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

In the matter of an Application to the Supreme Court for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006

SC/Appeal 150/2016

SC/HCCA/LA/171/16

CP/HCC/KAN/37/2013(FA)

DMS 11288 (DC Kandy)

D.J.M.G. Kusumawathie,

Rajasinghapura,

Dodanwella

Plaintiff

Vs.

H.M. Tikiri Banda Herath,

No. 53.,

Dehideniya,

Peradeniya

Defendant

AND THEN BETWEEN

H.M. Tikiri Banda Herath,

No. 53.,

Dehideniya,

Peradeniya

Defendant – Appellant

Vs.

D.J.M.G. Kusumawathie,
Rajasinghapura,
Dodanwella
Plaintiff - Respondent

AND NOW BETWEEN
H.M. Tikiri Banda Herath,
No. 53.,
Dehideniya,
Peradeniya
Defendant – Appellant – Appellant

Vs.
D.J.M.G. Kusumawathie,
Rajasinghapura,
Dodanwella
NEW ADDRESS
94B,
Godamuduna
Dodanwela
Murutalawa
Plaintiff – Respondent – Respondent

BEFORE: B.P. Aluwihare, P.C., J
Vijith K. Malalgoda, P.C., J
Murdu N.B. Fernando, P.C., J

COUNSEL:	Harith de Mel with Dulani Peiris and Lakindu Wijesundara instructed by Jayamuditha Jayasooriya for the Defendant-Appellant-Appellant. Charitha N. Jayawickrema instructed by Poornima Gunasekara for the Plaintiff-Respondent-Respondent.
ARGUED ON:	23.06.2020 and 06.07.2020.
WRITTEN SUBMISSIONS:	Written Submissions of the Defendant-Appellant-Petitioner on 28.02.2017 Written Submissions of the Plaintiff-Respondent-Respondent on 25.09.2016
DECIDED ON:	10.11.2023.

Judgement

Aluwihare, P.C., J

The Defendant-Appellant-Petitioner-Appellant (hereinafter the Defendant) sought Leave to Appeal against the Judgement of the Civil Appellate High Court of Kandy, which upheld the Judgment of the District Court of Kandy.

The Plaintiff-Respondent-Respondent (hereinafter the Plaintiff) filed action in the District Court of Kandy under Chapter LIII of the Civil Procedure Code to recover a liquidated sum of Rs. 184, 000 /- on a promissory note together with a further sum of Rs. 36, 800 /- and legal interest until the due execution of the decree. Summons were issued to the Defendant and the Defendant applied to court by way of a petition and affidavit for leave to appear and defend the action. The District Court allowed the Defendant to file an answer upon furnishing security and the Defendant sought to dismiss the action.

The Defendant by way of his answer admitted that the money-transaction took place but denied placing the signature on the Promissory Note and Deed No. 958 and

contended that the signatures are forgeries. Defendant sought by way of a prayer to the Answer an order that the impugned promissory note be forwarded to the Examiner of Questioned Documents (hereinafter the EQD) for examination and a report to be tendered to Court. The contention of the Plaintiff on the other hand was that the Defendant placed his signature on the Promissory Note as well as the Deed No. 958 on the same day. The Deed was for an unrelated transaction and Hapugaskuburegedara Samel was a witness for both transactions.

To issue a Commission on the EQD sample signatures were tendered before the Registrar of the Court by the Defendant on 15.09.2006 but the EQD by a letter dated 27.11.2006 informed the Learned District Judge that the sample signatures were dissimilar from the document in question and requested the signatures of the Defendant in the ordinary course of affairs. Thereafter the Defendant provided the sample signatures along with amended draft Commission papers by way of a Motion dated 29.05.2007. The application was allowed by the Learned District Judge. Subsequently, it was reported that Deed No. 958 had been misplaced which was kept at the Registry for safekeeping and the Commission on the EQD was also not forthcoming. Eventually the document was found in the custody of the Registry. It seems owing to the administrative lapses and the Defendant's conduct a conclusive Commission of the EQD was unavailable.

On 27.08.2012 as the Defendant was absent and unrepresented, the case was fixed for ex-parte trial against the Defendant and the Plaintiff closed his case on that day. The Defendant's contention is that he was unable to retain representation as Attorneys- at- Law in his locality that he approached, refused to take up the matter due to the concerns of a fraudulent Deed executed by a member of the legal fraternity. The Learned District Judge, after considering the evidence, entered judgement in favour of the Plaintiff. The Learned District Judge, came to this conclusion mainly based on the evidence provided by the witness Samel and based on Deed No.958, which was a duly registered instrument in the Land Registry, hence held that the Promissory Note was genuine and was duly presented for payment (vide p. 166 to 168 of the Brief).

The Defendant being aggrieved by the said Judgement preferred an Appeal to the Provincial High Court of Kandy. The Learned Judges of the High Court upheld the judgement of the District Court by judgment dated 02.03.2016.

Consequently, the Defendant filed a Leave to Appeal application to this Court and the Court granted leave on 26.07.2016 for the following questions of law set out in sub-paragraphs (b) and (c) of paragraph 18 of the Petition of the Defendant;

(1) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has satisfactorily proved that a notice of dishonour has been given in respect of an action based on a Promissory note?

(2) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has complied with the mandatory requirements of the Bills of Exchange Ordinance to succeed in enforcing a Promissory note?

Before considering the merits of the Defendant's case I will consider the preliminary objection raised by the Plaintiff. The Plaintiff contends that the Defendant was not entitled to prefer this appeal to this Court as the Defendant had not moved to have the ex-parte judgement of the District Court set aside in terms of Section 84 of the Civil Procedure Code and that in terms of Section 88(1) no appeal lies against any judgement entered upon default .

It was argued that as per Section 88(1) of the Civil Procedure Code an ex-parte judgement is not appealable and the party in default must apply against the judgement in the same Court for an order setting aside judgment. As held by His Lordship Justice Samayawardhena in *Geethika Sudhirani Samaraweera v Uduruwangala Gedarage Charaka* SC/APPEAL/78/2021 (S.C Minutes 21.11.2022) at p. 6;

"In terms of section 88(1) 'No appeal shall lie against any judgment entered upon default.' This means a final appeal cannot be filed from an ex parte judgment entered against a defendant for failure to file answer or for want of appearance of the defendant on the trial date. A final appeal also cannot be filed from a judgment entered against a plaintiff for want of appearance on the trial date. In such a situation, if the defaulter is the defendant an application under section 86(2) or if the defaulter is the plaintiff an application under section 87(3) shall first be made to purge the default before contesting the case of the opposite party on the merits."

However, as stated earlier, the Plaintiff for reasons best known for her never took up this objection when the matter was argued before the High Court of Civil Appeals and chose to participate in the proceedings before it.

This Court is now called upon to consider the impugned judgement of the High Court of Civil Appeals which was an *inter-parte* proceeding. When this matter was supported for leave to proceed, neither the preliminary objection taken at the outset nor did the Defendant- Respondent raise a question of law on this point when the matter was supported.

In my view, the failure to object to the jurisdiction of the Provincial High Court amounts to a waiver and the Plaintiff is estopped by their conduct. It was held in ***Nawinna Kottage Dona Lalitha Padmini v. N.K.D. Pradeepa Nishanthi Kumari*** **SC/HC/CA/LA No. 134/2016 (S.C Minutes 07.09.2018)** that a party that failed to object to an appeal filed out of time amounts to waiver of such objections. It was held by His Lordship Priyantha Jayawardena at p.13 that;

"*The Petitioners raised the time bar objection for the first time in the Supreme Court. Therefore, it must be considered if the Petitioners are estopped by their conduct from raising the time bar objection before the Supreme Court.*

According to C.D. Field's 'Law relating to estoppel' revised by Gopal S. Chaturvedi, 3rd Ed, page 166;

'In order to constitute abandonment or waiver, it must be a voluntary act on the part of the person possessing the rights. Acquiescence or standing by when there is a duty to speak or assert a right creates an estoppel. In such cases knowledge of the act must be brought by the acquiescing party. Acquiescence does not mean simply an intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done.'

Therefore, waiver of an objection by a party aggrieved does not afford them the right to raise such objection at a later stage, as they are estopped by their prior conduct."

Similarly, once the Plaintiff failed to object to the jurisdiction of the Provincial High Court, the Plaintiff is estopped. For the aforementioned reasons I shall proceed to consider the questions of law on which leave to appeal was granted without considering the preliminary objection.

The only contention of the Defendant was that a notice of dishonour was not given by the Plaintiff within a reasonable period of time. The Defendant, however, did not

assert this position in the District Court or the High Court and took up the position for the first time before this Court.

A promissory note is defined in Section 85(1) of the Bills of exchange Ordinance as;

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

The principal differences of a promissory note from other bills as stated by William and Richard Hedley "*Bill of Exchange and Bankers Documentary Credits*" (4th edn at p. 148) is that

"*The basic difference between a promissory note and any other bills is that a note is a promise by the maker to pay, whereas an ordinary bill is an order to someone else (that is the drawee) to pay.*"

Meanwhile, the object of notice of dishonour is to prevent prejudice to the drawer or indorser, as stated in *"Byles on Bills of Exchange and Cheques*" (27th Edition at page155);

"***The object of notice is to inform the party, to whom notice is given that the holder or the party giving notice looks to him for payment. The rationale being that, where the bill has not been accepted or paid the drawer or indorser will be prejudiced if no such notice is given. There is no need though for the drawer or indorser to show prejudice, since the requirement to give notice is an absolute one***"

The requirement to give a notice of dishonour is stipulated in Section 48 of the Bills of Exchange Ordinance. The Section provides;

"*Subject to the provisions of this Ordinance, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:*

Provided that-

(a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequently to the omission, shall not be prejudiced by the omission;

(b) where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted."

Therefore, it is explicit that, as in the case of dishonour by non-acceptance, so also in that of dishonour by non-payment, notice of dishonour must be given to the drawer and each indorser; otherwise, the drawer or any indorser to whom such notice is not given is discharged. However, in certain circumstances a party can be excused from providing a notice. Section 50(2) of the Bills of Exchange Ordinance provides that a notice can be dispensed with if;

"Notice of dishonour is dispensed with -

(a) When, after the exercise of reasonable diligence, notice as required by this Ordinance cannot be given to or does not reach the drawer or indorser sought to be charged ;

(b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice ;

(c) As regards the drawer in the following cases, namely -

(i) where drawer and drawee are the same person,

(ii) where the drawee is a fictitious person or a person not having capacity to contract,

(iii) where the drawer is the person to whom the bill is presented for payment,

(iv) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill,

(v) where the drawer has countermanded payment;

(d) As regards the indorser in the following cases, namely -

(i) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill,

(ii) where the indorser is the person to whom the bill is presented for payment,

(iii) where the bill was accepted or made for his accommodation"

A notice of dishonour can be dispensed when the drawee and the drawer are the same person. When the drawer is also the drawee and the drawee refuses payment obviously the drawer will already know, hence there is no need to give notice of dishonour. That situation corresponds where a promissory note is made between the maker of the note and another. In this regard, *"Byles on Bills of Exchange and Cheques*" (27th Edition at page178) states;

"As set out in S.5(2) of the 1882 Act where in a bill the drawee and the drawer are the same person the holder may treat the instrument either as a bill or as a note. If the holder elects to treat the instrument as a bill there is no reason why he should be given notice of dishonour, in his capacity as drawer, since, in his capacity as drawee, he is responsible for the non-acceptance or non-payment of the bill. Thus, notice is expressly dispensed with ***(Equally no notice need be given if the instrument is treated as a note, since the person is the maker of the note and thereby corresponds with the acceptor of a bill, to whom notice need not be given)"***

The above position also corresponds under the Bills of Exchange Ordinance. As stated in Section 91(2);

"*In applying those provisions the* ***maker of a note shall be deemed to correspond with the acceptor of a bill,*** *and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order*"

Hence, the contention of the Defendant is without merit as there is no requirement to provide a notice of dishonor for a promissory note. The Defendant heavily relied on ***Senanayake v Abdul Cader*** **74 N.L.R. 255** and ***Ceylon Estate Agency v De Alwis*** **70 N.L.R 30.** The case of ***Senanayake*** [supra] was an action upon a cheque where no notice of dishonour was averred in the plaint and the Court dismissed the action owing to the defect. However, that judgment is not applicable to the instant appeal since the present action is upon a promissory note and not a cheque. In ***Ceylon Estate Agency*** [supra], a notice of dishonour was not given in an action for a promissory note and the Court dismissed the cause of action owing to the defect. That judgement can be distinguished from the present appeal since the Court was concerned with

notice to the indorser of the note. His Lordship Justice L.B. De Silva in ***Ceylon Estate Agency*** at page 39 stated;

"We hold that in an action on a promissory note where presentment for payment is necessary, to ***make the maker and indorsers liable,*** *it is a necessary averment in the plaint that the promissory note was duly presented for payment and was dishonoured. If there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded. As against the indorsers, the plaint must further aver that notice of dishonour was given to them, unless there was an excuse for not giving such notice, when such excuse should be pleaded. Even if the court is to take a liberal view of the pleadings, the defect should at least be cured by raising the appropriate issues on these matters unless these facts are admitted by the defendants."*

In the present case the Defendant is the maker of the note and not the indorser, hence the judgement of ***Ceylon Estate Agency*** is not applicable.

In any event, I am of the view that the Defendant was provided with sufficient notice. The Defendant admits the receipt of a Letter of Demand dated 22.06.2003 (vide. Admissions of the Parties p. 90 of the Brief marked 'E'). However, the Defendant contends that the said Letter of Demand was not marked at the trial by the Plaintiff because the said Letter of Demand was misplaced, and the Learned Judge could not evaluate or analyze the contents. Further, it was stated by the Defendant that contents of the documents cannot be proved by oral evidence as per Section 59 of the Evidence Ordinance (as amended). It was also argued by the Defendant that Section 49(5) of the Bills of Exchange Ordinance requires the notice of dishonor to sufficiently identify the bill and intimate the bill was dishonored by non-acceptance or non-payment. In the absence of the said Letter of Demand, the Defendant contends that Section 49(5) of the Bills of Exchange Ordinance, is not complied with by the Plaintiff.

As held by His Lordship Justice Nawaz in ***T.M Tennakoon v Seemitha Nuwara Eliya District Sakasuruwam and Naya Ganudenu Samupakara Samithiya*** **C.A. Case No. 751/2000 (F) (C.A Minutes 20.05.2016)** at p. 7 a notice of dishonor must be distinguished from a Letter of Demand.

"Notice of dishonor must be distinguished from a 'Letter of Demand'. It is necessary to make a demand by way of a 'Letter of Demand' but it is equally necessary to give

notice of dishonour when a cheque is dishonoured. Section 47 (2) of the Bills of Exchange Ordinance enacts:

'Subject to the provisions of the Ordinance, when a bill is dishonoured by non~payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.'

Section 48 of the Bills of Exchange Ordinance stipulates the requirement for a notice of dishonor. This provision contains not only the requirement of a notice of dishonour but also the effect of not giving such notice."

Hence, it is apparent that a Letter of Demand *per say* would not amount to a notice of dishonour unless the necessary requirements of the Bills of Exchange Ordinance are complied with by a plaintiff. However, it was contended by the Plaintiff that she met the Defendant multiple times and attempted to present the note for payment, but the Defendant refused (vide proceedings on 25.08.2006, p. 98 of the Brief). The Defendant did not deny this position nor was it controverted by any other evidence. The Plaintiff states that this amounts to a sufficient notice of dishonour communicated by personal communication. I am inclined to agree with this view.

Section 49(5) of the Bills of Exchange Ordinance states;

"*The notice may be given in writing or by* ***personal communication*** *and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment*"

In ***Metcalfe v Richardson*** **(1852) 11 CB 1011** on the day after a bill became due, the holder's clerk called upon the drawer, and told him that the bill had been duly presented, and that the acceptor "could not pay it" to which the drawer replied that "he would see the holder about it:" It was held at p. 775 by Maule J that;

"The clerk, it is true, does not say that the bill has been dishonoured, or is unpaid; but that Dalgleish, the acceptor, cannot pay it. He assumes that he has duly ascertained that: and it is plain that the sense in which the plaintiff understands the communication is, that he is called upon to pay the bill. He treats it as a notice that the acceptor has not paid the bill, and that he himself is called upon to pay. Therefore, we have the fact of the bill being dishonoured, and of the drawer's being informed of the acceptor's incapacity to pay, as being established, and that the drawer is looked to

for payment. And, when the plaintiff, in reply to the communication so made to him, says, 'I will see Mr. Richardson about it' I think no jury could come to any other conclusion than that he considered and accepted it, as it evidently was intended, as a notice of dishonour."

The Court states further that;

"It was competent to them to assume, and it was properly left to them to infer from the conversation deposed to, that the plaintiff had had notice of dishonour, and that he would be looked to for payment of the bill, which is the material part of the notice. I therefore think there should be no rule that it was proper to infer from this conversation that the drawer had due notice of dishonour."

In my opinion, similar to ***Metcalfe v Richardson*** (supra) once the Plaintiff attempted to present the note and the Defendant refused, this amounted to sufficient notice of dishonour. Hence, I am of the view it is proper to infer that sufficient notice of dishonour was given.

Conclusion

For the reasons stated above, I answer the questions of law upon which leave to appeal was granted as follows;

(1) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has satisfactorily proved that a notice of dishonour has been given in respect of an action based on a Promissory note?

No

(2) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has complied with the mandatory requirements of the Bills of Exchange Ordinance to succeed in enforcing a Promissory note?

No

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, P.C., J

I agree.

JUDGE OF THE SUPREME COURT