IN THE SUPREME COURT OF THE DEMOCRATICE SOCIALIST

REPUBLIC OF SRI LANKA

Central Finance Company Limited,

84, Raja V eediya,

Kandy.

Supreme Court No.SC /CHC 27/2007 **Plaintif**

Commercial High Court **Vs.**

Case No: HC (Civil) 159/2004 (1) **Janatha Estate Development Board,**

55/75, Vauxhall street,

Colombo-02.

Defendant.

And now

In the matter of an appeal in terms of Section 754(1) of the Civil Procedure Code.

Janatha Estate Development Board,

55/75, Vauxhall Street,

Colombo-02.

Defendant-Appellant

Vs.

Central Finance Company Limited,

84, Raja Veediya,

Kandy.

Plaintiff-Respondent.

BEFORE: **Hon. K. Sripavan J**

Hon. Sathyaa Hettige PC J

Hon. P. Dep PC J

COUNSEL: **Sumedha Mahawanniarachchi with**

Amila Vithana for the Defendant appellant

Avindra Rodrigo with Manoj de Silva

and Shanaka Gunasekare for the Plaintiff

Respondent .

DATE OF ARGUMENT: 21st January, 2013

WRITTEN SUBMISSIONS OF THE PLAINTIFF RESPONDENT : On 1st February, 2013

DATE OF JUDGMENT: 6th February , 2014

SATHYAA HETTIGE PC J

The defendant Appellant (hereinafter referred to as the appellant) has filed this appeal from the judgment of the Commercial High Court dated 10.05.2007 which was entered in favour of the plaintiff respondent (hereinafter referred to as the respondent) exercising civil jurisdiction of the High Court of the Western Province as prayed for in the plaint. The appeal has been filed based on the following grounds.

a) The Judgment dated 10/05/2007 is contrary to law and the facts in this case
b) The learned High Court Judge has disregarded the fact that the basic term of the lease agreement between the parties , that is the delivery of the leased article , had been fulfilled by the respondent.
c) The learned High Court Judge has erred in law by holding that the appellant is estopped from taking up the position that some of the documents marked by the respondent were not properly listed and therefore are inadmissible.
d) The learned High Court Judge has disregarded the fact that the respondent should have complied and complained as the respondent cannot complain of a loss supposed to have incurred in the process of supplying the leased articles when the same was not even delivered to the appellant.
e) The learned High Court Judge has ignored the basic principles of leasing.
f) The judgment of the learned High Court Judge was against the decided authorities on law of evidence, leasing and contract,
g) The learned High Court Judge has disregarded the disadvantages already caused to the appellant from the transaction with the respondent, due to no fault on the part of the appellant.

The facts of the case as presented before this court are as follows:

The appellant called for tenders from the local suppliers of four wheel drive motor vehicles for their use and selected Carplan Limited who were the local agent for Kia Motor Corporation of South Korea to supply four units of "Kia Sportage" Four Wheel motor vehicles vide P.10 .

The appellant requested the respondent to provide finance leasing facilities for purchase of four units of four wheel drive motor vehicles. Thereafter the appellant entered into a Lease Agreement dated 29/09/2000 marked P1 with the respondent. Under the said lease agreement the appellant agreed to pay the total purchase price of the motor vehicles in 48 installments.

The respondent was reluctant to finance the import of vehicles since the motor vehicles were not physically available at the time of paying the money. However, respondent agreed to finance the import of vehicles after the appellant undertook to furnish four letters of indemnity in respect of each of the vehicles. The respondent accordingly issued the four letters of Indemnity marked P2,P3,P4 and P5 and the respondent paid accordingly a total sum of USD 49. 680 to the manufacturer in South Korea for the said four motor vehicles.

The said four vehicles were seized and confiscated by the Sri Lanka Customs when they were imported by the importer without disclosing **a**n additional payment of USD 6000.00 in the Customs Declaration that were made to the manufacturer in South Korea and due to the failure to pay the heavy fine imposed by the customs. The respondent instituted action in the Commercial High Court for recovery of the loss suffered based on the four Letters of Indemnity as the petitioner failed to comply with the demand made by the respondent in terms of the four Letters of Indemnity.

It can be seen from the material placed before the High Court and this court that the respondent was reluctant to finance the importation of four motor vehicles without the letters of indemnities being furnished and the role of the respondent had been restricted to finance the transaction to import the said vehicles.

I will deal with all the grounds of law urged by the appellant in this appeal . It must also be noted that the appellant has failed to file any written submissions after the hearing was concluded though the opportunity was granted to both the parties. The respondent has filed the written submissions on 1st February , 2013. However, I will consider the appellant's case on the material placed before this court.

I will now proceed to consider the relevant clause (iii)in the Letter of Indemnity marked P1 addressed to the respondent (same clause appears in all four Letters of Indemnity marked P2, P3 and P4) which reads as follows:

" ***We/will indemnify and keep indemnified you, your successors and assigns from and against all loss or damage suffered and all claims, costs and expenses made against or incurred by you in any way directly or indirectly arising out of or consequent upon your having established the Letter of Credit and / or importing the consignment, whether arising out of a breach by us or any of the terms and conditions hereof or otherwise and whether or not you have a legally enforceable right to claim in respect of such loss, damage, claims costs and expenses against us for any other guarantor or indemnifier and whether or not you have availed yourself of all your legal remedies against us or any other guarantor or indemnifier. A certificate of any manager employed as to the time being due from us shall be conclusive and binding upon us***." *(emphasis added)*

On a perusal of the above clause it appears that the appellant was bound to pay and indemnify the respondent for the losses and damages incurred by the petitioner in the importation of the vehicles referred to above because the indemnity that has been given by the appellant has created a primary obligation on his part to pay. The appellant cannot absolve himself from the liability to pay under the above clause.

It was the contention of the respondent that under the letters of indemnities , the appellant undertook to indemnify the respondent against all loss and damage suffered and all claims costs and expenses made against or incurred by the respondent directly or indirectly arising out of or consequent upon the respondent having established the letters of credit / importing the consignment, whether arising out of a breach by the defendant or not and thereafter the letters of credit were opened through the HSBC Bank and the opening of the letters of credit were financed by the respondent.

It can be seen that when the trial commenced in the Commercial High Court on 23rd September 2005 there had been admissions recorded by the parties admitting that the Sri Lanka Customs confiscated the four vehicles at the time of importation , the four letters dated 13.11.2002 in respect of each letter of indemnity written by the respondent through its Attorney at Law to the appellant and the four replies written by the appellant to those letters dated 14.1.2003 and the fact that the respondent and the appellant entered into a lease agreement dated 29.9.2000.

It is also to be noted that the appellant under the lease agreement marked P1 (in the original court) agreed to pay the total purchase price of the said motor vehicles in 48 monthly installments and once the vehicles were imported the appellant was required to hand over the said vehicles to the plaintiff respondent who would be the absolute owner of such vehicles. However, it must be stated that, in this commercial transaction, though the respondent transferred the total money in a sum of US $ 49,680 including the conversion charges to the manufacturer in Korea the four vehicles imported had not been physically delivered to the respondent and indemnified any loss and damage suffered by the respondent as undertaken. In fact the four letters of indemnities in question had expressly covered such loss.

The appellant strongly contended that the evidence led on behalf of the respondent in the original court was not of a satisfactory nature to prove the respondent's case on a balance of probability. The learned counsel also argued that the documents marked P6 and P6 (a) in the High Court were inadmissible and documents marked P10, P 14 and P 15 were not listed documents before the first trial date but subsequently filed by an additional list of documents just two days prior to the evidence of the second witness called by the respondent and therefore, it was the contention of the appellant that the said documents marked were inadmissible.

On a careful examination of the case in the High Court it appears that the respondent has called two witnesses on behalf of the respondent and the appellant has failed to call a single witness to give evidence controverting the evidence of the respondent's witnesses.

In fact , It must be stated that the learned High Court Judge has dealt with very carefully at page 5 of the Judgment, in regard to the submissions of the appellant on the question of admissibility of the documents P6 and P6 (a) and P 10 , P 14 and P 15 which is reproduced as follows:

" ***In the submissions of the defendant ,it is stated that the documents marked P6 and P 6 (a) has not been properly proved and therefore the contents therein should not be considered as evidence. These are the invoices sent by Car Plan Limited to the plaintiff company informing of the prices of the vehicles that were to import from Korea. Even if the contents of these documents are not considered at all, the testimony of the witnesses for the plaintiff would establish the amount of monies that have been paid by the plaintiff company in importing the vehicles in dispute. This piece of evidence has not been controverted. On the other hand, the question of admissibility of documents P6 and P6 (a) as evidence , will not arise since the oral evidence led in this regard is sufficient to establish the necessary facts.***

The learned Counsel for the defendant also has stated that the documents P 10 , P14 and P 15 had not been listed before the first date of trial and has moved that the contents of those documents be disregarded. If those documents have not been listed in terms of the Civil Procedure Code the counsel for the defendant should have raised this objection at the time, the documents were marked. There was no such objection raised at that point of time. Thus the defendant is estopped from raising this objection at this stage and therefore, I hold that this court cannot disregard the contents of those documents as inadmissible evidence."

Therefore I do not agree with the submissions of the counsel for the appellant on the question of admissibility of the documents referred to above.

Now I will deal with the legal position of the case.

The contention of the respondent had been that the respondent did not have the physical possession of the vehicles at the time of payment and therefore the respondent had to keep some security for the money paid to the manufacturer. Furthermore it was contended that respondent would not have financed the import of the vehicles if the appellant had not furnished the letters of indemnities undertaking to indemnify the respondent of any loss and or damage that he would suffer as a result of financing the purchase. If I proceed to examine the nature of the terms of the Letters of Indemnities in this case it is clear that the appellant covenanted to indemnify the respondent in respect of any loss or damage and that the assured would be fully indemnified and the appellant cannot escape the liability attached under the indemnity contract.

It will be useful to understand the meaning of the word "indemnity" as the whole case is based on the interpretation of the letters of indemnities involved in this appeal. The word "indemnity" derives from the Latin term " indemnis" combined with "facere" meaning " to make".

(Garner: A Dictionary of Modern Legal usage , 2nd Edition)

The word "indemnity" has been defined in the Black's Law Dictionary as "***a duty to make good any loss, damage or liability incurred by another"***

" ***indemnity has the general meaning of "hold harmless"; that is one party holds the other harmless for some loss or damage***. Please see article on "**Indemnity agreement**" by **Jean Murray** published in US Business Law / Taxes.

Forbes J in **Renolds** v **Phonix Assurance Co. Ltd (1978) 2 Lloyds Rep 440** had referred to the judgment of Brett L.J in **Castellain** v **Preston (1883) 11 QBD 380 at page 386** wherein the assured's right to be indemnified was discussed.

" ***The very foundation , in my opinion , of every rule which has been applied to insurance law is this , namely that the contract of insurance contained in a marine or fire policy is a contract of indemnity and indemnity only, and this contract means that the assured , in case of a loss against which the policy has been made , shall be fully indemnified but shall never be more than fully indemnified. That is the fundamental principle of insurance , and if ever proposition is brought forward which is at variance with it, that is to say which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity that proposition must certainly be wrong***".

Is not it that the respondent in the case before this court has suffered malicious damage as a result of non payment of pecuniary loss caused by the appellant and the appellant has been unjustly enriched .

In **Murphy** v **Wexford County Council** (1921) 2 IR 230 at page 240 the court held that "… ***the law will endeavor so far as money can do it to place the injured person in the same position as if the contract had been performed or before the occurrence of the tort…"***

It can be seen from the above that the respondent in this case is the injured person and has to be placed in the original position as if his contracts of indemnities have been performed rightly and lawfully. It has been decided in cases in other jurisdictions referred to above that the assured's right to be indemnified for any loss or damage has been protected by law and the circumstances of the case before us would afford grounds

for interference of this court to give effect to the express provisions and terms of the letters of indemnities and not to grant relief to the appellant but to grant reliefs to the respondent.

The purpose of an indemnity is to secure that the indemnitee does not suffer economic loss . It must be mentioned that the power of the court was called upon by the respondent to prevent any economic loss and injustice occasioned by the act of the appellant and accordingly the court has intervened to do justice.

It can be stated that the oral evidence that was elicited in the High Court coupled with other documentary evidence in favour of the respondent would suffice to support the reasoning and the conclusion of the learned High Court Judge's judgment which I think is sufficient to decide the case before us. I am satisfied with the submissions of the learned counsel for the respondent and conclude that the appellant has failed in all the grounds of appeal to convince this court that the learned High Court Judge made an error of law in the judgment.

Accordingly , I affirm the Judgment of the Commercial High Court dated 10/05 2007.

In the circumstances , This court is not inclined to grant any relief to the appellant.

Appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

K. Sripavan J.

I agree

JUDGE OF THE SUPREME COURT

P.Dep PC J

I agree.

JUDGE OF THE SUPREME COURT.