

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

S.C Appeal 223/2017

SC HCCA LA No. 407/2016

Appeal No. WP/HCCA/MT/24/12 (F)

D.C. Nugegoda No. M 071/08

Suduwadewage Dinapala

No. 304/12,

Ihalabiyawila,

Kadawatha.

**PLAINTIFF**

**-VS-**

Upali Seneviratna

No. 276, High Level Road,

Maharagama.

**DEFENDANT**

**AND**

Upali Seneviratna

No. 276, High Level Road,

Maharagama.

**DEFENDANT-**

**APPELLANT**

**-VS-**

Suduwadewage Dinapala

No. 304/12,

Ihalabiyawila,

Kadawatha.

**PLAINTIFF-**

**RESPONDENT**

**AND NOW BETWEEN**

Upali Seneviratna

No. 276, High Level Road,

Maharagama.

**DEFENDANT-**

**APPELLANT-**

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**-VS-**

Suduwadewage Dinapala

No. 304/12,

Ihalabiyawila,

Kadawatha.

**PLAINTIFF-**

**RESPONDENT-**

**RESPONDENT**

**Before:** Hon. E.A.G.R. Amarasekara, J.  
Hon. Yasantha Kodagoda, PC, J.  
Hon. Achala Wengapulli, J.

**Counsel:** Ms. Daphne Pieris Vissundera on the instructions of Asela Rajapakse for Defendant-Appellant-Appellant  
Lasitha Kanuwanarachchi with Michele Jayasinghe instructed by Mayomi Ranawakka for Plaintiff-Respondent-Respondent

**Argued on:** 05.03.2021

**Decided on:**07.03.2025

**E.A.G.R. Amarasekara, J.**

This is an appeal by the Defendant- Appellant-Appellant (hereinafter sometimes referred to as “the Defendant” or “the Appellant”) against the Judgment of the Civil Appellate High Court of the Western Province Holden at Mount Lavinia dated 12.07.2016, where the learned High Court Judges dismissed the appeal of the Defendant and affirmed the Judgment of the District Court of Nugegoda dated 31.10.2011 that was originally decided in favour of the Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as “the Plaintiff” or “the Respondent”).

As per the Plaint filed on 19.11.2007 in the District Court of Mount Lavinia, the Plaintiff-Respondent described the cause of action as follows:

- The Plaintiff is a property broker, and he met the Defendant and discussed with the Defendant after coming to know that a land belonging to the Defendant facing high level road at Maharagama was to be sold.
- As per the discussion, the Defendant asked him to find a buyer to sell the said property for Rs. 59,000,000/- and the Plaintiff agreed to find a buyer to sell the property at Rs. 59,000,000/-, and the Defendant agreed to pay a commission of 3% from the selling price irrespective of the fact whether it is sold at a price exceeding or below the said agreed price.
- The above verbal agreement was entered between the Plaintiff and Defendant on or about December 2006.

- The Plaintiff introduced 'The Finance Company Limited' as the buyer and as per the accepted practice, the aforesaid buyer agreed to pay 1% of the selling price and the Defendant agreed to pay the aforesaid 3% of the selling price as a commission.
- The sale was concluded with the said buyer introduced by the Plaintiff on or about February 2007.
- Although the buyer, 'The Finance Company Limited' paid the agreed 1% commission to the Plaintiff, the Defendant paid only Rs. 560,000/- and the Defendant failed to pay a sum of Rs. 1,210,000/- out of the total commission of Rs. 1,770,000/- that he had to pay as per the agreement.
- Even though the Plaintiff requested on many occasions, the Defendant defaulted to pay the said amount and, thereafter, the Plaintiff demanded the said sum through a letter demand made thereto by his lawyer but the Defendant up to the time of filing the Plaint had failed to pay that amount.

As a result, the Plaintiff had prayed the Court to deliver a judgment to recover from the Defendant the outstanding amount of Rs. 1,210,000/- with legal interest and costs.

After transferring the case to the District Court of Nugegoda from the District Court of Mount Lavinia, the Defendant filed his Answer on 11.06.2008. The Defendant, except for his residence, denied the averments contained in the Plaint, and stated that there was no money due by him to the Plaintiff. The Defendant specially denied the cause of action pleaded by the Plaintiff and the fact that he entered into an agreement with the Plaintiff. The position of the Defendant in the Answer was that the Plaintiff had filed the action maliciously to harass him. Therefore, the Defendant prayed the Court to dismiss the Plaintiff's action with costs.

Consequently, the trial was commenced on 13<sup>th</sup> November 2008. While admitting the jurisdiction of the District Court, both parties raised 10 issues. Issues No. 1-6 were raised on behalf of the Plaintiff and Issues No. 7-10 were raised on behalf of the Defendant.

While the issues raised by the Plaintiff reflects the position taken through the Plaint, issue No. 7 raised by the Defendant is slightly different from the Defendant's position in the Answer. As mentioned before, the position in the Answer denied any agreement between the Parties while alleging malice on the part of the Plaintiff. The issue No. 7 raised on behalf of the Defendant,

focused on the fact whether there was any **enforceable agreement** between the Plaintiff and the Defendant indirectly indicating that even if there is an agreement, it is not enforceable. However, no reason for such unenforceability is projected through the Defendant's issues making it a very wide issue. In fact, the learned District Judge and the Parties should have considered the appropriateness of such a wide issue even at the time of raising issues as an opposite party cannot meet a specific position which is not clearly revealed but only exists in the mind of the other party.

During the trial at the original Court, the Plaintiff and the Branch Manager of the 'The Finance Company', Nugegoda Branch gave evidence for the Plaintiff, and the Defendant gave evidence on behalf of the Defendant.

It was stated in the evidence of the Plaintiff that the Plaintiff met the Defendant following a paper advertisement regarding a land to be sold, and after a discussion with the Defendant and his wife, the Plaintiff introduced The Finance Company to sell the property for Rs. 59,000,000/-. After that, The Finance Company had paid 1% of the commission it agreed to pay, but the Defendant only gave Rs. 560,000/-, even though the Defendant agreed to pay 3% of the sale proceeds. The proceedings also indicate that the Plaintiff marked P1, P2, P3 and P4 during his evidence to show that;

- The Finance Company paid him 1%,
- He made complaint to the police regarding the non-payment of the commission as agreed by the Defendant,
- He sent a letter of demand and,
- The Defendant made a statement to the police in reply to his complaint.

The Plaintiff has further stated that, even though the Defendant said to the police that Rs. 1,000,000/- was paid to the Plaintiff, the Defendant paid only Rs. 560,000/-. The Plaintiff's position is that he introduced the buyer and the transaction took place as a result of the said introduction of the buyer. Other than suggesting that the owner was not the Defendant, it was not suggested in cross examination that the Defendant acted as a disclosed agent of anyone else or that the transaction took place due to the intervention of any other person. However, as per the answers given during cross examination, it indicates that the Plaintiff believed that the owner was the Defendant. The Branch Manager of The Finance Company also testified to the effect that the

Plaintiff acted as the broker of the transaction related to this matter. He also confirmed that the Plaintiff introduced the Defendant when they went to see the land involved in the transaction. He further had stated that the 1% due from his company was paid to the Plaintiff. This witness further had stated that originally, the discussion was to sell the land for Rs. 61,026,000/-, but since the management wanted to reduce the price, Rs. 2,000,000/- was reduced from that and the land was sold at Rs. 59,026,000/-. He also revealed that the owner of the land was one Tharanga Sanjeewa Seneviratne (Appears to be the son of the Defendant) but, as per his evidence, it is clear that the discussions by the Plaintiff for the transactions took place with the Defendant. He had also stated that the Plaintiff did not take part in further discussions to reduce the sale price as aforesaid. It must be noted that, if there was a reduction of price, it is a matter between the true owner and the buyer but not related to the agreement between the Plaintiff and the Defendant to find a buyer and pay 3% of the sale proceeds as the commission. It must be also noted that no suggestion had been made in cross examination to indicate that the Plaintiff knew that the true owner was the son of the Defendant or that the Plaintiff knew that the Defendant was an agent of the true owner. Furthermore, nothing was suggested in cross examination to say that the transaction has happened for a reduced price due to the intervention of another person. When the Plaintiff closed his case, reading in evidence the documents marked P1 to P4, no objection had been reiterated. It appears when the matter was in appeal, originals of the said marked documents were not in the brief. However, once a document is marked, it becomes part of the brief. If the Appellant wanted the originals to be before the Appellate Court, he should have asked to reconstitute the Appeal brief with the originals. However, the Judgment of the High Court clearly indicates that copies were available and Parties agreed to proceed with the appeal in the absence of the originals. Now, the Appellant should not be allowed to say that the originals are not available. On the other hand, whatever recorded in evidence with regard to said documents can be considered as there is no challenge to what has been recorded in evidence. The evidence led on behalf of the Plaintiff clearly shows that there had been an agreement between the Plaintiff and the Defendant, for the Defendant to find a buyer to sell the land and if the sale takes place, to pay 3% of the sale proceeds as commission to the Plaintiff. Neither in the Answer nor in the issues the Defendant had taken up the position that the Defendant was the disclosed agent of his son to sell the property or that the sale took place due to the intervention of another person. It is only the Defendant who knew the true ownership of the property, whether it is his or his son's, and the relationship with his son

whether he is an agent or not, unless he revealed it during the course of transactions between the Parties. If he has revealed that he was the disclosed agent of his son to sell the land in his Answer or in issues, the Plaintiff could have met that position through appropriate means. As indicated above, no such stance was suggested even during the cross examination of the Plaintiff's witnesses. If the Defendant was the undisclosed agent of his son, it is correct to file action against the Defendant. On the other hand, as alleged by the Plaintiff this was an agreement to provide a service. A service of finding a buyer to sell a land for a commission of 3% to be paid when the sale is completed. A father can enter into such an agreement even for the benefit of his son. For providing such service, the Defendant himself can enter into the said contract on his own. With the invitation for offers through an advertisement, the offer made was to provide such service, namely to find a buyer for payment of 3% commission when the sale is completed, and accepting the offer completes the agreement. Introducing the buyer and completion of the sale of land with the said buyer accomplish the service agreed. To provide such service, the Defendant has to use his knowledge, time, connections, skills and labour which can be considered as valuable. Hence, there is a valuable consideration involved. Thus, there was sufficient ground for a valid contract between the Defendant and the Plaintiff, irrespective of the alleged fact that the Defendant was an agent of his son or not. In that context, it was correct to file the action against the Defendant. If the Defendant acted as an undisclosed agent of the son, whether the Defendant received any payment from the son is a matter between father and son and the Defendant need not receive any sum from The Finance Company. The Defendant got the service he expected from the Plaintiff. Thus, even when the Defendant entered into the contract on his own, there is no need for him to receive any sum from The Finance Company to satisfy the need of a valuable consideration.

On the other hand, while giving evidence in chief, the Defendant took up the position that the owner of the land was his son and the son published an advertisement in the Newspapers. Accordingly, the Defendant came and discussed with the son and the Plaintiff agreed to arrange a sale to The Finance Company for payment of a commission of reasonable amount. He further had stated that his son came to an agreement with an agent of The Finance Company to sell the land for Rs. 61,000,000/- but The Finance Company did not buy the land for that price. However, he states in evidence that, due to certain needs owing to the impending marriage of his son, his son through Pathmini Karunanayake, who was working in The Finance Company, got The Finance Company to agree to buy the land for a lesser amount which is less than Rs. 2,000,000/- to the

previously agreed amount. It is the position of the Defendant in his evidence in chief that the first agreement to sell the land for Rs. 61,000,000/- did not realize and the second arrangement for which the Plaintiff had no contribution realized and he did not receive any money from The Finance Company.

Further during the cross examination, the Defendant had stated that both the Defendant and his son came to know the Plaintiff when the Plaintiff came after the newspaper advertisement to meet them. It was the Defendant's position in cross examination that it was his son who agreed to pay a reasonable amount and there was no agreement to pay 3% as commission. He had attempted to assert that the transaction took place not because of the Plaintiff but due to the intervention of said Pathmini Karunanayake. However, the Defendant during cross examination had admitted that he did not ask anything about Pathmini Karunanayake when cross examining the Plaintiff's witnesses. At one point during the cross examination, the Defendant had said that an advance of Rs. 500,000/- was given to the Plaintiff and on another occasion had said that since the work was not done, a reasonable amount was paid and if the work was done properly more would have been paid. When cross examined, the Defendant had replied that the reasonable commission fee would be 1% or 2%.

It is important to note that during cross examination that the Defendant had admitted that by P2 complaint, the Plaintiff had complained to the police that the promised 3% was not paid and a balance of Rs. 1,240,000/- was due. The Defendant had further stated that in P4, what he had stated to the effect that a broker fee was not agreed for the land of 7 perches belonged to him, but he would pay a reasonable amount was a mistake and that mistake was not rectified. It appears with reference to P4, the Defendant had admitted that he had stated that the land was sold for Rs. 2,000,000/- less the originally agreed amount and he had paid Rs. 500,000/- as an advance and later through installments, another Rs. 510,000/- totaling up to Rs. 1,010,000/- to the Plaintiff. In contradiction to his own Police statement, he had again stated that the agreement took place between his son and the Plaintiff. Finally, in re-examination the Defendant had stated that final decision was with his son and the advance was paid by him and his son.

It must be noted that, nowhere in his evidence, the Defendant had taken up the position that he acted as the agent of his son who is the owner of the property, either as a disclosed or undisclosed agent. It is also pertinent to note that even though the Defendant endeavored to state that the



relevant agreement was between his son and the Plaintiff and it was not realized but a new agreement took place through the intervention of one Pathmini Karunanayake, this stance is not reflected in his answer nor in his issues, and had never been suggested to the Plaintiff's witnesses during cross examination. This stance contradicts what he had stated to the police in P4. It must be also noted that no evidence had been led by the Defendant to show that he replied to that letter of demand sent by the Plaintiff, refuting its contents. As said before, the original position in the Answer was that there was no agreement with the Plaintiff while the position expressed through the issues was that there was no enforceable agreement with the Plaintiff indicating that even if there is an agreement, it is not enforceable. After the Plaintiff placed his evidence to show that there was an agreement with the Defendant, without suggesting anything with regard to an agreement with his son which did not realize and also without suggesting that a sale of land that took place due to the intervention of one Pathmini Karunanayake while cross examining the Plaintiff's witnesses, the Defendant took up a new stance while giving evidence that the agreement was with his son and the Plaintiff and the land was not sold as per his introduction of the buyer and for the originally agreed price but the sale of land happened due to the intervention of one Pathmini Karunanayake for a lesser price. This stance clearly contradicts his position taken before the police and it is a stance placed before the Court without giving an opportunity for the Plaintiff to meet that stance as it was neither revealed in the Answer nor through issues nor through suggestions made while cross examining the Plaintiff's evidence. As observed above that there is no evidence to show that the Defendant refute the stance taken up by the Plaintiff through his letter of demand by replying to it stating his stance taken up while giving evidence.

On the other hand, the Plaintiff had placed his stance through evidence without any material contradictions and the Manager of The Finance company had given corroborating evidence to say that the Plaintiff acted as broker and he introduced the Defendant and the land. The Finance Company paying 1% as they agreed with the Plaintiff also confirms that the transaction took place due to the introduction made by the Plaintiff. Said witness had not said anything about the involvement of said Pathmini Karunanayake or nothing was suggested in that regard to the said witness. The evidence led by the Plaintiff indicates that he acted on the belief that the Defendant was the owner of the land. If there was no agreement with the Defendant, it cannot be understood why the Defendant paid an advance or why he stated to the Police that certain amount was paid in installments which payment the Plaintiff denied. Nothing was placed through the evidence of the

Defendant to show malice on the part of the Plaintiff as alleged in the Answer. If the agreement was with the son of the Defendant as alleged by the Defendant, I cannot find any reason for the Plaintiff not to opt to file an action against the said son. In the backdrop discussed above, I cannot find fault with the learned District Judge for accepting the Plaintiff's stance and not believing the Defendant's stance.

It appears the Defendant had taken up a stance to state that there was a novation of contract based on his evidence that the land was not sold at the originally agreed price but on a lesser price (Rs. 2,000,000/- reduced from the originally agreed price). Whether it happened in the same process or it was a new agreement between the real owner and the buyer and whether it falls within the concept of novation is a different matter. Whatever it is, it happened with regard to the agreement between the buyer and the real owner. As clearly identified by the Judges below, this matter relates to the agreement between the Defendant and the Plaintiff to find a buyer to sell the land for a commission to be paid when the sale materialized. The Plaintiff had clearly established on the balance of probability that there was a contract between him and the Defendant to find a buyer to sell the land involved for a commission of 3% to be paid to the Defendant when the sale occurred and the sale was completed. Whether the Defendant acted as an undisclosed agent of his son or on his own is a matter within the knowledge of the Defendant.

In fact, the learned District Judge made an error by deciding that the entitlement of the commission is only 2% based on the evidence of the Defendant that the reasonable commission would be 1% or 2% when the stance taken by the Defendant is unreliable. Even the learned High Court Judges had observed this error. As observed by the learned High Court Judges, the Plaintiff has not appealed against that error.

When an appeal was made to the High Court by the Defendant, while observing the said error which was not appealed against by the Plaintiff, the learned High Court Judges also confirmed the Judgment of the learned District Judge and dismissed the appeal made by the Defendant. As per the discussion made above, I cannot find any error regarding the final conclusion arrived by the learned High Court Judges. As evinced by the facts of the case, the Defendant either acted as the undisclosed agent of his son or acted on his own in entering into a contract with the Plaintiff. In both occasions the action has to be filed against the Defendant.

When the leave to appeal application was supported and leave was granted, this Court has allowed only one question of law as stated in paragraph 14(c) of the Petition dated 22.08.2016 which is mentioned below.

14(c) *Did the Learned High Court Judges err in law in expressly denying to consider the Petitioner's argument that he is not personally liable in his capacity as a agent for a disclosed principal for the reason of there being no specific issue to that effect, in fact when there is a wider issue questioning whether there is a contract enforceable against the Petitioner to wit පැමිණිලිකරු හා වින්තිකරු අතර කිසිදු නීතියෙන් බලාත්මක කල හැකි ගිවිසුමකට ඇතුළු වී නොමැති දී?*

As said before, the issue raised by the Defendant which poses the question of whether there is a contract enforceable against the Petitioner (Defendant) is very wide as it does not reveal why the Defendant says that it is not enforceable. Even the question of law allowed identifies it as a wider issue. A party cannot meet a stance that is not clearly revealed. The Plaintiff has clearly established an offer made and acceptance and the fulfilment of his obligations but denial of payment by the Defendant as agreed. The position that the Defendant is a disclosed agent of his son is not revealed through his Answer or by a reply to the letter of demand or through the issues raised or through suggestions made during the cross examination of the Plaintiff's witnesses. Thus, it is not a stance that could have been met by the Plaintiff. A thorough scrutiny of the Defendant's evidence also reveals that he has not taken the position that he was an agent of his son whether disclosed or undisclosed. It is his position that his son entered into the agreement. He has not uttered a single word regarding any principal and agent relationship between him and his son. This appears to be a stance taken up later through submissions. The learned High Court Judges have referred to such submissions made by the Defendant's lawyers in their judgment- vide page 11 of the Judgment. The Plaintiff had disclosed facts relating to an enforceable contract. If it is not enforceable against the Defendant for a specific reason, the Defendant must reveal it through his Answer or through his issues. Here, at least, he has not suggested it to the Plaintiff's witnesses during the cross examination nor has clearly stated in his evidence in defense. Hence, I cannot find fault with the Judges below for not finding the Defendant as a disclosed principal of his son. There is no reason to interfere with the final conclusions of the Courts below. Therefore, the above question of law should be answered in the Negative.

The facts discussed above show that the Defendant did not have reasonable grounds to challenge the decisions of the Courts below. The attempts of the Defendant were to delay the enjoyment of the fruits of victory by the Plaintiff. In such a situation it is not unreasonable to consider exemplary costs. Therefore, this Court decides that the Plaintiff is entitled to five times the costs of all three courts.

Hence, this Appeal is dismissed with Costs as mentioned above.

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Judge of the Supreme Court

Hon. Yasantha Kodagoda, PC, J.

I agree.

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Judge of the Supreme Court

Hon. Achala Wengapulli, J.

I agree.

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Judge of the Supreme Court