

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

In the matter of an Appeal under and in terms of
Section 5(1) of the High Court of the Province
(Special Provisions) Act No. 10 of 1996.

Merchant Bank of Sri Lanka PLC,
Bank of Ceylon Merchant Tower,
No. 28, St. Michael's Road,
Colombo 03.
And Formerly No. 189, Galle Road,
Colombo 03.

Plaintiff

**SC CHC Appeal No. 32/2008
SC CHC Appeal No. 32A/2008
CA (Civil) Case No. 17/2001 (1)**

Vs.

1. Maheshwari Nallathamby,
No. 47, Chilaw Road,
Negombo.
2. Nallathamby Kumarachandran,
No. 8/1, Maitland Crescent,
Colombo 7.
3. Nallathamby Chandra,
No. 17, The Glade, Welshwood Park,
Colchester, Essex 004 3JD,
United Kingdom.

Respondents

AND NOW BETWEEN

Nallathamby Chandra,
No. 17, The Glade, Welshwood Park,
Colchester, Essex 004 3JD,
United Kingdom.

3rd Defendant-Appellant

Vs.

Merchant Bank of Sri Lanka PLC,
Bank of Ceylon Merchant Tower,
No. 28, St. Michael's Road,
Colombo 03.

Plaintiff-Respondent

Nallathamby Kumarachandran,
No. 8/1, Maitland Crescent,
Colombo 7.

2nd Defendant-Respondent

Before: **Justice P. Padman Surasena**
 Justice A.L. Shiran Gooneratne
 Justice Mahinda Samayawardhena

Counsel: Murshid Maharooof with Shoaib Ahamed and Manin Mudugalle
 instructed by Parathalingam for the **2nd Defendant-Appellant.**

Dr. Romesh de Silva, PC with Sugath Caldera, Fahima Ishar,
Manindra Wickramanayaka and Newoma Wijeweera for the
Plaintiff-Respondent.

Argued on: 11/09/2024

Decided on: 11/12/2024

A.L. Shiran Gooneratne J.

- [1] By Plaintiff dated 25/01/2001, the Plaintiff-Respondent (sometimes referred to as ‘the Plaintiff Bank’) filed this action against the 1st, 2nd and 3rd Defendants (now between the 2nd and 3rd Defendants-Appellants) and sought to recover a sum of Rs. 8,307,207.19 together with due interest.
- [2] In paragraph 4 of the Plaintiff, it is stated that the Plaintiff-Bank at the request of the Defendants granted Bill Discounting facilities to the 1st and 2nd Defendants.
- [3] In paragraph 5 of the Plaintiff, the Plaintiff stated that the 1st and 2nd Defendants undertook to repay the said Bill Discounting facility up to Rs. 6,163,166.32 on the due date together with interest thereon at the rate of 22% per annum.
- [4] In paragraph 6 and 7 of the Plaintiff, the Plaintiff stated that as security for repayment of the said Bill Discounting Facility, the 3rd Defendant by Mortgage Bond Nos. 838 and 1206, marked ‘A’ and ‘B’ in this Plaintiff, mortgaged and hypothecated land and premises morefully described in the schedule thereto, and that by the said Mortgage Bonds the 1st and 2nd Defendants agreed to repay on demand the full sum set out therein.
- [5] In paragraph 9 of the Plaintiff, it is stated that the said sum is due and owing from the 1st and 2nd Defendants to the Plaintiff-Bank upon the Bill of Exchange No. 41825 dated 01/07/1998, which became payable on 31/07/1998, marked and pleaded as ‘D’ in this Plaintiff.

- [6] Claiming in paragraph 12 of the Plaintiff, that the Defendants have made default in the repayment of the said banking facility, the Plaintiff filed this action as aforesaid, to sue the Defendants jointly and/ or severally for the recovery of the said sum of Rs. 8,307,207.19 together with interest at the rate of 24% p.a.
- [7] The 2nd and 3rd Defendants filed separate Answers, both dated 19/01/2004.
- [8] In paragraph 4 of the answer, the 2nd Defendant admitted the averments contained in paragraphs 3, 4, 6, and 7 of the Plaintiff, however, stated *inter alia*, that the Plaintiff's claim is not justified and is bad in law. In the admissions recorded in the Commercial High Court on 09/03/2005, the 2nd Defendant has admitted paragraph 5 of the Plaintiff.
- [9] In paragraph 10 of the Answer, the 3rd Defendant states that she is a person governed by 'Tesawalami' and is subjected to 'matrimonial powers of her husband', thus without consent or concurrence of her husband, the execution of the said Mortgage Bonds lacks legal validity.
- [10] Having considered the pleadings, the evidence led and the written submissions tendered by the respective parties the learned High Court Judge by judgment dated 01/04/2008 decided that the Plaintiff-Bank has proved its case and accordingly made judgment in favor of the Plaintiff-Bank.
- [11] Being aggrieved by the said Judgment the 2nd and 3rd Defendants-Appellants, by separate petitions dated 30/05/2008 and 29/05/2008 respectively, are before this Court to set aside the said Judgment dated 01/04/2008, delivered by the Commercial High Court of Colombo.
- [12] The Plaintiff submits that since the 1st Defendant, the mother of the 2nd and 3rd Defendants is deceased, this action proceeded only against the 2nd and 3rd Defendants.

- [13] The 2nd Defendant has admitted that the 1st and 2nd Defendants obtained Bill Discounting Facilities up to Rs. 6,163,166.32, as security subject to the terms and conditions set out in the Mortgage Bonds Nos. 838 and 1206, marked 'A' and 'B' (now marked 'P2' and 'P3'), and agreed to repay on demand the full sum set out therein.
- [14] The said facility was granted to the 1st and 2nd Defendants as borrowers and the 3rd Defendant as obligor.
- [15] The Plaintiff's evidence in chief was by affidavit and the Plaintiff produced documents marked 'P1' to 'P15'. The following security documentation was tendered in connection with the said facility obtained.
- The offer letter of the Bill Discounting Facility which the 1st and 2nd Defendants signed and accepted, marked 'P1'
 - The Mortgage Bonds Nos. 838 and 1206 executed by the 1st and 2nd Defendants, marked 'P2' and 'P3'
 - The bill of exchange No. 41825 drawn by the 1st and 2nd Defendants agreeing to pay the sum mentioned therein on the due date, marked 'P5'
 - The statement of accounts, marked 'P12', which reflects the sum of Rs. 8,307,207.19 due to the Plaintiff from the Defendants upon the bill of exchange, marked 'P5'.
- [16] The Plaintiff has also led in evidence letters written to the 1st and 2nd Defendants, marked 'P6' to 'P10', which sets out the monies due and owing.
- [17] By letter dated 08/04/1999 marked 'P11', the 2nd Defendant has agreed to re pay Bill of Exchange No. 41825 for Rs. 6,163,166.30 and has acknowledged the Plaintiff's letter dated 17/03/99, as the final reminder to settle the overdue Bill.

[18] In the circumstances, the Plaintiff-Bank takes up the position that the Defendants admitted that the said sum of Rs. 6,163,168.32 was given by the Bill of Exchange produced marked 'P5' and that the Defendants had failed to pay the said sum with interest as shown in the statement of accounts marked 'P12'.

[19] It is not in dispute that at the request of the Defendants, the Plaintiff granted bill discounting facilities to the 1st and 2nd Defendants and that the 3rd Defendant signed Mortgage Bonds No. 838 dated 20/06/1996 and No. 1206 dated 01/07/1998, as security for repayment on demand sums of monies that are due and owing from the Defendants to the Plaintiff-Bank by the said facility.

[20] The Defendants by their letter dated 08/04/1999, has acknowledged the said debt and agreed to repay the same. Additionally, in cross examination, the 2nd Defendant has admitted obtaining the said bill discounting facility and its non-payment. [vide proceedings dated 17/01/52007]

“Q: There is a due date upon which you have to make payment in terms of the bill discounting facility

A: Yes

Q: and you did not make the payment.

A: Yes”

[21] In the circumstances, it is the position of the Plaintiff-Bank that the 2nd Defendant has admitted that he received and benefited by the bill discounting facility and that having agreed to pay the sum of Rs. 6,163,168.32 upon the said Bill, has failed to do so.

[22] The 2nd Defendants position before the Commercial High Court was that he had settled in excess of Rs. 5.3 million to the Plaintiff-Bank and has produced receipts to confirm the said payment, which the 2nd Defendant contends, the Plaintiff-Bank has not challenged.

The claim by the 2nd Defendant-Appellant of settling in excess of Rs. 5.3 million.

- [23] The offer letter dated 01/07/1998, marked 'P1', was an application to reschedule the existing Bill Discounting facility of Rs. 5,000,000/- to a new limit of Rs. 6,163,166.32 approved by the Plaintiff-Bank, under the offer letter dated 01/07/1998, which is now claimed by the Plaintiff-Bank as due.
- [24] In paragraph 9 of the affidavit dated 06/12/2006, tendered as evidence in chief by the 2nd Defendant, states that, payments amounting to a sum in excess of Rs. 5.3 million in respect of the bill discounting facility granted in 1994 and the enhancement in 1998 had been made, and has tendered copies of the receipts issued by the Plaintiff-Bank, acknowledging payments of the said sum, marked '2D2' to '2D29'.
- [25] In cross examination the 2nd Defendant admitted that in 1998, the outstanding interest of Rs. 1,100,000 due on the previous facility was capitalized and included in the principal amount which was due and owing to the Plaintiff-Bank.
- [26] The 2nd Defendant has admitted that he agreed with the bank to add the outstanding interest to the Bill Discounting facility obtained in 1998, which is reflected in Document marked 'P5', and that he agreed to pay the sum mentioned in 'P5', which is the Bill Discounting facility upon which this action has been instituted. It is also admitted by the 2nd Defendant that '2D1' to '2D26' were payments made prior to the existence of 'P5'.
- [27] In this background, in Judgment dated 01/04/2008, the learned Judge of the Commercial High Court has correctly observed that;

"It is further admitted by the 2nd Defendant that he agreed to pay the sum stated in the document marked P5. In cross examination the 2nd Defendant also admitted that although he undertook to pay the sum stated in the above document marked P5, he has failed to make the payments accordingly. it is observed in the cross examination

that the 2nd Defendant has admitted the fact that the documents marked 2D (2) to 2D (27) indicate the part payments made prior to the date of the document marked P5.”

[28] In the aforesaid circumstances, taking into consideration the payments made by the 2nd Defendant, I am of the view that the learned Judge of the Commercial High Court made no error in calculating the sum claimed by the Plaintiff-Bank.

[29] When this matter was taken up for hearing before this Court, the 2nd Defendant-Appellant challenged the Plaintiff's action in the Commercial High Court, on the basis that;

- I. the 1st Defendant had passed away in or about July 2000, long prior to the filling of this action. Therefore, naming the 1st Defendant in the Plaint is bad in law,
- II. a misjoinder of the alleged causes of action pleaded against the 1st and 2nd Defendants in respect of the Bill Discounting Facility and against the 3rd Defendant in respect of the Mortgage Bonds in suit,
- III. as per the Bills of Exchange Ordinance, a Bill must be presented for payment to the 2nd Defendant before making a claim, which was not done in accordance with Section 45 of the Bills of Exchange Ordinance,

[30] At the very outset, if I may deal with **No. III** above, the argument that the Bill of Exchange was not presented for payment in accordance with Section 45 of the Bills of Exchange Ordinance was raised for the first time in these proceedings during the pre-hearing written submissions. This argument is wholly inconsistent with the principles professed in Section 150, Explanation 2, of the Civil Procedure Code which explicitly states that "*The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to*

be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings."

- [31] In the present case, the Defendants-Appellants did not raise this issue in their pleadings, nor was it framed as an issue during trial. Furthermore, this position was never put in issue when the Plaintiff's witness was under cross examination. By raising this argument only at the pre-hearing stage, the Defendants-Appellants has materially altered their case which goes against the procedural safeguards provided in the Civil Procedure Code. As observed in *Thalwatte vs. Somasundaram*¹, a party cannot raise new grounds on appeal or at a later stage of proceedings if such issues were neither reflected in the pleadings nor framed as issues during trial. In this case, the Supreme Court refused to entertain a new argument on appropriation of payments because it fundamentally altered the nature of the case originally presented.
- [32] Similarly, the Defendants-Appellants in the present case failed to raise any objection regarding the presentation of the Bill during trial or cross-examination, and the pleadings contain no defence on this ground. Allowing such a defence to be introduced at this stage would prejudice the interests of the Plaintiff-Bank, which was not afforded an opportunity to address or counter this argument at any stage during the trial.
- [33] This Court is of the view that introducing a new defence post-trial, undermines procedural integrity and fairness, especially when such a defence involves mixed questions of fact and law that should have been considered during the trial stage. Accordingly, the argument regarding non-presentation of the Bill for payment does not merit consideration.

¹ 1997 2 SLR 109

Nos. I and II

- [34] This action was filed on the basis that the Defendants were jointly and/ or severally liable for the recovery of the stated sum. “*Where one of the makers of a joint promissory note granted in consideration of a sum of money lent by the payee to the makers, dies, on the note itself it is open to the payee to sue only the surviving maker.*” (*Vaitilingam vs. Karunakarar*²).
- [35] It is an admitted fact that the action of the Plaintiff-Bank has been instituted on the basis that ‘at all times material to this action, the 1st and 2nd Defendants have been carrying on business in partnership under the name, style and firm of E. Nallathamby, at No. 141, main street, Negambo.
- [36] The 1st and 2nd Defendants drew and accepted the Bill of exchange dated 01/07/1998, agreeing to pay the sum mentioned and delivered to the Plaintiff-Bank, which is produced marked ‘P5’. As per the said document marked ‘P5’, the 1st and 2nd Defendants promised and agreed that they will pay the said sum of Rs. 6,163,166.32 to the Plaintiff-Bank on the due date.
- [37] On the death of a partner who had granted the note, its holder sued thereon the surviving partners only. It was held that “*the action was not bad for non-joinder of the legal representatives of the deceased partner. In the case of a partnership, each member is severally bound, and may be sued separately on a note made by one in the name of the partnership*” (*Muttiah Chetty vs. De Silva et al*³).
- [38] In *Uragoda v. Jayasinghe and Others*⁴ the plaintiff sued Dr. Uragoda (1st defendant) and the partners of "Glass House" (2nd to 6th defendants) and sought

² 22 NLR 343

³ 3NLR 59

⁴ 2004 1SLR 108

damages for alleged medical negligence. The defendants raised an objection during the trial and argued that they could not be sued together. The court held that as per section 22 of the Civil Procedure Code, objections regarding the misjoinder must be raised at the earliest possible opportunity and such objections are required to be made prior to the commencement of the hearing. The court observed that if such objections were not raised within this time, the defendants are deemed to have waived their right to object. The court further explained that as per Section 91 of the Civil Procedure Code, such objections should be submitted before the hearing by filing a motion accompanied by a written memorandum.

The Court cited *Adlin Fernando v. Lionel Fernando*⁵ where Ranaraja, J. has stated that provisions relating to joinder are procedural and not substantive, and courts should adopt a common-sense approach in deciding questions of misjoinder or non-joinder. The court also cited *Podihamy v Simon Appuhamy*⁶ where it was held that the court should not be fettered by technical objections on matters of procedure.

Similarly, in the present case, the claims against the Defendants, arising from the Bill Discounting Facility and associated Mortgage Bonds are interconnected and stem from a shared factual and a transactional background. Therefore, this Court does not observe any irregularity in disposing those two matters in the same trial.

[39] Moreover, there is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed where there is a misjoinder of causes of action.; and that is therefore, improper for the Court to dismiss an action on the ground of misjoinder of Defendants and causes of action, without giving an opportunity to the

⁵ 1995 2SLR 25

⁶ 47 NLR 503

Plaintiff to amend his Plaintiff. (*D. Appuhamy et al. vs. T. Pangananda Thero et al*⁷, *Wismaloma et al. vs. Azapatha*⁸)

[40] Therefore, invoking a question on misjoinder at the appeal stage, does not merit consideration. For these reasons I reject the propositions taken by the Defendants-Appellants in respect of Nos. I, II, and III as stated earlier in this Judgment.

The Application of Tesawalamai law to the 3rd Defendant-Appellant.

[41] In paragraph 3 of the Answer dated 19/01/2004 and in the admissions recorded in the proceedings dated 09/03/2005, the 3rd Defendant admitted that she was aware of a contract which was entered into between the parties. Also has taken up the position that she is a person governed by ‘Thesawalamai’ and thus is subjected to the matrimonial power of her husband and that by law, all acts and deeds concerning her property require the consent and concurrence of her husband. It is also the position of the 3rd Defendant that it is an imperative requirement that no action can be filed against her without making her husband a party to an action.

[42] On the legal validity of the said Mortgage Bonds No. 838 and 1206 dated 20/06/1996 and 01/07/1998 respectively, the only substantive question of law put in issue by the 3rd Defendant was regarding the legal validity of the execution of the Bonds, for the reason that the 3rd Defendant’s husband did not grant his consent or concurrence either for the said authorization or the execution of the said Mortgage Bonds.

[43] On the above stand, the Commercial High Court concluded that;

“The 1st Defendant who is the lawful Attorney of the 3rd Defendant and her husband, under and by virtue of Power Attorney attested in England by J. M. Jones Notary

⁷ 67 NLR 89

⁸ 45 CLW 67

Public on 19th March 1996 has duly executed the said Mortgage Bonds and duly mortgaged and hypothecated the said property with the Plaintiff-Bank.”

[44] In proceedings before the Commercial High Court, the learned Counsel appearing for the 3rd Defendant stated that “--- *in the light of Honour’s order refusing a postponement for the 3rd Defendant to give evidence ---- I close my case without calling any witnesses*” [Vide proceedings dated 19/07/2007], which is an acknowledgment that the 3rd Defendant failed to tender the affidavit in evidence or to assert her position in evidence.

[45] Commenting on the 3rd Defendants case before Court, the learned Judge of the Commercial High Court concluded that;

“It is to be noted at this juncture that the 3rd Defendant in this action has tendered the examination-in-chief by way of an affidavit. But has not subjected herself for cross examination to assert her position in this action. After filling the affidavit has not made her appearance [sic]. Therefore, any position taken by the 3rd Defendant has not been proved and has not established her rights.”

[46] Therefore, the proceedings before the Commercial High Court, dated 19/07/2007 makes it abundantly clear that the learned Counsel closed the case for the 3rd Defendant, without calling the 3rd Defendant or any other witness to give evidence, on her behalf.

[47] In this regard, it is pertinent to note that, as held in the case of ***Mohamed Feuz and another vs. Sala Umma and another***⁹ where Basnayake CJ held, that evidence does not become legal evidence by mere fact that it passes into the record of the

⁹ LVII CLW 47

proceedings unnoticed by the judge or without objection being taken from the opposite side.

- [48] For the above reasons I am of the view that the 3rd Defendant has not asserted her position taken in the said answer dated 19/01/2004, by evidence before Court, to establish that she is governed by the law of Thesawalamai.
- [49] In the said circumstances, I agree with the conclusions made by the learned Judge of the Commercial High Court and I am of the view that, the stand taken by the 3rd Defendant, that she is a person governed by Thesawalamai law was not established and therefore, the 3rd Defendant's obligation to pay the Plaintiff-Bank survives.
- [50] For these reasons, the Judgement of the Commercial High Court is affirmed; both appeals are dismissed with costs fixed at Rs. 150,000/-

Judge of the Supreme Court

P. Padman Surasena, J.

I agree

Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree

Judge of the Supreme Court