surety, it must be proved by the creditor. Neither proposition applies to a demand guarantee.* ***The principle which underlies demand guarantees is that each contract is autonomous.*** *In particular,*

the obligations of the guarantor are not affected by disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor (or counter-guarantor), and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the bank will not be a party." [emphasis added]

The above distinction was referred to in **Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd** [2015 EWHC 999 (Comm)] in the following manner:

"*Performance bonds create an independent obligation to pay on demand by way of primary obligation on the party giving the guarantee and not by way of surety. They are irrevocable undertakings to pay a specified sum to the beneficiary in the event of a breach of contract, rather than a promise to see to it that the contract will be performed. They are also often called "performance guarantees" or "demand guarantees", although they are not guarantees in the true sense, but rather a strict form of contract of indemnity. Thus the various equitable defences available to a surety are not available to the issuer of a performance bond. (see for example Marubeni Hong Kong and South China Ltd v Mongolia [2005] 2 Lloyd's Rep 231) The issuer of a performance bond is as a general rule not concerned with the rights or wrongs of any underlying dispute between the beneficiary and the account party. His obligation to pay in accordance with the terms of the contract is entirely independent of the ultimate contract between the account party and the beneficiary. In practice, performance bonds are treated as substitutes for cash*."

In **Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA** [(2012) EWCA Civ 1629], Longmore LJ stated that:

"In deciding whether the document is a traditional "see to it" guarantee or an "on-demand" guarantee, it would be obviously absurd to say that there are six pointers in favour of the former and only four pointers in favour of the latter and it must therefore be the former. But if the law does not permit boxes to be ticked in this way,

commercial men will need some assistance from the courts in determining their obligations. The only assistance which the court can give in practice is to say that, ***whilst everything must in the end depend on the words actually used by the parties****, there is nevertheless a presumption that, if certain elements are present in the documents, the document will be construed in one way or the other.*

In **Paget's Law of Banking** [supra; page 990] it has been stated that:

"Where an instrument:

"*(i) relates to an underlying transaction between parties in different jurisdictions;*

(ii) is issued by a bank or other financial institution;

(iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written'); and

(iv) does not contain clauses excluding or limiting the defences available to a surety;

it will almost always be construed as a demand guarantee.

By contrast, where an instrument is not given by a bank or other financial institution it has been held that there is a strong presumption against it being construed as a demand bond.

The key question *in either case* ***is whether on its proper construction the instrument is in substance payable on demand*** *(with or without some supporting documentation)* ***rather than on proof of the underlying liability****. The presence of principal debtor clauses, clauses excluding or limiting the defences available to a guarantor (so-called 'protective clauses') or the use of words such as 'on demand' are relevant to the proper construction of the instrument, but of limited significance."* [emphasis added]

For the sake of completeness I must state that, that does not mean that a beneficiary under an on-demand guarantee can keep the money it receives from the bank with no

questions asked by the principal at whose request the bond was issued. While payment in full by the bank to the beneficiary would discharge the bank of its obligation under the bond, the beneficiary is nonetheless required in terms of the underlying contract with the party at whose request the bond was issued to account for its losses. While this would occur only if the latter demands that the beneficiary does so and that too after the bank has honoured its obligations, this position has been summarised by Potter LJ in **Comdel Commodities Ltd v Siporex Trade SA** [(1997) 1 Lloyd's Rep 424 at 431] as follows:

> *"The substantive issue between the parties is whether, as Siporex contends, Siporex are entitled to keep the full amount paid under the performance bonds regardless of the amount of damage which Siporex suffered as a result of Comdel's breach of the original contracts of sale.*
>
> *The law in this respect has recently been the subject of an illuminating decision of Morison J. in Cargill International SA v Bangladesh Sugar and Food Industries Corporation [1996] 2 Lloyd's LR 524 in which the authorities are reviewed, most notably decisions in two Australian cases and dicta of Lord Denning, MR in State Trading Corporation of India Limited -v- E.D. & F. Man (Sugar) Limited, July 17th, 1981, transcript.*
>
> *Those authorities are to the effect that it is implicit in the nature of a performance bond that, in the absence of some clear words to a different effect, when the bond is called, there will at some stage in the future be an "accounting" between the parties to the contract of sale in the sense that their rights and obligations will finally be determined at some future date. The bond is a guarantee of due performance; it is not to be treated as representing a pre-estimate of the amount of damages to which the beneficiary may be entitled in respect of the breach of contract giving rise to the right to call for payment under the bond. If the amount of the bond is not enough to satisfy the seller's claim for damages, the buyer is liable to the seller for damages in excess of the amount of the bond. On the other hand, if the amount of the bond is more than enough to satisfy the seller's claim for damages, the buyer can recover from the seller the amount of the bond which exceeds the seller's damages."*

Combined Performance Bond - P4

With the final decision whether a bond or guarantee is conditional or payable on-demand dependent on the wording of each bond/guarantee, I shall now consider if P4 is an on-demand payable bond or was subject to conditions that had to be satisfied prior to the Defendant honouring any claim made under it by the Plaintiff. The relevant parts of P4 are re-produced below:

> "*KNOW ALL MEN BY THESE PRESENTS that M/s T F N Pinto and Sons (Contractor)* ***and*** *M/s Ceylinco Insurance Company Limited (Surety)* ***are held and firmly bound unto*** *M/s K D A Hettiarachchi, Premasiri Super Market, 243, R A De Mel Mawatha, Colombo 3 (Employer)* ***… in the full and just sum*** *of Rs. One Million Two Hundred and Twenty Three Thousand Fifty Five and Cents Ninety Two Only*
>
> *for the payment of which sum of money well and truly to be made and done, the said* ***Contractor binds himself****, his heirs, executors and administrators AND* ***the Surety binds itself****, its successors and assigns, jointly and severally firmly by these presents.*
>
> *We the Surety hereby renouncing the beneficium ordinis divisionis et excussionis the meaning force and effect of renouncing which have been explained to us by our Proctor and with which we hereby declare that we are now fully acquainted and all other benefits, privileges and advantages to which sureties as such are by law entitled.*
>
> *WHEREAS the Contractor has entered into a certain written contract with the Employer by Conditions of Tender bearing date … for the construction of proposed building at 316, Galle Road, Colombo 3 all of which are more particularly shown in the said written Tender which Contract with all its covenants and conditions is hereby* ***made a part of this Agreement*** *to all intents and purposes as though the said Contract has been incorporated herein.*
>
> *NOW, THEREFORE, the conditions of the foregoing obligation is such that:*

if the Contractor shall well, true and faithfully comply with all the terms, covenants and conditions of the said Tender on his part to be kept and performed according to the true purpose intent and meaning of the said tender, or

***if in default by the Contractor**, the Surety shall satisfy and discharge **the damages sustained by the Employer** hereby **upto the sum of** Rs. One Million Two Hundred and Twenty Three Thousand Fifty Five and Cents Ninety Two Only,*

then this obligation shall be null and void, otherwise it shall remain in full and virtue." [emphasis added]

The fact that:

(a) the Contractor and the Defendant were jointly and severally held bound unto the Plaintiff under P4;

(b) the Defendant has renounced the defence available to it as a surety that the Contractor be excussed prior to it being pursued;

(c) P1 formed part and parcel of P4 and that P4 was therefore not an autonomous contract; and

(d) the Defendant was only required to satisfy and discharge the **damages** sustained by the Plaintiff up to a maximum sum,

clearly demonstrate that, (a) P4 was not a performance bond payable on demand but a conditional bond, and (b) the Defendant therefore was not required to honour any claim without demur.

That P4 was a conditional bond is further confirmed by two other factors. The first is that in the event of any alleged default on the part of the Contractor, the Plaintiff was not entitled to, as of right, to the full value of P4 but was only entitled to claim damages sustained by him **upto** the sum specified in P4, which can either be the full value or a value lesser than that. This required the Plaintiff to establish that the Contractor had not commenced and/or completed the work after the receipt of the retention money, that he

has suffered damages as a result thereof and, more importantly the extent of such damages. The second is the corresponding right of the Defendant to call upon the Plaintiff to establish that he has suffered damages and the extent thereof.

Clauses similar to the aforementioned provision in P4 have been considered over the years in several other jurisdictions. One of the first such cases is **Workington Harbour and Dock Board v. Trade Indemnity Company Limited** (No. 2) [(1937) 3 All ER 139]. In the Court of Appeal, Greer L.J., stated at page 143 that, "*The plaintiff bringing an action has not merely to prove a breach of contract: he has to prove the damages which he has suffered by reason of that breach of contract*." On appeal, [(1938) 2 All ER 101] Lord Atkin stated at page 105 that, "*It is well established that in such an action the plaintiff has to establish damages occasioned by the breach or breaches of the conditions, and, if he succeeds, he recovers judgment on the whole amount of the bond, but can only issue execution for the amount of the damages proved*."

In **Tins' Industrial Co. Limited v Kono Insurance Limited** [1987 BLR 42], the Court of Appeal of Hong Kong referring to the relevant clause under consideration which read as follows:

> "*NOW THE CONDITION of the above written bond is such that if the contractor shall duly perform and observe all the terms, provisions conditions and stipulations of the said contract on the contractor's part to he performed and observed according to the true purport intent and a meaning thereof, or if on default by the contractor the surety shall satisfy and discharge the damages sustained by the employer thereby up to the amount to the above written bond then this obligation should be null and void, but otherwise shall be and remain in full force and effect*.",

held that, "*This in our view is a case where a claimant under the bond has to prove first breach, and secondly damages*."

In **Trafalgar House Construction (Regions) Limited v General Surety & Guarantee Company Limited** [(1996) 1 A.C. 199; at pages 203-204], the impugned clause read as follows:

"Now the condition of the above written bond is such that if the subcontractor shall duly perform and observe all the terms provisions conditions and stipulations of the said subcontract on the subcontractor's part to be performed and observed according to the true purport intent and meaning thereof or if on default by the subcontractors the surety shall satisfy and discharge the damages sustained by the main contractors thereby up to the amount of the above written bond then this obligation shall be null and void but otherwise shall be and remain in full force and effect…."

In the Court of Appeal, Saville, L.J identified the commercial purpose of the bond as being to provide immediate funds for the respondents in the event of failure of performance by the contractor (i.e. Chambers), and held that the obligation under the bond was to pay what the respondents asserted in good faith to be the amount of damages. Referring to this finding, the House of Lords observed that the Court of Appeal were in error:

(a) '*by determining that the appellants' liability under the bond arose on the failure of Chambers to complete the contract followed by a demand in good faith for the amount of the damages which they claim to have suffered were effectively treating it as a type of on demand bond*.' and

(b) '*in concluding that the bond was not a guarantee but was akin to an on demand bond*.'

The House of Lords thereafter referred to the above passage of Lord Atkin and concluded that, "*This dictum makes it clear beyond doubt* ***that proof of damage and not mere assertion thereof*** *is required before liability under such a bond arises.*" [emphasis added]

Thus, while in a conditional bond such as P4, the beneficiary must establish the extent of the damages suffered by it, I must for the sake of clarity reiterate that even though a bank is required to honour an on- demand payable performance bond, that does not absolve the beneficiary who called upon the bond of subsequently accounting its actual loss to the party on whose behalf the bond was issued.

This brings me to the question of whether the Plaintiff has satisfied the legal obligation cast on him of establishing the damages suffered by him as a result of the breach of the Contractor.

Action in the District Court

On 27th March 1996, the Plaintiff filed action in the District Court of Colombo against the Defendant claiming a sum of Rs. 1,222,055, which for some unexplained reason is one rupee less than in P4. The case of the Plaintiff was that P4 was issued to secure payment of the aforesaid sum of money that the Plaintiff had retained as retention money under P1 and that as the Contractor had failed to complete the works as agreed, the Plaintiff had suffered a loss amounting to Rs. 1,222,055 which the Defendant was liable to pay in terms of P4. The Defendant filed its answer denying any liability under P4 and took up the position that the Plaintiff has not suffered any loss or damage and that in any event, the Plaintiff has not complied with the conditions stipulated in P4 that required the Plaintiff to make a demand within one month of the default and for action to be filed within one month thereafter.

Of the 11 issues raised by the Plaintiff, Issue No. 7 has a direct nexus to the question of law raised by the Plaintiff before this Court and is therefore re-produced below:

> "*Has the Plaintiff suffered loss and damage to the extent of Rs. 1,222,055,92 in consequence of the default of the contractor?*".

Although it was sought to be argued before the High Court that mere default on the part of the Contractor would entitle the Plaintiff to claim a sum of Rs. 1,222,055 from the Defendant under and in terms of P4, the above issue makes it clear that the Plaintiff was very much aware that he was required to establish that he has suffered loss and damage to the extent of the value in P4.

The Plaintiff gave evidence and led the evidence of T.P. Weerasinghe, the Managing Director of the Consultant. However, none of the witnesses gave any evidence of the loss or damage suffered by the Plaintiff as a result of the default of the Contractor. The Defendant did not lead any evidence.

By its judgment delivered on 20th March 2003, the District Court took the following view:

> "පැ 4 ලෙස සලකුණු කොට පැමිණිලිකරු සාක්ෂි දෙමින් "සංයුක්ත ඉටු කිරීමෙ බැඳුම්කරය" (Combined Performance Bond) ඉදිරිපත් කර ඇත. එකි බැඳුම්කරයේ කොන්දේසි කියවා බැලිමේ දි ට්.එෆ්.එන්. පින්ටෝ සහ පුත්‍රයෝ කොන්ත්‍රාත්කරු වශයෙන් කොළඹ 03, ගාලු පාරේ අංක 316 දරණ යෝජිත ගොඩනැගිල්ල සැදිමේ දි පැමිණිලිකරුවන්ට සිදු කරන **යම් කිසි පාඩුවක් හෝ පැහැර හැරීමක්** සම්බන්ධයෙන් **දින 14 ක කාලයක් තුල දැනුම් දුන් විට විත්තිකරු ඇප කරු ලෙසට රු. 1,223,055.92 ක මුදලක් පැමිණිලිකරුට ගෙවිමට ඇප වී ඇත**. විත්තිකරු විසින් එකි ඇපකරය පිළිගෙන ඇත."

Thus, the District Court, similar to the English Court of Appeal in **Trafalgar House Construction (Regions) Limited v General Surety & Guarantee Company Limited** [supra] fell into error when it took the view that P4 was an on-demand bond payable within 14 days of the demand. For that reason, the District Court did not consider the necessity on the part of the Plaintiff to establish the loss or damage suffered as a result of the default of the Contractor.

Having arrived at the said erroneous view, the District Court continued to err when, not having realised that the Contractor had been given an extension of time until 15th October 1995 to complete the work, and the purpose for which P4 had been issued, it answered *inter alia* Issue No. 7 as follows:

> "කොන්ත්‍රාත්කරු විසින් මාස 18 ක කාලයක් තුල දි මෙම ගිවිසුමට අදාලව යෝජිත ගොඩනැගිල්ල සම්පුර්ණ කිරීමට අපොහොසත් වු බවට දි ඇති සාක්ෂිය විත්තිකරු විසින් බිඳ හෙළා නොමැත. රඳවා ගැනිමේ මුදල ද කොන්ත්‍රත්කරුට ගෙවු බවට මෙම අධිකරණයට සනාථව ඇති හෙයින් **වැඩ නිම කිරීමකින් තොරව රඳවා ගැනිමේ මුදල කොන්ත්‍රත්කරු හට ගෙවිමට සිදු, විම මගින් පැමිණිලිකරු** හට රු. 1,223,055.92 ක අලාභයක් සහ පාඩුවක් සිදු වු බවට මෙම අධිකරණයට සනාථව ඇති හෙයින් 7 වන විසදිය යුතු ප්‍රශ්ණයට "ඔව්" යනුවෙන් අධිකරණය පිළිතුරු දෙනු ලබයි."

The above formed the basis for the District Court to grant the Plaintiff the relief claimed by him.

Judgment of the High Court

Aggrieved, the Defendant filed an appeal with the High Court. By its judgment, the High Court, relying on the aforementioned provision in P4 that the Plaintiff shall establish the damages sustained by him, concluded that the Plaintiff has failed to establish that he has suffered damages as a result of the failure on the part of the Contractor to complete the building and accordingly allowed the appeal of the Defendant.

The relevant passages in this regard from the judgment of the High Court are re-produced below:

> "මේ අනුව, මෙම බැදුම්කරය යටතේ හිමිකම් පෑමට නම් කොන්ත්‍රත්කරු එම ගිවිසුම අනුව කටයුතු කිරීමට අපොහොසත් වී තිබිය යුතු අතර **එම හේතුව මත පැමිණිලිකරුට අලාභ සිදුවී තිබිය යුතුය.** එනම් **පැමිණිලිකරුට අය කර ගත හැකි වන්නේ එකී බැදුම්කරයේ සීමාවට යටත්ව සිදු වී ඇති අලාභය පමණි.** එම නිසා **මෙම බැදුම්කරය යටතේ මුදලක් අය කර ගැනීමට නම් තමාට සිදු වී ඇති අලාභය පැමිණිලිකරු ඔප්පු කළ යුතුය.**
>
> මෙම කාරණා දෙකම එක්ව සලකා බැලීමේ දී පැමිණිලිකරුට සිදු වූ අලාභයේ ප්‍රමාණය තහවුරු වී නොමැති අතර, එමෙන්ම එම අලාභය සිදු වූයේ කොන්ත්‍රත්කරු නිසි පරිදි සිය ටෙන්ඩරය අනුව කටයුතු නොකිරීම නිසි බවට තහවුරු වී නැත. මෙම තත්ත්වය මත පැමිණිලිකරුට මෙම බැදුම්කරයේ සඳහන් මුදල් අය කර ගැනීමේ හැකියාවක් නැත."

Questions of Law raised by the Plaintiff

Dissatisfied by the said judgment of the High Court, the Plaintiff sought and obtained leave on the following question of law:

> "*Did the learned High Court Judges err in law in holding that the Plaintiff has failed to prove damages?*"

For the reasons that I have already adverted to in this judgment, I am in agreement with the High Court that in terms of P4, the Plaintiff was required to establish that he has suffered damages as a result of the Contractor not commencing and/or completing the work after the receipt of the retention money. I shall now consider if the Plaintiff has discharged the evidentiary burden in that regard and whether the Plaintiff has established the quantum of the damages suffered by him.

Has the Plaintiff established the damages suffered by him – pre-trial correspondence

I have already stated that the retention money belonged to the Contractor for work done by him and that, as evidenced by P2 and P3, the Plaintiff released the said sum of Rs. 1,223,055.92 to the Contractor upon the recommendation of the Consultant on 2nd and 22nd March, 1995. It was the position of the Plaintiff that the Contractor failed to commence work even after the payment of the said retention money, and that the Contractor sought extensions of time to commence and complete the work. The Plaintiff stated further that the final extension of time was granted upto 15th October 1995, as borne out by P7, and that he lodged a claim with the Defendant by P6 on 26th October 1995.

The Defendant did not dispute that the Contractor has abandoned the site or that the Contractor has not completed the work. However, the Defendant taking the view that P4 was not an on-demand payable bond responded to P6 by its letter dated 30th October 1996 [**P8**] as follows:

> "*In accordance with the policy issued may we kindly request you to immediately carry out joint measurements in the presence of the Consultant – Design Team Three (Pvt) Limited and Contractor T.F.N. Pinto and Sons to finalise the loss assessment.*
>
> *We also wish to inform you that we have appointed an independent loss adjuster by the name of Mr. Nihal Bogahalanda who will contact you immediately and be present at the time the joint measurements are taken.*
>
> *Please note that we need this done immediately in the presence of all parties as we have to finalise the claim accordingly.*
>
> *Your immediate attention is very much appreciated.*"

P8, which was copied to the Consultant and the Contractor, is a clear statement by the Defendant to the Plaintiff that it is mandatory that joint measurements must be carried out. The Plaintiff did not dispute P8 nor did he claim that such a process was not required for the Defendant to process and finalise his claim. With the Contractor admittedly not having completed the work and the question of waiting until the end of the defects liability

period to release the retention money not being in issue as the monies had already been released, the necessity for the joint measurement to be carried out was obvious. It was the only way the Defendant could find out, (a) the value of the work carried out by the Contractor in order to determine if the Contractor has been overpaid, (b) if there were any defects in the work that had already been carried out by the Contractor and if so the cost of rectifying such defects, and thereby determine the extent of the damage suffered by the Plaintiff.

By letter dated 8th December 1995 addressed to the Contractor with copy to the Plaintiff and the Consultant [**P9**], the loss adjuster requested the Contractor to submit his claim for work done as from the date of termination. It appears that the Contractor responded to P9, for, by letter dated 18th December 1995 [**P10**], the loss adjuster informed the Consultant, with copy to the Plaintiff, as follows:

> "*I refer to M/s T F Pinto and Sons letter of 7.12.95 enclosing their final claim on the project for a proposed building for Mr. K.D.A. Hettiarachchi at No. 316, Galle Road, Colombo 3.*
>
> *Please be good enough to check and certify this claim including the unrecovered portion of the advance so that I could send my report to M/s Ceylinco Insurance Limited.*
>
> *It would be appreciated if any disputes regarding reductions in this claim are settled with the Contractor after discussions so that the final amounts certified are not disputed.*
>
> *Any disputes that are not mutually agreed to may further delay any settlement.*"

Thus, it appears from P10 that the Contractor had a monetary claim against the Plaintiff for the work carried out by him, and that the mobilisation advance paid by the Plaintiff has not been fully recovered. However, neither party has produced the claim preferred by the Contractor which is referred to in P10. Furthermore, even though the Defendant had called upon all three parties involved in P1 to carry out a joint measurement in order to value the work carried out by the Contractor, it does not appear that this request had

been complied with. This was a grave mistake on the part of the Plaintiff and was the reason for the Plaintiff to fail in proving his case.

By letter dated 10th January 1996 [**P5**], the Consultant informed the loss adjuster as follows:

> "*As per the Conditions of Contract, the retention money is to be released at the expiration of the maintenance of a project and if the contract was terminated, it is to be kept until the* ***costs of execution and maintenance and all other expenses incurred by the employer are ascertained****. (refer Clause 63(3) of the ICTAD Conditions of Contract).*
>
> *Therefore, we wish to state that this amount of Rs. 1,223,005.92 should be released to the Employer, K.D.A. Hettiarachchi to cover the additional costs which (he) will incur in completion of the balance work and other expenses.*" [emphasis added]

Thus, in terms of Clause 63(3) referred to in P5, the Plaintiff was entitled to hold on to the retention money until the '*costs of execution and maintenance and all other expenses incurred by the employer are ascertained'.* I have already stated that it is normal for a contractor to submit a guarantee/bond to secure the said obligation and have the retention money released to him. However, once a claim is made by an employer and in this case by the Plaintiff under P4, the obligation on the part of the Defendant to release sums promised under P4 would arise only once the '*costs of execution and maintenance and all other expenses incurred by the employer are ascertained'.* Without ascertaining such sums, I am of the view that the Defendant was not obliged in terms of P4 to pay the Plaintiff.

By P5, the Consultant has given a breakdown of the payments made to the Contractor. The first payment is the mobilization advance of Rs. 4,892,000 paid on 3rd November 1993. Ten other interim payments totalling Rs. 10,850,453.48 have been paid between 23rd December 1993 – 9th February 1995. In addition to the payment of the retention money of Rs. 1,223,055.92 in March 1995, the Plaintiff has paid a further sum of Rs. 1,306,171.72 on 10th April 1995. The aggregate of all payments is Rs. 16,965,519.40.

Neither the Plaintiff nor the Consultant seem to have addressed the claim of the Contractor referred to in P10. Instead, by letter dated 6th February 1996 [**P12**], the Plaintiff informed the Defendant as follows:

> "*Further to my letter dated 26th October 1995 and the subsequent correspondence I wish to reiterate that in terms of the above Bond, you are liable to pay me a sum of Rs. One Million Two Hundred and Twenty Two Thousand and Fifty Five and cents ninety two as the Contractor M/s T.F.N. Pinto and Sons has failed to perform or comply with the terms of the Contract.*"

While it was clear that the Contractor was in breach of its obligation to complete the building as required by P1, the correspondence exchanged between the parties clearly indicate that even at the time action was instituted in the District Court, the Plaintiff had failed to inform the Defendant of the exact quantum of damages suffered by it as a result of the breach of the Contractor.

Has the Plaintiff established the damages suffered by him – evidence at the trial

Having failed to address the requirement of the Defendant that a joint measurement be carried out in order to determine the value of the work done and thereby quantify the damages suffered by the Plaintiff, the Plaintiff filed action on 27th March 1996 seeking the recovery of the entire sum covered by P4. However, it is clear from Issue No. 7 that the Plaintiff was fully conscious of his obligation to establish the damages suffered by him.

Even though the Plaintiff led the evidence of Mr. T.P. Weerasinghe, the Chairman of the Consultant, he did not provide details of the work carried out and/or completed by the Contractor or the value of the work done by the Contractor. These details should have been available with the Consultant for the reason that eleven interim payments had been made, which in terms of the standard Conditions of Contract could only have been made after measurements were carried out.

The failure to provide such details becomes even more critical in view of the following two factors.

The first is the evidence of Mr. Weerasinghe as to the amount of work that has been completed by the Contractor. The following question posed to Mr. Weerasinghe during his evidence-in-chief, and his answer thereto are re-produced below:

"ප්‍ර: පින්ටෝ මහතා මේ වැඩ අවසන් කලාද?

උ: සම්පුර්ණයෙන් කලේ නැහැ. **75% ක් පමන කර තිබියදි නතර කලා."**

Thus, where the contract sum is Rs. 24.5m, 75% of the work would represent a sum of Rs. 18.1m. As borne out by P5, if the Contractor had only been paid Rs. 16.9m, that leaves approximately a sum of Rs. 1.2m in the hands of the Plaintiff.

In cross examination, Mr. Weerasinghe stated further as follows:

"ප්‍ර: වැඩ කටයුතු හරියට කරලා ඉවර වුණ නැත්නම් අවසන් කර නැත්නම් එම රැඳවා ගැනිමේ මුදල මුදාගැනිමට අනුමත කරන්නේ නැහැ. නේද?

උ: ඔව්. මේ වැඩ සම්පුර්ණ කර තිබුනේ නැහැ. නතර කර තිබුනේ. හෙට්ටිආරච්චි මහත්තයාගේ වැඩ තිබුණා. **තවත් වැඩ සුළු කොටසක් කරන්න තිබුණා.**

ප්‍ර: තමා කියන්නේ මෙහි සඳහන් වෙනවා මේ කොන්ත්‍රත්කරුගේ ඉතිරි වැඩ ටික ඉවර කරන කල් ඔය මුදල් දෙන්නේ නැහැ කියලා කියා තියෙනවා?

ප්‍ර: මේ ඇඩ්වාන්ස් සම්පුර්ණයෙන් අයකර ගෙන තිබුණු අවස්ථාවේ දි සහ රැඳවා ගැනිමේ මුදල් අයකර ගැනිමේ අවස්ථාවේ දි සම්පුර්ණ මෙම කොන්ත්‍රත් එකේ යටතේ වුවද, පැ.2 හි ඉතිරි වැඩ පිලිබඳව සඳහන් කිරීමක් කර නැති බැවින් **මේ කොන්ත්‍රාත් එකේ වැඩි කොටසක් අවසන් කර තිබුණා නේද**?

උ: **ඔව්**."

Thus, the Consultant was not able to tell Court the exact amount of work that had been carried out by the Contractor, the value of such work and/or the exact quantum of damages suffered by the Plaintiff.

The second is the evidence of Mr. Weerasinghe that the mobilization advance was deducted at the rate of 20% from each interim payment and that the Plaintiff had recovered the entirety of the mobilisation fee. The evidence of Mr. Weerasinghe is re-produced below:

ප්‍ර: ඔබ කියා සිටින්නේ සහතික කරන ලද ගෙවීම්වලින් කොටසක් සුදානම් කිරීමේ අත්තිකාරම් වශයෙන් අඩුකර ගන්නා බවයි.

උ: ඔව්.

ප්‍ර: සෑම මුදලකින්ම අඩුකර ගන්නවාද?

උ: සුදානම් කිරීමේ අත්තිකාරම් මුදලින් 20% ක් සහ රැඳවා ගැනීමේ මුදලින් 10% ක් වශයෙන් අඩුකරනවා. සම්පූර්ණ මුදල 30% ක් අඩුකර ගන්නවා.

ප්‍ර: ඒ කියන්නේ රැඳවා ගැනීමේ මුදල් සඳහා 10% ක් සහ සුදානම් කිරීමේ මුදල වශයෙන් 20% ක් වශයෙන් අඩුකර ගන්නවා?

උ: ඔව්.

ප්‍ර: ඒ කියන්නේ සම්පූර්ණයෙන් එකි අත්තිකාරම් මුදල අයකර ගත්තා?

උ: ඔව්

ප්‍ර: සුදානම් කිරීමේ අත්තිකාරම් මුදල් වලින් කොපමණ මුදලක් අයකර ගත්තාද?

උ: සම්පූර්ණ මුදල් අයකර ගෙන තියෙනවා.”

Thus, according to the Consultant, the mobilization advance has been recovered in full. Under normal circumstances, the fact that the mobilization fee has been recovered in full means that the Contractor has completed the entirety of the work. Since the work had not been completed, it was critical for the Plaintiff to have established the value of the work completed by the Contractor in order to determine, (a) if the Contractor has been overpaid, and/or (b) the cost of completing the balance work and/or (c) the cost of rectifying any defects in the work already done.

I am therefore satisfied that the Plaintiff has not discharged the evidentiary burden cast on him to establish the damages suffered by him. The conclusion of the High Court is therefore correct and I would accordingly answer the question of law raised by the Plaintiff in the negative.

Second question of law

In its answer, the Defendant took up the position that the Plaintiff has not complied with the conditions stipulated in P4 that required the Plaintiff to make a demand within one month of the default and for action to be filed within one month thereafter. The High Court had rejected this contention of the Defendant. The Defendant therefore raised the following question of law before this Court - "*Has the Plaintiff complied with his obligation under the performance bond marked P4 in giving 14 days written notice of the alleged non-performance or non-compliance on the part of the contractor that have risen to the claim for damages?*"

In view of the conclusion reached by me that the Plaintiff has failed to establish its damages, the necessity for me to consider the second question of law does not arise.

Conclusion

In the above circumstances, I affirm the judgment of the High Court. The appeal of the Plaintiff is therefore dismissed, without costs.

JUDGE OF THE SUPREME COURT

S. Thurairaja, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree.

JUDGE OF THE SUPREME COURT