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

In the matter of an appeal under Articles 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the High Court of the Provinces (Special Provision) Act No 54 of 2006

1. Aquamarine International
   (Pvt) Ltd.
   No. 60/1, Sri Gnanendra Road,
   Ratmalana.

2. Nihal Ananda Malavi Pathirana,
   The Chairman,
   Aquamarine International
   (Pvt) Ltd.
   No. 60/1, Sri Gnanendra Road,
   Ratmalana.

Plaintiffs

Vs.

The Attorney General,
Attorney General's Department,
Colombo 12.

Defendant

AND BETWEEN

The Attorney General,
Attorney General's Department,
Colombo 12.

Defendant-Appellant

Vs.

SC Appeal 13/2014

SC/HC/CALA 353/2012

SP/HCCA/RAT/304/2007

DC Embilipitiya 5874/Compensation

1. Aquamarine International
(Pvt) Ltd.
No. 60/1, Sri Gnanendra Road,
Ratmalana.

2. Nihal Ananda Malavi Pathirana,
The Chairman,
Aquamarines International
(Pvt) Ltd.
No. 60/1, Sri Gnanendra Road,
Ratmalana.

Plaintiff-Respondents

AND NOW BETWEEN

1. Aquamarine International
(Pvt) Ltd.
No. 60/1, Sri Gnanendra Road,
Ratmalana.

2. Nihal Ananda Malavi Pathirana,
The Chairman,
Aquamarine International
(Pvt) Ltd.
No. 60/1, Sri Gnanendra Road,
Ratmalana.

Plaintiff-Respondent-Petitioner/Appellants

Vs.

The Attorney General,
Attorney General's Department,
Colombo 12.

Defendant-Appellant-Respondent

Before: **Murdu N.B. Fernando, PC, J**
E.A.G.R. Amarasekara, J., and
A.L. Shiran Gooneratne, J.

Counsel: Nigel Hatch, PC with S. Galappatti and Ms. S. Illangage for the Plaintiff-Respondent-Appellants

Rajitha Perera, DSG for the Defendant-Appellant-Respondent

Argued on: 09-03-2022 and 20-05-2022

Decided on: 08-10-2024

Murdu N.B. Fernando, PC. J.,

The Plaintiff-Respondent-Appellants, Aquamarine International (Pvt) Limited and its Chairman ("the Plaintiff/Appellant") sued the Defendant-Appellant-Respondent, the Hon. Attorney General ("the Defendant/Respondent"), for compensation pertaining to the matter discussed below. The District Court of Embilipitiya entered judgement in favour of the Plaintiff. The Defendant went up in appeal to the Civil Appellate High Court of Ratnapura ("the High Court"). By the judgment dated 17th July, 2012 the appeal was dismissed by the High Court. Nevertheless, the High Court varied the quantum of damages awarded by the District Court. The Plaintiff is now before this Court being aggrieved by the said judgement.

The Plaintiff's Case

01. The Plaintiff submitted a project proposal to the Greater Colombo Economic Commission (now known as the Board of Investment- "BOI") to establish and operate an export oriented ornamental fish breeding facility at the Udawalawa Fisheries Station. This facility setup on State land was managed by the National Aquatic Resources Agency (NARA).
02. The BOI approved the project subject to conditions. By letter dated 21-02-1994, NARA granted permission for the Plaintiff to commence 'preliminary work' at the Udawalawa Fisheries Station, pending approval of the Cabinet of Ministers. The Udawalawa Fisheries Station, a land in extent 76 acres, was a research station established by NARA under an ADB project for fish breeding. It had 46 ponds and buildings attached to the station and was lying abandoned at the said time.
03. The Cabinet of Ministers approved the grant of land to the Plaintiff for the said project on a 30 year lease, subject to entering into a lease agreement with the State and payment of lease rental and furnishing of security. The Secretary, to the Ministry of Fisheries and Aquatic Resources conveyed the decision of the Cabinet of Ministers to the Plaintiff by letter dated 03-08-1994.
04. However, prior to the execution of the lease agreement and consideration been paid by the Plaintiff, the Secretary to the Ministry of Fisheries and Aquatic Resources by a letter dated 27-09-1994 informed the Plaintiff to vacate the Udawalawa Fisheries Station on the ground that the Plaintiff was in unauthorized occupation.

05. The Plaintiff did not vacate the land and thereafter steps were taken to evict the Plaintiff, in terms of the State Lands (Recovery of Possession) Act No 7 of 1979 from the Udawalawa Fisheries Station.
06. The Magistrate Court of Embilipitiya issued an order of eviction on the Plaintiff. Being aggrieved by the said order, the Plaintiff went before the High Court of Ratnapura and on 15-10-1996 the High Court of Ratnapura affirmed the order of eviction and the Plaintiff vacated the State land.
07. Thereafter, the Plaintiff filed the instant action in the District Court of Embilipitiya and moved for the following relief:-

(i) Declaratory relief

- that the Plaintiff entered the property for implementation of the export oriented fish breeding project;
- that the Plaintiff carried out improvements to the ponds as a *bona fide* improver and has an entitlement to receive compensation;
- that the Plaintiff has a right to remain in possession of the land, until compensation is paid;
- that the State has no right to take steps to eject the Plaintiff under the State Lands (Recovery of Possession) Act; and
- that the Plaintiff is entitled to compensation and damages.

(ii) award of Compensation

- Rs. 2,523,662.35 - for costs incurred to commence, breed and purchase of fish;
- Rs. 4,620,600.00 - for loss of profit; and
- Rs. 3,000,000.00 - as damages caused to the goodwill of the Plaintiff.

The Defendant's Case

01. The Defendant filed Answer denying liability and pleaded that the Plaintiff had failed to discharge the pre-conditions laid down by the Cabinet of Ministers *viz.,* execute the lease agreement, deposit security and pay rental to the State and that there was no binding contract between the parties.
02. The Defendant also pleaded that NARA had no authority to permit the Plaintiff to enter the land and included a cross claim for damages caused to the ponds.

Judgement of the District Court

01. The learned District Judge rejected the defence of the State and the cross claim. The District Court held that there was a valid and a binding contract between the parties and granted the relief prayed for by the Plaintiff, subject however, to a limitation placed on the start-up costs *i.e.,* costs incurred by the Plaintiff to commence, breed and purchase fish, and restricted the said sum to Rs. 1,500,000.00.
02. Thus, the learned District Judge granted all the declarations prayed for and entered judgement in favour of the Plaintiff and awarded compensation and interest thereon, for the following:

- For costs incurred	-Rs. 1,500,000.00
- For loss of profit	-Rs. 4,620,600.00
- For loss of goodwill	-Rs. 3,000,000.00
Total awarded	Rs 9,120,600.00

Judgement of the High Court

01. Being aggrieved by the said judgement, the Defendant appealed to the High Court imputing that the trial court erroneously held, that there was a contract between the Plaintiff and the State, the award of damages was erroneous and the Plaintiff had failed to prove the damages claimed.

02. The High Court rejected the Appeal of the State and held that there was a binding contract between the parties.

03. The High Court further held,

- that restricting of damages of incurred or start-up costs, under limb one for *bona fide* improvements, to a sum of Rs. 1,500,000.00 was in accordance with the law; and

- that damages awarded to the Plaintiff under limb two and three *i.e.,* Rs. 4,620,600.00 for loss of profit and Rs. 3,000,000.00 for loss of goodwill was erroneous, since the Plaintiff had failed to prove such damages and varied and disallowed the damages awarded under the said two limbs, in its entirety.

The Appeal before the Supreme Court

Having referred to the factual background pertaining to this matter, let me now move onto consider the Appeal before this Court.

The Appellant obtained Leave to Appeal from this Court on three questions of law. They are as follows;

(i) Did the Civil Appellate High Court err in law, by setting aside the grant of damages to the Plaintiff-Respondent by the District Court for loss of profit, having regard to the reception of P18 and P19 and the evidence on record?

(ii) Did the learned High Court Judge err in holding that a claim for loss of reputation cannot be made in an action for breach of contract?

(iii) Did the learned High Court Judges err by misconstruing the decision of the Court of Appeal in **Seabridge Shipping Limited v. CPC (2002) 1 SLR 126** in holding that a claim for loss of reputation cannot be made in an action for breach of contract, when in fact the said decision recognizes a claim in respect of loss of trade reputation?

It is to be noted that the Respondent did not appeal against the judgement of the High Court, which dismissed the State Appeal nor raise any questions of law before this Court. Thus, the Respondent seems to be content with the judgement of the High Court.

It is further, noted that the relief sought by the Appellant is to uphold the judgement of the District Court. As discussed earlier, the Plaintiff by its plaint moved for damages under three limbs, *viz.,* incurred costs, loss of profit, and loss of reputation.

The District Court awarded damages to the Plaintiff under all three limbs. However, it limited the damages for incurred costs, and granted the total sum prayed for under limbs (ii) and (iii).

The High Court upheld the damages granted by the District Court for incurred costs but disallowed the damages granted for *loss of profit* and *loss of good will and reputation*.

Thus, by this Appeal, the only challenge is to the non-awarding of the damages for the loss of profit and the loss of reputation of the Appellant.

Loss of Profit

The case of the Appellant was that possession of the Udawalawa Fisheries Station ("the facility") was obtained in February 1994 and it took the Appellant 2-3 months to repair the ponds on the 76 acre land and to introduce the fingerlings. The Appellant's case was that it takes an average of 12 months, for the fingerlings (depending on the species of the fish) to grow into fish, to be suitable for export.

In September 1994, when the Appellant was asked to vacate the facility the Appellant contended, 23 ponds/tanks had been renovated and breeding of fish had commenced. Further, it was contended that the Appellant commenced work anticipating to obtain from the State, lease of the facility for a period of 30 years. However, within seven months of the Appellant coming into possession and prior to the lease agreement being executed, the Appellant was asked to vacate the facility. The Appellant contends such action by the Respondent resulted in loss of profit to the Appellant. The evidence led at the trial denotes, that the Appellants core business is export of ornamental fish and the Appellant has a facility at Neluwa Galle and at some other place for such purpose. Acquisition of Udawalawa facility was an additional element.

The Appellant relied on two documents marked P18 and P19 to establish before the trial court, the claim for compensation/damages for loss of profit. P18 was a letter from a US based company dated 15-04-1994 for supply of fresh water fish to the value of USD 80,000.00 per year, as per agreement for 6 years until the year 2000. P19 was a letter from a company based in Germany dated 10-03-1994, for supply of ornamental fish from the Udawalawa facility to the value of USD 208,000.00 per year until the year, 1999.

There is no doubt that P18 and P19 were led in evidence without demur and the trial judge granted the entire amount claimed for loss of profit, placing total reliance on P18 and P19 and the 'contents therein', on the assumption that the project was planned for a period of 30 years.

The learned judges of the High Court were of the view, that the findings of the trial judge on loss of profit was based on two erroneous assumptions. First, the failure to object to the presentation of the two documents P18 and P19, as evidence contrary to the provision of Evidence Ordinance, had been extended by the trial judge not only to admission *per-se* of P18 and P19 as evidence of the case, but also to the 'contents' of P18 and P19. Secondly, the

aforesaid finding is coupled to another erroneous finding, that there were no questions or suggestions put forward at the trial by the Respondent to the Appellant, that the Appellant could have supplied the required quantity of fish for export, from the Appellant's other facilities located in Neluwa, Galle and elsewhere.

Its observed, upon perusal of the impugned judgement of the High Court, that the learned High Court Judges have scrutinized the relevant evidence and reviewed the findings of the trial court. It had given clear and cogent reasons as to why they disagree with the findings of the trial judge. The High Court Judges have analysed the evidence in detail, and held that the Appellant had failed to establish the necessity to award compensation/damages for loss of profit, and moreover failed to establish that the sum of as Rs. 4,620,600.00 was justly due to the Appellant from the State, as loss of profit.

I do not wish to examine each piece of evidence considered in detail in the impugned judgement. Suffice is to state the High Court held, although the trial judge emphasized that suggestions and questions had not been put to the Plaintiff in cross-examination pertaining to P18 and P19, that in fact the Plaintiff had been cross-examined on such facts, and thereby the Appellant's evidence had been challenged. Thus, the finding of the High Court was that the contents of P18 and P19 cannot be accepted in toto as correct, as held by the trial judge and therefore based upon same, the compensation for loss of profit as justly due, cannot be established.

Furthermore, the learned Judges of the High Court have meticulously, tabulated and examined another piece of evidence, P20, a book titled "Details of shipments made by Aqua Marine (International) (Pvt) Limited from 1990 to 1997" which contains details of exports on a daily basis.

The Judges have then considered the shipment dates, consignee, country, number of boxes, export value in USD, Airway Bills in P 20 *vis-â-vis* P18 and P19 and found that not a single shipment had been made in respect of the sender referred to in P19, the company said to be based in Germany, before or after the placing of order P19 and the shipments made to the company referred to in P18, the company based in US, were irregular and far below the value mentioned in P18. Thereafter, considering the said facts *vis-â-vis* the evidence of the 2nd Plaintiff, that at least a years preparation was needed in view of the gestation period of ornamental fish, to commence exports from Udawalawa facility, it was the finding of the High Court, that the orders in P18 and P19 could not have been supplied from the Udawalawa facility and the Appellant ought to have relied upon its facilities at Neluwa and the other, to cater for the orders placed via P18 and P19.

Another factor that the learned judges had considered, was that there were no documents led in evidence, responding to or acknowledging the purported offer of P18 and P19 nor letters expressing the displeasure of the purported foreign buyers pertaining to the non-supply of the agreed quantity of ornamental fish. Therefore, the High Court concluded that the Appellant had failed to establish that the loss of profit, as alleged by the Appellant was entirely due to the disruption of the Udawalawa project itself, for the Appellant to obtain the compensation/damages claimed in the plaint and thus, rejected the findings of the trial court.

Moreover, upon perusal of the judgement of the High Court, it shows that the learned Judges have examined P16, an album consisting of photographs of the repair work at the

facility, to come to the finding about the time line of repair, and thus to cast doubts about the Plaintiff's evidence, that the ponds were ready in 2-3 months.

In the impugned judgement the learned Judges refer to the turnover of the Appellant Company based on the figures in P 20 and comes to the conclusion firstly, that the handing back the facility to the State in 1997, has had no impact on the annual turnover of the Appellant Company i.e., the annual turnover shows an increase and not a decrease.

Secondly, the Appellant claimed loss of profit due to the disruption of the Udawalawa facility. In order to satisfy this contention, the Appellant ought to have proved the turnover of the company before the facility was acquired, to indicate that the acquisition of the facility enhanced production resulting in an enhanced turnover and since eviction from the facility, there was a drop in production coupled with a drop in turnover. However, P 20 presents a different version *viz.,* the turnover had improved. Therefore, the learned Judges of the High Court held that the Appellant had failed to prove on a balance of probability, the basis of quantifying the compensation/damages under loss of profit and therefore rejected the said compensation/damages awarded to the Appellant, by the trial court under limb (ii) and accordingly varied the judgement.

This Court is mindful, that although notice to quit was given in September, 1994 that the Udawalawa facility was handed back to the State by the Appellant only in 1997. Thus, the Appellant enjoyed the fruits of the facility for a period of three years. This delay was due to the Appellant resorting to the Appeal process recognized by law and we have no qualms about same. However, in computing loss of profit such factor would be a material item and cannot be totally ignored.

The learned President's Counsel for the Appellant submitted that the approach of the High Court was entirely misconceived in law and contrary to judicial precedent. The learned President's Counsel relied upon the Court of Appeal judgement of **Cinemas Ltd v. Sounderarajan (1998) 2 SLR 16** to emphasize that the failure to object to a document when it is produced and the failure to impugn such document, either in cross-examination or by leading evidence against it, by the opposing party renders such document as proof of the matters in dispute. Thus, it was contented that there is a paramount duty on a party to object to a document, and failure to perform such duty renders such document as proved in law.

Furthermore, the President's Counsel forcefully submitted that the aforesaid **Cinemas Ltd v. Sounderarajans case** is authority for the proposition that the failure of a party at the trial to object and impugn documents, cannot be rectified in appeal.

Another submission of the learned Counsel was that the High Court considered irrelevant material and he specifically referred to the findings of the High Court in relation to the annual turnover. His submission was that the basis of such tabulation and findings were irrelevant, since increase or decrease in turnover would have no bearing on loss of Udawalawa facility, which is the matter for which compensation/damages were sought. The Appellant further submitted that the testimony of the 2nd Plaintiff, that he was expecting to earn USD 200,000.00 from the Udawalawa facility was not challenged by the State.

Responding to the said submissions, the learned DSG relied upon the maxim h*e who asserts must prove* to argue, that a trial judge cannot blindly accept 'the contents of a document'

and that the party producing the document must prove the contents therein, based on evidence placed before court.

Further, it was submitted that although the 2nd Plaintiff, the Chairman of the 1st Plaintiff Company, produced P 18, P 19 and P 20, that he did not give any evidence relating to the inability to supply the fish referred to in P18 and P19 or the loss suffered by the Appellant as a result of being unable to supply the fish referred to in P18 and P19. Similarly, it was contented by the learned DSG that the 2nd Plaintiff failed to give evidence about the contents or the factors referred to in P 20, the details of shipments dates, countries, number of boxes etc. Moreover, the 2nd Plaintiff admitted that P 20 was not a document prepared by him.

Thus, it was the position of the learned DSG, that the Appellant failed to discharge the burden of proof which lies on the Appellant. The DSG also submitted that a party in a civil action seeking to establish 'the contents of a document' should, through independent evidence, prove his case. The Appellant failed to prove the factors and content of P 18, P 19 and P 20. Therefore, the learned DSG argued that the Plaintiff failed to establish its case on a balance of probability as required by law.

Furthermore, it was the position of the DSG, that the trial judge failed to consider P 18, P 19 and P 20 *vis-â-vis* the photograph album P16, which he submitted was conflicting evidence pertaining to the time line of repair and went on to contend that when there is conflicting evidence before court, the trial judge failed to consider and evaluate such evidence on a balance of probability, and thus failed in its functions in discharging the burden of proof bestowed on a judge.

Having referred to the submissions of the Appellant relating to compensation/damages for loss of profit, let me now move onto examine the Court of Appeal case of **Cinemas Ltd v. Sounderarajan** (Supra), the judicial precedent relied upon by the learned President's Counsel.

The case pertains to acceptance of a certified copy of a *certificate of heirship in succession* issued by a revenue authority in a foreign country. At the trial, no objection was raised when this document was marked and produced. At the appeal however, the point of contention was that such certified copy of the certificate cannot be accepted as evidence, in view of the provisions of Section 78(6)(ii) of the Evidence Ordinance. The learned judge of the Court of Appeal having analyzed the provisions of Section 154 of the Civil Procedure Code and specifically the 'explanations' referred to therein, opined that admissibility of such document cannot be raised for the first time in appeal and if a document is not objected to by the opposing party, the judge must admit the document, unless it is forbidden by law.

The principle and rational behind this rule as held in the **Cinemas case** is that, had an objection been taken, the party proposing to adduce the document would have tendered to court, evidence *aliunde* and by the failure to raise an objection, the opposing party has waived its right to object to such document as the opportunity for the proposing party to tender evidence *aliunde* has lapsed and no longer available.

There is no doubt that the principle laid down in the above case is sound and good law. But the question that requires an answer from this Court is, should a mere non-objection to producing a document at a trial, (in the instant case P18 and P19) envisage that the 'contents of the document' be taken as proof of all factors referred to therein.

Moreover, based only upon the said factors and content in P18 and P19, can the Appellant claim compensation/damages for loss of profit? In other words, without adducing any additional material or evidence, can the Appellant be entitled or to claim Rs. 4,620,600.00 as justly due to the Appellant? Should not the Appellant give evidence and itemize and show the breakdown or tabulate the loss of profit? Should not the Appellant prove when and how such a loss took place? Can a trial court blindly accept the said sum of Rs 4.6 Million as a loss of profit, without an iota of evidence or without a single supporting independent document been led as evidence? Has the trial judge performed the duty cast upon him under the Civil Procedure Code, to evaluate and analyse evidence and come to a correct finding based upon preponderance of evidence?

Upon perusal of the judgement of the learned District Judge, it is seen that the trial judge has not analysed the contents of P18 and P19. He has not indicated the manner in which the computation of the claim for Rs. 4,620,600.00 was made. This is more so, since P18 and P19 is in US Dollars. P18 and P19 is said to be the price for supply of fish *per annum*. The damages awarded was in Sri Lanka Rupees and is what was exactly pleaded. The trial judge has not shown its calculations and computations. The trial Judge has blindly accepted the contents in P18 and P19 as loss of profit for the Appellant, for a period of 6 years. Why six years? The Appellant has not acknowledged nor responded to P18 and P19. The buyer is silent about the non-performance of the contract. No correspondence in respect of the breach whatsoever was led in evidence at the trial.

The trial judge, it appears has inferred that the entire loss was incurred only due to the Appellant been requested to vacate the Udawalawa facility. In my view, he has failed to analyse the evidence led. He has failed to consider the words 'as per agreement' referred to in P18 or to consider what exactly was the understanding between the Appellant and the writer of P18 and P19. It is noted that by P18, the writer had requested exclusive rights for all fresh fish shipments to New York area. The 2nd Plaintiff did not give evidence in respect of such condition or as to whether exclusive rights for sale of ornamental fish in New York had ever been granted to the writer of P18 by the Appellant. If so, was the pre-condition fulfilled?

The trial court in my view, has failed to examine and analyse the evidence before court, in order to ascertain whether the Appellant has correctly proved the loss of profit and as to whether any loss whatsoever was caused to him. Thus, the trial judge has fallen short of weighing the evidence led before court on a balance of probability, in coming to a finding in favour of the Appellant.

Furthermore, the learned trial judge has failed to examine the mitigatory factors. Although the Appellant was issued a notice to quit within seven months of coming into possession of the Udawalawa facility, the Appellant continued to be in possession of the land and engaged in breeding and export of oriental fish for a period of three years, (until the revision application filed by the Appellant in the High Court of Ratnapura was dismissed and a period of three months was given to the Appellant to vacate the premises). Secondly, the Appellant was in possession and enjoyed the fruits of the facility in extent of 76 acres with 46 ponds, for three long years, without having a formal lease agreement been executed and without depositing security and without a red cent been paid as rental to the State.

Hence, in my view, the judicial precedent relied upon by the Appellant, in the **Cinemas case** *viz.,* failure to object to a document when marked renders the document to be taken as

proved in all circumstances and such failure cannot be rectified in appeal, can be distinguished in reference to the facts of the instant appeal. The ratio in **Cinemas case** cannot be taken in isolation and applied in the given instance in respect of P18 and P19. The contents of P18 and P19 have to be analysed, viewed and proved, in the light of the facts and circumstances pertaining to the matter in issue and the supporting evidence. Thus, in my view the observations in **Cinemas case** has no relevance to this appeal and can be easily distinguished.

Even for argument sake, if you accept the Appellant's contention, that the contents in P18 and P19 is proved, it proves only a placement of a supply order. Nothing else, nothing more. Thus, loss of profit has to be established independently. If not in my view, the Appellant cannot succeed in his claim for damages under this limb.

Coming back to the **Cinemas case,** as discussed earlier which party to be substituted, was the matter in issue in the said case. The certificate of heirship is directly connected to such issue. When a party fails to challenge the authenticity of such document and thereby accept the heirship, that party is thereafter estopped from challenging such fact, especially at the appellate stage. The Court of Appeal pronounced the said observations in the said circumstances and I am of the view that the ratio of **Cinemas case** has no relevance to the instant appeal, as the crux of the matter is vastly different from what was the issue in **Cinemas case**.

Nevertheless, I wish to state, that the aforesaid proposition laid down in **Cinemas case** is and has been constantly applied in cases pertaining to admissibility of deeds. This Court on many an occasion accepted the contention that a party who fails to challenge a deed when produced at the trial, cannot thereafter challenge the authenticity of such deed or move that the deed should be proved in accordance with the provisions of Section 68 of the Evidence Ordinance.

[Ref. **Seyed Mohamed v. Perera 58 NLR 246; Syadoris v. Danoris 42 NLR 311; Seelwathie Gunasekera v. Resanona SC Appeal 22/1987; Samarakoon v. Gunasekara and another [2011] 1 SLR 149; Prasanth and another v. Devarajan and another (2021) 2 SLR 419** and also the separate judgement of Amarasekera, J., in **Kugabalan v. Ranaweera (2021) 2 SLR 79**. For a contra view see also **Samarasinghe v. Mervin Silva SC/Appeal 45/2010- S.C. Minutes 11.06.2019** and **Ismail v. Hamithu SC/Appeal 04/2006- S.C. Minutes 02.04.2018]**

Similar views have been pronounced by our courts in respect of admissibility of field books and bills of exchange too. [Ref. **Silva v. Kinderslay 18 NLR 85** and **Chetty v. Thomas Cook and Sons 31 NLR 385**]

If I may digress, the law on this issue *i.e.,* proof of deeds and documents, is now settled in view of Act No 17 of 2022 which brought in a new Section, Section 154 A to the Civil Procedure Code. The transitional provisions in the said Act relates to pending appeals too.

Nevertheless, if I may repeat, in the instant appeal the relief prayed was for compensation/ damages for loss of profit. Hence, in my view the ratio in **Cinemas case** and the cases referred to above cannot be blindly followed and applied in the instant appeal. **Cinemas case** and the aforesaid cases have no relevance to the facts in this appeal. Therefore, this case can be easily distinguished, since the matter in issue in the instant appeal is awarding of compensation/damages for loss of profit and not for marking or producing a certificate, a

deed, a field book or a bill of exchange. I re-iterate, that the Appellant should establish the loss of profit through independent evidence. P18 and P19 would not suffice. Cogent evidence is required to prove the loss of profit.

Thus, I see merit in the proposition of the State that *'he who asserts must prove'* or to quote the latin term *'Incumbit probatio qui dicit non qui negat'*. In the given circumstances, the compensation/damages for loss of profit should be pleaded and proved, individually and independently, item by item. In my view, the Appellant has failed to prove and establish that the sum of Rs. 4,620,600.00 was the loss of profit suffered by the Appellant for the relevant period 1994 to 1997 and the said loss occurred entirely due to the steps taken by the State to take back the possession of the Udawalawa facility.

Hence, I agree with the submissions of the State, that in order to obtain relief from a court of law, *'he who asserts must prove'* his case. The Appellant should have proved that he accepted the offer of the writer of P18 and P19 to supply the stated amount of ornamental fish from the Udawalawa facility only; the said facility was fully geared to supply the ornamental fish referred to therein during the stipulated time frame (which goes against the Appellant's own narration that the fingerlings need a one year gestation period to be ready for export); the Appellant failed to honour the said agreement referred to in P18 and P19 which had a knock-on effect in the Appellant's turnover and anticipated profits; such action resulted in loss of profit, exclusively in a sum of Rs. 4,620.600.00; all such losses were incurred manifestly due to the acts of the State, to evict the Appellant and take back the Udawalawa facility; such actions of the State resulted in the Appellant to abandon the project and to vacate the Udawalawa facility; and therefore, the State is liable to make good, the said loss to the Appellant.

Furthermore, in my view, the failure of the Respondent to challenge or object to the documents P18 and P19 itself, cannot be considered as proof of P18 and P19 and the contents therein and as establishing that the Appellant suffered a loss of profit, in a sum of Rs. 4,620,600.00 and such loss happened entirely due to the acts of the State which were detrimental to the Appellant.

In the aforesaid circumstances, I am of the view that, the Appellant has failed to prove his assertions and the trial judge has erred in his findings. As discussed earlier, the High Court reversed the findings of the trial judge for good and cogent reasons.

Hence, I see no reason to interfere with the findings of the learned Judges of the High Court. The High Court has correctly analysed the totality of the evidence, considered and examined the material before court and rightly arrived at the decision, to dismiss the State Appeal, and to vary the sum awarded to the Appellant by the trial court under the limb, 'loss of profit'.

Further, such analysis by the High Court, cannot be considered as propping up evidence and infirmities of the trial court, as adverted to by the Appellant in his submissions made to Court. Adversarial systems of law as ours, permit the appellate courts, to examine the significance of the evidence, led at the trial to ascertain whether the trial court has diligently decided on the issues before court to come to a proper finding.

Moreover, the learned Judges rightly referred to the ratio of the Court of Appeal judgement, in the case of **Seabridge Shipping Ltd. v. Ceylon Petroleum Corporation**

(Supra) pertaining to what is needed to be proved in a claim of damages arising out of breach of contract, and furthermore, what is the degree of proof required in such matters *i.e.,* balance of probability, weighing of evidence presented by both parties.

In my view, there is no ambiguity whatsoever, upon the principle that damages for breach of contract are given by way of compensation, for loss suffered and not for wrong inflicted. Therefore, as observed in **Seabridge case** (Supra), measure of damages is not affected by the motive or manner of breach. There is no place in the law of contract for vindictive or exemplary damages. The nature of damages being compensatory, the affected party is only entitled to such sum, as will indemnify him for the loss which such person actually suffered.

The learned High Court Judges correctly interpreted the law and came to the finding that the Appellant has failed to establish damages resulting from loss of profit and thus, is not entitled to claim compensation/damages under the said limb, for the purported loss of profit, based only upon P18 and P19. Hence, in my view the High Court did not err, in its finding in respect of loss of profit.

In the aforesaid circumstances, I answer the 1st Question of Law raised before this Court in the negative and in favour of the Respondent.

Loss of Reputation

The 2nd and 3rd Questions of Law raised before this Court pertains to compensation/damages in respect of loss of reputation.

The learned District Judge granted the total sum claimed in the plaint, *viz,* Rs.3,000,000.00 to the Appellant. The plaint referred to the said sum as compensation for failure to honour foreign orders.

The reasoning of the trial judge was that the Appellant has won a catalogue of awards. Hence, in view of the loss of profit incurred by the Appellant for the failure to honour P18 and P19, the Appellant has to be compensated for loss of reputation by the State.

The learned Judges of the High Court, varied the order of the trial court. One such ground for varying was that a claim for reputational loss cannot be hoisted only upon loss of profit and for reasons already discussed pertaining to P18 and P19 in this judgement. Further, the High Court held, that the Appellant could not have anticipated an enhanced production from the Udawalawa facility as the evidence amply demonstrated that production of ornamental fish for export could only take place after one year of the fingerlings being put to the ponds. Thus, the High Court determined, even if the foreign buyers, based on P18 and P19 discredited the Appellant for failure to supply the fish in expected quantities, the failure of the Udawalawa facility will have no bearing and did not contribute to such fact. Thus, the High Court emphatically held that Appellant is not entitled to compensation/damages for loss of reputation.

In the impugned judgement, a passage from Anson's Law of Contract quoted in the **Seabridge case** was reproduced. It is in relation to loss of reputation and breach of contract.

The learned President's Counsel for the Appellant submitted, that the High Court relied upon an old edition of the Anson's Law of Contract and thereby misconstrued the **Seabridge**

case (Supra) where loss of trade reputation was the matter in issue and that in fact, compensation can be claimed for loss of reputation. It appears the 3rd Question of Law raised before this Court, refers to the purported misconstruction by the High Court of the **Seabridge case**.

Moreover, the learned President's Counsel referred to the development of the law based on jurisprudence in England and Wales to put forward the argument that damages can be claimed for loss of reputation arising from a breach of contract. [Ref **- Addis v. Gramaphone Co. Ltd (1909) AC 488; Wilson v. United Counties Bank Ltd (1920) AC 102: HL 1920 Groom v. Crocker (1939) 1 KB 194; Aerial Advertising Co. v. Batchelors Peas Ltd. (1938) 2AER 788; Foaminol Laboratories Ltd v. British Artid Plastics Ltd (1941) 2 AER 393** and **Malik v. BCCI and Mohamed v. BCCI (1997) 3 AER 1**]

The learned President's Counsel contended that though in the **Addis Case** (Supra), 1st case referred to above, the conventional view was taken, that damages for loss of reputation arising from a breach of contract cannot be recovered, that thereafter drastic change in policy had taken place in the United Kingdom as seen from the rest of the cases referred to above. He specifically drew our attention to the opinions of Lord Mustill and Lord Steyn in the House of Lords judgement in **Malik v. BCCI and Mohamed v. BCCI** (Supra) to submit that damages are recoverable for loss of reputation. Thus, he exhorted using the expression of Lord Denning, 'ghosts of the past clanking their medieval chains', that learned DSG is relying upon 'ghosts of the past' *viz.,* old precedents no longer relevant or applicable, and therefore that those should be side stepped and simply ignored.

Responding to the said submissions, the learned DSG relying upon the judgement of **Dialog Broadband Networks (Pvt) Ltd. v. Electroteks Network Services (Pvt) Ltd. S.C. (CHC) Appeal No 53/2012 - S.C. Minutes 12.12.2018** contended, in the instant appeal there was no evidence led by the Appellant to prove that the breach of contract which purported to cause a reputational loss and damage to goodwill, gave rise to a financial loss. Thus, it was the submission of the State, having failed to establish a financial loss, that the Appellant is not entitled for damages under the limb, 'loss of reputation'.

The learned DSG also relied upon the said **Dialog Broadband case** and its observations pertaining to requisites of a judgement, to submit that in the instant matter, the trial judge has failed to evaluate and consider the totality of the evidence and hence, there was no compliance with Section 187 of the Civil Procedure Code. He drew our attention to the case of **Warnakula v. Ramani Jayawardena (1990)1 SLR 206** where the Court of Appeal vitiated the judgement of the trial court for failing to consider evidence led at the trial.

Mr. Hatch P.C. for the Appellant distinguished the observations relating to reputational loss in the judgement of **Dialog Broadband Case** (Supra) as obiter, and contended that the principle ground of challenge in the said case, was non-compliance of Section 187 of the Civil Procedure Code and thus, the finding pertaining to reputational loss, being obiter, need not be followed in this instance.

Having referred to the submission of both parties, let me now move onto consider the impugned judgement in the light of the said submissions.

There is no doubt that the law pertaining to reputational loss has developed during the ages.

The 1908 **Addis case,** was considered the leading authority for the proposition that damages are not recoverable in contract for loss of reputation. In the said case, where the plaintiff sued for compensation for loss of reputation for wrongful dismissal, the House of Lords held that the plaintiff should not be compensated for any loss of his reputation and compensation should be limited, instead to his direct and pecuniary loss. Thus, the real ratio in the said case was that damages for breach of contract *per se* are awarded only for loss caused by breach of contract and not for loss caused by the 'circumstances or manner of the breach'.

Hence, if a party is able to establish financial loss was caused by the injury to reputation, the courts in England and Wales have granted relief. In **Aerial Advertising case** (Supra) Atkinson, J., stated that he was 'not giving damages for injury to reputation and that type of thing' but that the damages were rather 'in respect of the pecuniary loss which had been suffered.'

In the said **Aerial advertising case** the plaintiffs were to advertise the defendant's products under contract, by flying over two cities towing a streamer. The Plaintiffs flew on Armistice Day, when two minutes silence was observed and it had the opposite effect. The public disapproved of it and boycotted the defendant's products. The defendant refused to honour the contract. The plaintiff sued for the contract price. The defendant counter claimed for damages for breach of contract for the said loss and succeeded. Atkinson, J., in the said circumstances observed as above, and stated that damages is not for the injury to the reputation but for the pecuniary loss suffered.

The **Groom v. Crocker case** (Supra) is in respect of the plaintiff being adjudged guilty of negligent driving as a result of the defendant solicitor's actions. The plaintiff sued the defendant for injury caused to his reputation as a careful driver and it was held that no damages can be recovered as the loss did not result in a pecuniary loss.

From the foregoing it is seen that the courts in England and Wales have granted damages, only when pecuniary loss ensues. Hence, in order to obtain relief for loss of reputation it is *sine-qua-non* that a pecuniary loss is established.

With regard to the House of Lords decision in **Malik v. BCCI** and **Mohamed v. BCCI** (Supra) it is observed that Lord Steyn's opinion was that damages are recoverable for a breach of contract, which occurred therein, since there was an implied contractual obligation on the part of the bank, not to run a 'corrupt and dishonest business'.

This case was in relation to the claims for 'stigma damages' by two employees of the Bank of Credit and Commerce International (BCCI), which collapsed and which in turn made the two employees redundant. The claim of the two employees was based on the fact that by operating a corrupt and dishonest business, the bank placed the employees at a serious disadvantage in finding further employment in the financial services industry, resulting in financial loss to them. Thus, in the said instance, the said two employees were compensated not for the 'manner' of breach but for the breach of the contract itself, *viz.*, breach of an implied term of the bank to maintain trust and confidence. Lord Nichollas in his opinion, cautioned of 'opening of flood gates' and further opined, 'that assessment of damages should be done on the basis of ordinary contractual principles, subject to the question of causation, remoteness and mitigation.'

The aforesaid principles pertaining to loss of reputation have been recognized in our courts too. **Dialog Broadband case** (Supra) is a case in point. Aluwihare J., having analysed the dicta in **Malik v. BCCI** (Supra) and **Weeramantry on The Law of Contracts** (Vol 1 page 889) observed as follows:

> *"The question in narrow terms is to see whether 'patrimonial loss' in Roman Dutch Law or 'damages for contractual breach' in English Law allows damages for reputation and loss of good will.*
>
> *There is no doubt that a cause of action in respect of injury to reputation lies in the law of delict. The law of delict provides for damages, where the necessary ingredients are present, whether or not the said reputational injury has caused a financial loss. There is requirement to prove actual damage. On the other hand, an award of damages for breach of contract has a different objective. To quote the words in Malik v. BCCI, objective is 'compensation for financial loss by a breach of contract.*
>
> *As often seen in matters involving commercial entities, the distinction between damage to reputation and financial loss can become blurred. Damage to the reputation of professional persons, or persons carrying on a business, frequently causes financial loss. There is no question that, a 'supplier who delivers contaminated meat to a trader can be sued for loss of commercial reputation involving loss of trade' [vide Malik v. BCCI].*
>
> *Thus, in so far as a commercial* ***entity is concerned, financial losses incurred by loss of reputation caused by a breach of contract is a patrimonial loss and not a compensation for "pain or suffering". There is no punitive element involved****.*
>
> ***The question therefore is one of evidence as opposed to principle. The claimant must prove that the breach of contract which caused a reputational loss and damages to good will gave rise to a financial loss"*** (emphasis added)

The above dicta in the **Dialog Broadband case,** clearly envisage that our courts too, have adopted a more pragmatic view and considered the evidence led to ascertain whether the claimant has proved the financial loss in a breach of contract situation, which caused a reputational loss and damage to the good will of the claimant.

Prior to the Supreme Court decision in the afore discussed **Dialog Broadband case,** the Court of Appeal too, in **Hatton National Bank v. Tilakaratne (2001) 3 SLR 295** took up a similar approach.

The **Hatton National Bank case** relates to a wrongful dishonor of a cheque, the liability and duty of care of a bank in relation to contractual obligation, injury to creditworthiness and the reputation of the drawer. Having analysed the evidence led, the court held that the plaintiff's evidence on the transaction was vague, nebulous and indeterminate and that the plaintiff had

not proved any actual or special damages. Thus, the court varied the quantum of damages awarded by the trial court and awarded nominal damages for injury to reputation.

From the analysis of the English cases and the cases from our own jurisdiction, including the Court of Appeal judgement in **Seabridge case** discussed earlier, there is no doubt, that damages for reputational loss can be recovered only in instances in which the plaintiff can prove that financial loss has occurred due to the injury.

Moreover, as held in **Malik v. BCCI case** (Supra) in assessing damages, ordinary contractual principles relating to causation, remoteness and mitigation should be followed.

In the instant appeal, the trial judge awarded Three Million Rupees as damages for loss of reputation without any evidence being led to establish that financial loss was caused due to the alleged reputational loss. Moreover, the principles of causation, remoteness and mitigation were furthest in the mind of the trial judge.

The learned Judges of the High Court on the other hand, having meticulously analysed the evidence led at the trial court, clearly and unambiguously held, that the Appellant failed to establish that the acceptance of foreign orders P18 and P19 with the anticipation of enhanced production based on the Udawalawa facility, could not have become a reality, as the evidence of the Appellant itself indicated, it takes almost a year to expect production from that facility. Thus, the finding of the learned Judges of the High Court was that the eviction of the Appellant from the facility, will have no bearing on the non-fulfillment of P18 and P19.

Therefore, in the circumstances of this case and for reasons more fully dealt under loss of profit arising upon P18 and P19, the High Court came to the finding that the trial judge's conclusion on the loss of reputation is erroneous and the Appellant failed to prove the quantum of damages. Thus, the High Court went onto hold that the Appellant is not entitled to claim damages for loss of reputation.

I see no reason to interfere with the said finding of the High Court. The examination, the deliberation and the analysis pertaining to loss of repudiation by the learned Judges is clearly in line with the law. The Appellant has failed to lead any evidence whatsoever to establish that financial loss was caused to the reputation of the Appellant, in order to obtain damages under the said limb.

Hence, I answer the 2nd Question of Law raised before this Court, in the negative and in favour of the Respondent.

Furthermore, this Court is mindful, vide Section 187 of the Civil Procedure Code that a judgement should reveal the trial judges thought process. A mere order deciding the matter in dispute not only prejudices the rights of the parties but whittles down the importance attached to the judicial process and it colours the decision as one of whim and fancy. [Ref. **Swarna Latha Gosh v. H.K.Banarjee and another 1969 AIR 1167** and **Warnakula v. Ramani Jayawardena** (Supra)]

The 3rd Question of Law is an extention of the 2nd Question of Law. For reasons discussed earlier in this judgement, I hold that the learned Judges of the High Court have correctly appreciated and analysed the **Seabridge case** and came to the finding that in the instant matter, the Appellant has failed to lead evidence to establish that financial loss was

caused to the Appellant from the loss of reputation. Thus, in my view the learned High Court Judge's have not erred nor misconstrued the **Seabridge case**.

In the said circumstances, I answer the 3rd Question too, in the negative and in favour of the Respondent.

Thus, for reasons adumbrated in this judgement, I uphold the judgement of the High Court.

The Appeal of the Appellant is dismissed with costs fixed at Rs. Fifty Thousand (Rs. 50,000.00) payable by the Appellant to the Respondent.

Judge of the Supreme Court

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

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree

Judge of the Supreme Court