

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

*In the matter of an appeal in terms of section 5(1)  
of the High Court of the Provinces (Special  
Provisions) Act No. 10 of 1996, against a  
judgment pronounced by the High Court  
exercising its jurisdiction under section 2 of the  
said Act.*

SC (CHC) Appeal No. 44/2014  
Commercial High Court  
Case No: 322/2009/MR

Lanka Orix Leasing Company PLC,  
100/1, Sri Jayawardhanapura Mawatha,  
Rajagiriya.

**PLAINTIFF**

Vs.

Kaluarachhilage Osmond Bandula  
8L, Housing Scheme,  
Hanthana,  
Kandy.

**DEFENDANT**

AND NOW BETWEEN

Lanka Orix Leasing Company PLC,  
100/1, Sri Jayawardhanapura Mawatha,  
Rajagiriya.

**PLAINTIFF-APPELLANT**

Vs.

Kaluarachhilage Osmond Bandula  
8L, Housing Scheme,  
Hanthana,  
Kandy.

**DEFENDANT-RESPONDENT**

Before:                   **P. PADMAN SURASENA, J**  
  
                                  **KUMUDINI WICKREMASINGHE, J**  
  
                                  **ARJUNA OBEYESEKERE, J**

Counsel:               Sumedha Mahawanniarachchi with Binara Silva for the Plaintiff-Appellant instructed by Santhoshi S. Herath Associates. (Dipika Herath, AAL)

W.D. Weeraratne for the Defendant-Respondent.

Argued on :           06.12.2022

Decided on :         03.11.2023

**P Padman Surasena J**

The Plaintiff-Appellant (hereinafter referred to as the Plaintiff) had entered into the Agreement bearing No. 163 dated 17-04-2008 produced marked **P1**<sup>1</sup> with the Defendant-Respondent (hereinafter referred to as the Defendant) for the lease of the property described in its schedule. Parties have inter alia agreed on the followings,

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<sup>1</sup> Produced marked "P1" in the Petition of Appeal dated 20-12-2013, filed before the Supreme Court and produced marked "A" in the Plaint dated 13-07-2009 filed in the Commercial High Court.

- a) The Defendant will lease the relevant property to the Plaintiff for a period of five years commencing from 01-06-2008 and ending on 31-05-2013 for a total consideration of Rs. 5,400,000/=.
- b) The lease rental shall be Rs. 90,000/= per month,
- c) Out of the total consideration of Rs. 5,400,000/= , a sum of Rs. 3,240,000/= shall amount to the total lease rentals for the period of first three years (36 months) i.e., for the period commencing from 01-06-2008 ending on 31-05-2011.
- d) Out of the said total lease rentals for the period of first three years (Rs. 3,240,000/=), a sum of Rs. 3,140,000/= shall be given to the Defendant as an advance.
- e) The balance sum of Rs. 100,000/= from the first three years' rental shall be retained with the Plaintiff to spend for any minor repairs that may be needed during the operative period of the lease.
- f) The Defendant shall renovate the said premises in the agreed manner and handover the same to the Plaintiff on or before 01<sup>st</sup> June 2008.
- g) The Plaintiff shall pay to the Defendant, the balance sum of Rs. 2,160,000/= as lease rentals at the rate of Rs. 90,000/= per month for the balance 24 months commencing from 01<sup>st</sup> June 2011 and ending on 31-05-2013.
- h) At the expiry of the full term of the lease, the Plaintiff shall pay back the aforesaid retained sum of Rs. 100,000/= to the Defendant after deducting any expenses that may have been incurred.

The Plaintiff has pleaded that its officers visited the relevant premises from time to time and it was made clear for the said officers (as per their observations with regard to the progress of the work), that the Defendant was not in a position/or was not planning to hand over the possession of the relevant premises to the Plaintiff before the agreed date, i.e., 01-06-2008. The Plaintiff has also stated that the relevant premises was not ready even by 10-11-2008. It was on that basis that the plaintiff had requested the Defendant to allow the Plaintiff to finish the remaining work in a manner that could suit the carrying out of the Plaintiff's business at the Plaintiff's expense and thereafter to deduct the said cost from the lease rentals of the balance two years.

As a second cause of action, the Plaintiff has averred in the Plaint that it had lost the opportunity of conducting its business as it had lost the opportunity of opening a branch at Ampara, because of the failure of the Defendant to hand over the possession of the relevant premises to the Plaintiff by the due date. The plaintiff on the said second cause of action had sought to recover a sum of Rs. 2,000,000/- from the Defendant.

The case for the Plaintiff is based on an allegation that the Defendant had entered into the aforesaid Agreement only with the intention of getting the afore-stated advance money. It was in the above circumstances that the Plaintiff had sent through its Attorney-at-Law a Letter of Demand to the Defendant demanding the re-payment the aforesaid advance with interest and damages at the rate of Rs. 3,000/- per month as per the Agreement. It was in the light of the above background that the Plaintiff in its plaint filed in the Commercial High Court of Colombo had prayed *inter alia* :

- a) that a judgement and decree against the Defendant be entered in favour of the Plaintiff to recover a sum of Rs. 3,140,000/= and Rs. 3,000/- per day from 01<sup>st</sup> June 2008, until the aforesaid sum is paid in full to the Plaintiff;
- b) a judgement and decree against the Defendant be entered in favour of the Plaintiff to recover a sum of Rs. 2,000,000/= and legal interest thereon from the date of the decree, until the aforesaid sum is paid in full to the Plaintiff,

The Defendant had filed an answer taking up the following positions:

I. The Defendant had carried out and completed the relevant renovations and/ or alterations as requested by the Plaintiff as per the Agreement at a cost of Rs. 982,500/-

II. After the said completion, the Defendant had informed the Plaintiff to take over the possession of the relevant building on 01-06-2008 as previously agreed, upon which the officers of the Plaintiff had visited the premises and became satisfied with the renovations/ alterations carried out by the Defendant.

III. Despite the aforesaid, the Plaintiff in breach of the Agreement had failed and neglected to take over the possession of the relevant premises.

The Defendant has also stated that the Plaintiff had sent the Letter of Demand to him only after a lapse of nine months. The Defendant had stated that this was designed to show falsely, a failure to hand over

the possession by the due date by the Plaintiff to the Defendant. The Defendant has also stated that his Attorney-at-Law, by the letter dated 26-03-2009 had responded to the Letter of Demand he had received from the Plaintiff.

The Defendant in his answer had prayed for dismissal of the Plaintiff's action. Submitting a Claim in Reconvention, the Defendant had sought to recover from the Plaintiff, a sum of Rs. 2,210,000/- together with legal interest thereon from 01-06-2008, being the loss and damage suffered by him as he was compelled to terminate the lease of three other lessees who were occupying the said premises in order to handover the vacant possession of the said premises to the Plaintiff. It was on that basis that the Defendant had prayed for judgment and decree against the Plaintiff on the Claim in Reconvention, in a sum of Rs. 2,210,000/- together with legal interest thereon from 01-06-2008 until the date of the decree and thereafter legal interest on the decreed sum until payment in full, together with costs.

The Plaintiff filed replication on 09-03-2010 and the case was taken up for trial on eight Admissions and seventeen issues.

The afore-stated eight Admissions are as follows:<sup>2</sup>

- 1) *Paragraph 01 of the plaint is admitted.*
- 2) *The fact that the parties entered into the agreement marked "A" produced with the plaint, is admitted.*
- 3) *The fact that a sum of Rs. 3,140,000/- being the rent in advance for a period of thirty six months commencing from 01st June 2008, was paid to the Defendant by the Plaintiff in terms of the agreement marked "A" produced with the plaint, is admitted.*
- 4) *The fact that the Plaintiff paid to the Defendant, a sum of Rs. 100,000/-being a deposit, to be refunded after deducting any costs for repairs, is admitted.*
- 5) *The fact that the Plaintiff agreed to pay the Defendant an aggregate lease rental of Rs. 5,400,000/- for a period of 5 years commencing from 01<sup>st</sup> June 2008 at the rate of Rs. 90,000/- per month in terms of the agreement marked "A" produced with the plaint, is admitted.*

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<sup>2</sup> Vide Consolidated Admissions and Issues at page 135 of the brief.

- 6) *The fact that the Plaintiff requested the Defendant to carry out certain alterations and/or renovations to the said premises in order to suit the Plaintiffs business requirements and to provide vacant possession of the said premises by 01<sup>st</sup> June 2008, is admitted.*
- 7) *The fact that the Defendant sent the letter marked "B" produced along with the plaint to the Plaintiff, is admitted.*
- 8) *The bare receipt by the Defendant, of the document marked "C" produced along with the plaint, is admitted.*

At the conclusion of the trial, the learned Judge of the Commercial High Court by his judgment dated 29-10-2013, had concluded that the Plaintiff had failed to establish his case against the Defendant and dismissed the Plaintiff's action. The learned Judge of the Commercial High Court also dismissed the Defendant's Claim in Reconvention.

Being aggrieved by the judgment of the learned Commercial High Court judge, the Plaintiff has lodged the instant appeal to this Court seeking to set aside judgment of the Commercial High Court dated 29-10-2013.

Let me now examine whether there is merit in this Appeal. The Plaintiff had led the evidence of four witnesses and produced documents marked **P1** to **P40**. Thereafter, the Defendant had led evidence of two witnesses and produced documents marked **V1** to **V4**(~~4~~).

At the outset, I must observe that the learned Judge of the Commercial High Court by its judgment dated 29-10-2013 had dismissed the action of the Plaintiff mainly because he had not believed the evidence of the witnesses called by the Plaintiff.

The Plaintiff in order to prove that the Defendant had failed to complete the required renovations and/or alterations as per the Agreement by the due date i.e., 01-06-2008, had relied on the evidence of its first witness who is the Plaintiff's Chief Regional Manager (Sirikkaduge Yanik Sajanaka Fernando). He had produced his evidence in chief by way of an Affidavit. This witness in paragraph 17 of the said Affidavit dated 03-03-2011 had stated as follows:

*"I state that thereafter, I inspected the said premises on 01<sup>st</sup> and 20<sup>th</sup> of April 2009 to ascertain the correctness in P22 and instructed Mr. Jayasundara Dissanayake of the Plaintiff to obtain photographs depicting the status of the premises on the said two dates."*

*True copies of 3 such photographs showing the status of the premises on 01<sup>st</sup> April 2009 are annexed hereto and produced in evidence as **P23** to **P25** and 5 such photographs showing the status of the premises as at 20<sup>th</sup> April 2009 are annexed hereto and produced in evidence as **P26** to **P30**."*

However, during the cross examination, this witness had admitted that although he had stated in paragraph 17 of his affidavit that he had inspected the premises personally on 01-04-2009 and 20-04-2009 and had requested Mr. Jayasundara to take pictures of the premises, this was not true. He stated in the cross examination that his final visit was in fact in September of 2008. This can be seen in the following excerpts produced from the proceedings pertaining to the cross-examination of this witness.

*"ප්‍ර : දිවුරුම් ප්‍රකාශයේ 17 වන ඡේදයේ නමා කියා තිබෙනවා නමා ඔය පරිශ්‍රය පරීක්ෂා කරන්න ගියා කියා 2009 අප්‍රේල් මාසේ. දැන් මහත්මයා කියපු සාක්ෂි අනුව මේ 17 වන ඡේදයෙන් කියා තිබෙන කරුණු වැරදියි. මහත්මයා දෙවනාවක්ම ප්‍රකාශ කළා 2008 සප්තම්බර් වලට පසු ඔය ස්ථානය බලන්න ගියේ නැහැ කියා?*

*උ : එහෙමයි. මගේ අවධානය මත තමයි ජයසුන්දර දිසානායක මහතා පින්තුර ටික ලබා දුන්නේ.*

*ප්‍ර : නමා පරීක්ෂා කලා කියන එක වැරදියි?*

*උ : වැරදියි.*

*ප්‍ර : නමා එතැන බොරුවක් කියා තිබෙන්නේ?*

*උ : වැරදියි.*

*ප්‍ර : දිවුරුම් ප්‍රකාශය 17 වන ඡේදයේ නමා එම පරිශ්‍රය පරීක්ෂාකර දිනක්සඳහන් කර තිබෙනවා. බලල තමයි තමන් කීවේ ජයසුන්දර මහතාට පින්තුර ගන්න කීවේ කියා?*

*උ : ඒක වැරද්දක්.*

*ප්‍ර : එසේනම් මහත්මයාගේ දිනපොත් නියාගෙන ඉන්න එකයි මේ ආයතනයෙන් නීති අංශයේ මහතුන්ට ඊමේල් පණිවුඩ යැව්වා කියන එක බොරු. මොකද මෙතන දින සඳහන් කරම කියා තිබෙනවා?*

*උ : අනෙක් කාරණා සත්‍යය බවට මම කියා සිටිනවා.*

*ප්‍ර : හැබැයි මෙතන සඳහන් වෙලා තිබෙන්නේ බොරුවක්?*

*උ : වැරද්දක්.*

*ප්‍ර : නමා කියන හැටියට දිනපොත් පිළියෙල කරනවා නම් ඊමේල් පණිවුඩ යවා තිබෙනවා නම් මේ වගේ බොරු ප්‍රකාශයක් කියන්න අවධාන නැහැනේ දිනයක් සඳහන් කර තමන් ගිහින් බැලුවා කියා?*

*උ : මෙතන ප්‍රකාශ කර තිබෙන එක වැරදියි බවට පිළිගන්නවා. නමුත් අනෙක් කරුණ සත්‍ය බවට ප්‍රකාශ කරනවා."*

Thus, the Plaintiff had relied on three photographs **P23** to **P25** to show the status of the premises as at 01<sup>st</sup> April 2009 and five photographs **P26** to **P30** to show the status of the premises as at 20<sup>th</sup> April 2009 with an attempt to prove that the Defendant had failed to complete the required renovations and/or alterations as per the Agreement by the due date i.e., 01-06-2008. The Defendant had not disputed that the photographs depict the relevant premises but had taken up the position that the dates shown on the photographs are fabricated. It is the position of the Defendant that these photographs are ones that had been taken some time back when the renovation work was in progress. In these circumstances, the dates on which these photographs have been taken have assumed the greatest importance. Thus, they have become directly relevant to the main fact in issue in this case, i.e., the issue whether the Defendant was ready to hand over the possession of the relevant premises to the Plaintiff before the agreed date, i.e., 01-06-2008. However, the Plaintiff's main witness himself has established before Court, the fact that these photographs had not been taken on the dates asserted by him .

The Plaintiff has also called witness Jayasundera Mudiyanseelage Dissanayake to give evidence on its behalf. According to the Plaintiff's Chief Regional Manager (Yanik Sajanaka Fernando), the witness Jayasundera Mudiyanseelage Dissanayake is the person who has taken three photographs **P23** to **P25** on 01<sup>st</sup> April 2009 and five photographs **P26** to **P30** on 20-04-2009. This witness in his evidence has stated that the photographs were taken on the dates printed on them. However, in view of the admission by Yanik Sajanaka Fernando that his assertion that the photographs were taken on those dates is false, the decision by the learned Commercial High Court Judge not to rely on the evidence of these witnesses is justified.

The Plaintiff has also called Muthupora Thotage Joseph Mary Anthony Perera to give evidence on its behalf. The said witness is the architect attached to the Plaintiff company. According to this witness's evidence, when he had visited the premise on 15-05-2008 there was only very little work to be completed and that work would have only taken about fifteen days for completion. Therefore, I observe that this witness has not established the Plaintiff's case but has been helpful to establish the position taken up by the Defendant.

Thus, the cumulative effect of all the above circumstances are directed towards justifying the conclusion arrived at by the learned Judge of the Commercial High Court that the Plaintiff has made an abortive attempt to convince Court that the Defendant had failed to complete the required renovations and/or alterations as per the Agreement by the due date i.e., 01-06-2008. Moreover, the Defendant does not accept that the Plaintiff's witnesses had visited the premises on the dates they claimed to have visited the said premises. The learned Judge of the Commercial High Court for the reasons set out in his



judgment had accepted the position taken up by the Defendant. I too have no reason to deviate from that conclusion either. This too no doubt has affected the credibility of the Plaintiff's case presented before Court. I agree with the above conclusion arrived at by the learned Judge of the Commercial High Court.

There are numerous other reasons which the learned Judge of the Commercial High Court had given in his judgment for his final conclusion. I am in agreement with those conclusions also. Since the above reasoning is sufficient to dispose this appeal, I would not endeavour to analyse all those reasons in detail again.

For the foregoing reasons, I see no merit in this appeal. I affirm the judgment dated 29-10-2013 pronounced by the learned Judge of the Commercial High Court and proceed to dismiss this appeal. The Defendant is entitled to costs in both Courts.

**JUDGE OF THE SUPREME COURT**

**KUMUDINI WICKREMASINGHE, J**

**I agree,**

**JUDGE OF THE SUPREME COURT**

**ARJUNA OBEYSEKERE, J**

**I agree,**

**JUDGE OF THE SUPREME COURT**