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

In the matter of an appeal in terms of Section 754 (1) of the Civil Procedure Code read with Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

SC.CHC.APPEAL NO. 12/2015
CHC Case No. HC/C/163/MR/11

People's Leasing Company Limited
No. 67,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.
PLAINTIFF

-Vs-

1. Selliah Sivan
   No. 15/15,
   Nawaloka Gardens,
   Peliyagoda.

2. Arumugam Sivan
   No. F 180/2/111,
   People's Park Shopping Complex,
   Colombo 11.

3. Arumugam Thiru Chelvam
   No. 4C, 2/1, Ebert Place,
   Dickmans Road,
   Colombo.
   DEFENDANTS

AND NOW BETWEEN

2. Arumugam Sivan
   No. F 180/2/111,
   People's Park Shopping Complex,

Colombo 11.

3. Arumugam Thiru Chelvam
   No. 4C, 2/1, Ebert Place,
   Dickmans Road,
   Colombo.

2ND & 3RD DEFENDANT-APPELLANTS

-Vs-

People's Leasing Company Limited
No. 67,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

PLAINTIFF-RESPONDENT

BEFORE : **P. PADMAN SURASENA, J**
ACHALA WENGAPPULI, J &
K. PRIYANTHA FERNANDO, J.

COUNSEL : Samhan Munzir instructed by P. C. De Silva for the 2nd & 3rd Defendant–Appellants.

Chamila Wickremanayake with Vidyani Andaramana and Ranuli Fernando for the Plaintiff - Respondent.

ARGUED &
DECIDED ON: 15-05-2024

P. PADMAN SURASENA, J.

Court heard the submissions of the learned Counsel for the 2nd & 3rd Defendant-Appellants (hereinafter sometimes referred to as the 2nd & 3rd Defendants) and the submissions of the learned Counsel for the Plaintiff–Respondent (hereinafter sometimes referred to as the Plaintiff) and concluded the argument of this case.

The Plaintiff had filed the Plaint in the instant case against the three Defendants (mentioned in the caption) praying for a judgment and decree against the Defendants, to recover from them jointly and/or severally, a sum of Rs. 3,450,322.99, the interest accrued to that sum of money at the rate of 4% per month until the date of the Plaint and the legal interest thereon from the date of the decree, until the aforesaid sum is paid in full to the Plaintiff.

The 1st Defendant was the principal applicant (Hirer) who applied to obtain a Hire Purchase facility from the Plaintiff to purchase the Vehicle bearing No. WPKA-8900.

The 2nd and 3rd Defendants are the Guarantors who had signed the Agreement produced, marked **P2** in that capacity.

Although, the Plaintiff has filed the Plaint naming all three Defendants, namely: the 1st Defendant who is the principal borrower, the 2nd and 3rd Defendants who are Guarantors, the Plaintiff had not proceeded against the 1st Defendant as the summons could not be served on the 1st Defendant even after several attempts. However, the Plaintiff had proceeded with the trial against the 2nd and 3rd Defendants.

The learned Commercial High Court judge by his judgment dated 28-10-2014, has granted reliefs prayed for, in the Plaint against the 2nd and the 3rd Defendants.

Being aggrieved by the judgment dated 28-10-2014 pronounced by the Commercial High Court, the 2nd and 3rd Defendants have lodged the instant Appeal to this Court.

In the course of the hearing, the learned Counsel for the 2nd and 3rd Defendants advanced only two arguments. The first argument is that it is wrong for the Plaintiff to have proceeded with the trial only against the 2nd and 3rd Defendants, leaving out the 1st Defendant who was the Hirer (the principal applicant for the facility).

The second argument is that the Statement of Accounts produced, marked **P6 A** does not reflect the correct sum of money due to the Plaintiff on the relevant Agreement.

Let us now advert to the first argument. We observe that the Plaintiff has had a reason to leave out the 1st Defendant and to proceed only against the 2nd and 3rd Defendants. These reasons can be gathered from the journal entry No. 02 and the journal entry No. 07 respectively at pages 14 and 18 of the Appeal Brief. Accordingly, it is clear that it has not been possible to trace the 1st Defendant to serve summons on him.

This fact has been clearly recorded by the learned Commercial High Court Judge in the afore-stated journal entries. We also observe that according to journal entry No. 07, the learned Commercial High Court Judge has directed the parties to provide the correct address of the 1st Defendant, to enable the Court to proceed against him. However, this attempt has not been successful.

Moreover, perusal of the Agreement produced marked **P2** clearly shows that the 2nd and 3rd Defendants who stood as Guarantors, had agreed to waive their rights and privileges as Guarantors and fully agreed with the Plaintiff's (Owner's) entitlement to sue the Hirer and Guarantors jointly and/or severally. This is found in Clause 03 of the Agreement which is as follows:

> *3. In consideration of the Owners letting the Goods to the Hirer under this Agreement upon the terms and conditions herein set out The Guarantors hereby :-*
>
> *(a) jointly and severally guarantee to the Owners the due and regular and punctual payment by the Hirer of all the monthly hiring rentals specified in Schedule III hereof and the performance and observance by the Hirer of the several terms and conditions herein.*
>
> *(b) bind themselves jointly and severally to pay forthwith on demand all monies which may become payable to the Owners hereunder whether by way of monthly rentals debt, damage, interest, cost charges or otherwise however.*
>
> *(c) agree that the Owners shall be entitled to sue the Hirer and Guarantors jointly and / or severally or to sue the Guarantors or either of them only in the first instance before recourse is had to the Hirer.*

(d) bind themselves jointly and severally to pay forthwith on demand to the Owners the amount of any judgement or decree that the Owners may obtain against the Hirer under this Agreement.

(e) renounce the right to claim that the Hirer should be excussed in the first instance and all other rights and privileges to which sureties are by law entitled.

(f) agree that each of the Guarantors is liable in all respects hereunder to the same extent and in the same manner as the Hirer.

We observe that the learned Commercial High Court Judge has clearly adverted to the above Agreement in his judgment.

Furthermore, we also observe that according to Clause 03 (f), the Guarantors have agreed that each of them (the Guarantors) are liable in all respects to the same extent and in the same manner as the Hirer.

Therefore, the Plaintiff's decision to proceed only against the 2nd and 3rd Defendants, leaving out the 1st Defendant particularly in view of the above circumstances, is in accordance with the agreement of the parties. In addition to the above, learned Counsel for the Appellant did not cite any Provision of law when he submitted that it is wrong for the Plaintiff to have proceeded with this case only against the 2nd and 3rd Defendants, leaving out the 1st Defendant who was the Hirer.

Thus, we are convinced that the decision by the Plaintiff to proceed only against the 2nd and 3rd Defendants, leaving out the 1st Defendant, has had a valid basis and is well within the Agreement **P2**.

Therefore, we decide to reject the first argument advanced by the learned Counsel for the 2nd and 3rd Defendants.

Let us now advert to the second argument advanced by the learned Counsel for the 2nd and 3rd Defendants. This is the argument relating to the Statement of Accounts and the said argument is that

the Statement of Accounts produced, marked **P6 A** does not reflect the correct sum of money due to the Plaintiff on the relevant Agreement.

As far as this argument is concerned, it would suffice for us to state here, that the 2nd and 3rd Defendants had neither objected to the Statement of Accounts produced, marked **P6 A** when it was produced and marked in evidence nor objected to it at the closure of the Plaintiff's case. This is manifest from pages 166 and 180 of the Appeal Brief. We clearly observe that the said document **P6 A** has been marked and read in evidence without any objection whatsoever.

Although, the learned Counsel for the 2nd and 3rd Defendants sought to rely on the proceedings dated 19-03-2013 in which there is some objection recorded by the learned Commercial High Court Judge, a closer look at the said proceeding reveals clearly that the said objection was raised only in relation to the marking of some other copy (not the Statement of Accounts produced, marked **P6 A**) without producing its original. In any case, this objection had been taken on the 19th March 2013 whereas the Statement of Accounts marked **P6 A** had been produced in evidence on 26-02-2014. Therefore, the objection on record relied upon by the learned Counsel for the 2nd and 3rd Defendants is an objection taken in relation to some other copy sought to be produced, almost about an year before the Statement of Accounts marked **P6 A** was produced in evidence at which time there was no objection raised by the 2nd and 3rd Defendants on record. Thus, we are unable to accept the submissions made by the learned Counsel for the 2nd and 3rd Defendants that they had objected to the Statement of Accounts marked **P6 A** being produced in evidence relying on the proceedings dated 19-03-2013.

Section 154 of the Civil Procedure Code deals with tendering of documents in evidence in the course of a trial. The explanation given at the end of that section would be relevant in this regard. It is as follows:

> Explanation to Section 154 of the Civil Procedure Code.
> *If the opposing party does not, on the document being tendered in evidence object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.*
>
> *If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:-*

- *Firstly, whether the document is authentic-in other words, is what the party tendering it represents it to be; and*
- *Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.*

  The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross- examination, makes out a prima facie case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.

  If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document.

  Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it.

We see that the Statement of Accounts marked **P6 A** is not a document that is forbidden by law to be received in evidence. Thus, in the absence of any objection by the 2nd and 3rd Defendants, the court should admit it.

We also note that this Court has repeatedly taken this view in the past too.

In the case of ***Sri Lanka Ports Authority and another V. Jugolinija – Boal East*** this Court had held as follows:

> *"If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the cursus curiae of the original Civil Courts…* [1]

Moreover, referring to the instance where such objection was raised in the appeal, this Court in that Case stated as follows:

[1] 1981 (1) SLR 18 at page 24

"...It is too late now in appeal to object to its contents being accepted as evidence of facts" [2]

The following excerpt from the case of ***Balapitiya Gunananda Thero V. Talalle Methananda Thero*** shows that this Court in that Case also had adopted the above dicta.

"P5 is the other document relied on by the Plaintiff. P5 is a handbill printed by the Dayaka Sabha giving notice of the robing ceremony of the Plaintiff and the Defendant. The point of relevance is that the Plaintiff's lay name appears first and the Defendant's lay name appear thereafter. Mr. Dissanayake's submission that the order in which the names are set out in P5 is an indication of the order in which the "novices" are to be robed seems to be well founded. P5, however, was marked in evidence subject to proof and the District Court held that the document was not proved, although P5 was read in evidence at the close of the Plaintiff's case without objection. This finding of the District Court was reversed by the Court of Appeal on the basis of the decision in Sri Lanka Ports Authority and another V. Jugolinija - Boal East [Supra]. In that case when P1 was marked in the course of the trial objection was taken but when the case for the Plaintiff was closed reading in evidence P1, no objection was taken by the opposing Counsel. Chief Justice Samarakoon, expressed himself in the following terms. "If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the cursus curiae of the original courts. The contents of P1 were therefore in evidence as to facts therein (vide section 457 of the Administration of Justice Law No. 25 of 1975) and it is too late now in appeal to object to its contents being accepted as evidence of facts". Mr. Seneviratne argued that the Court of Appeal was in error in holding that P5 was a part of the evidence in the case because the learned Chief Justice based his decision on the provisions of section 457 of the Administration of Justice Law which was repealed many years ago. I do not agree. The cursus curiae of the original courts (a matter on which the learned Chief Justice was eminently qualified to express an opinion) is independent of the reference to the provisions of section 457 of the Administration of Justice Law which appears in parenthesis. I accordingly hold that the ruling of the Court of Appeal in regard to P5 is correct and P5 must be considered as part of the evidence in the case." [3]

[2] Supra at page 24

[3] 1997 (2) SLR 101 at page 105

Thus, for the foregoing reasons, we hold that the document produced marked "**P6 A**" has been lawfully admitted and read in evidence in the trial and hence can be acted upon by Court as it is lawful evidence.

In addition to the above, the perusal of the proceedings with regard to the cross-examination of the Plaintiff's witness by the 2nd and 3rd Defendants show us that the 2nd and 3rd Defendants have failed to raise any particular incorrectness in the said Statement of Accounts marked **P6 A**. We see that the 2nd and 3rd Defendants had been content only with making few suggestions to the Plaintiff's witnesses which we observe have no factual or legal basis. Thus, those suggestions should remain as suggestions rather than evidence.

Although the 2nd Defendant had given evidence, we observe that the 2nd Defendant in his evidence also has not raised any specific incorrectness in the said Statement of Accounts (**P6 A**). Moreover, considering the totality of the evidence adduced by the 2nd Defendant gives us the opinion that he, in his evidence, has admitted his liability.

For the foregoing reasons, we see no merit in this appeal. We decide to dismiss this appeal. Appeal is dismissed without costs.

JUDGE OF THE SUPREME COURT.

ACHALA WENGAPPULI, J.

I agree.

JUDGE OF THE SUPREME COURT.

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE SUPREME COURT.

CK/-