

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

In the matter of an application in terms of section 754(2) of the Civil Procedure Code read with section 5(2) of the High Court of Provinces (Special Provisions) Act No. 10 of 1996

Trans Orbit Global Logistics (Pvt) Limited,
No. 260/5B, 1st Floor,
Dr. Danister De Silva Mawatha,
Colombo 09.

S.C. Appeal No. 92/2020

Plaintiff

S.C.H.C.L.A. No. 05/2020

Vs.

HC/Civil/640/17 (MR)

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Defendant

AND NOW BETWEEN

Trans Orbit Global Logistics (Pvt) Limited,
No. 260/5B, 1st Floor,
Dr. Danister De Silva Mawatha,
Colombo 09.

Plaintiff-Appellant

Vs.

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Defendant-Respondent

Before: S. Thurairaja, P.C., J.

A.L.Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Sumedha Mahawanniarachchi with Indika Weerasinghe for the Plaintiff -Appellant

Jaliya Bodinagoda for the Defendant-Respondent

Written Submissions tendered on:

27.01.2021 and 29.07. 2021 by the Plaintiff -Appellant

28.09.2020 by the Defendant-Respondent

Argued on: 14.07.2021

Decided on: 13.12.2021

Janak De Silva, J.

The Plaintiff-Appellant (hereinafter referred to as “Appellant”) instituted the above styled action in the Commercial High Court of the Western Province (Exercising Civil Jurisdiction) Holden in Colombo (hereinafter referred to as “Commercial High Court”) against the Defendant-Respondent (hereinafter referred to as “Respondent”) praying for damages in a sum of Rupees Twenty-Five Million (Rs. 25,000,000.00). The damages are claimed as a result of the alleged negligence of the Respondent.

After the framing of admissions and issues, the Respondent suggested that issue nos. 8(a) and 8(b) be determined as preliminary issues of law. Since the Appellant did not object to this application, the learned judge of the Commercial High Court decided to rule on the following issues as preliminary issues of law:

8 (අ) උත්තරයේ 1 වන ඡේදයේ සඳහන් කරුණු 1 ක් සහ/හෝ සමහරක් හේතු කොටගෙන මෙම නඩුව මෙම ගරු අධිකරණයේ පැවරීමට අධිකරණ බලයක් නොමැතිද?

(ආ) ඉහත විසඳිය යුතු ප්‍රශ්නයට විත්තිකරුගේ වාසියට පිළිතුරු ලැබේ නම් මෙම නඩුව නිෂ්ප්‍රභා සහ/හෝ ප්‍රතික්ෂේප කළ යුතුද?

The learned judge of the Commercial High Court held that the Court did not have jurisdiction to hear and determine the action as it is not an action to enforce any commercial transaction and that the cause of action is based on negligence and/or breach of duty of care and not on contract. Consequently, the action of the Appellant was dismissed.

Aggrieved by the dismissal of the action, the Appellant applied for permission to appeal. The Court has granted leave to appeal on the following question of law:

“Has the learned High Court Judge misdirected himself by holding that the Commercial High Court does not have jurisdiction to hear the Petitioner’s case?”

This appeal raises an important question of law concerning the jurisdiction of the Commercial High Court.

By virtue of Article 154P of the Constitution, a High Court was established for every Province in the country. Several constitutional provisions and other laws specify the jurisdiction conferred on this High Court.

The High Court of the Provinces (Special Provisions) Act No. 10 of 1996 (hereinafter referred to as the “Act”) sought to expand its jurisdiction in certain civil actions and matters specified therein.

The long title of a statute is part of it and, as such, is considered an aid to its construction. In *Union of India v. Elphinstone Spinning and Waving Co Ltd & Ors* [AIR (2001) Supreme Court 724] the Supreme Court of India held that a long title along with the preamble is a good guide regarding the object, scope or purpose of the statute. However, the long title of the Act is hardly of assistance in identifying its object, scope or purpose. There is no preamble to the Act.

However, the following excerpt from the speech made by the Minister at the Second Reading of the Bill in Parliament provides a clear understanding of the object, scope and purpose of the Act:

“Mr. Speaker, the Bill that is now before the House relates to commercial litigation specifically. I do not think that there is any doubt that this is one of the impediments and constraints that has been identified with regard to investments and in our country. Sometimes there is a reluctance on the part of persons to invest in our country because of the awareness that when problems arise it takes such a long time to sort out these problems. There is no efficient machinery available for the rapid resolution of commercial disputes. This is of interest not only to foreign investors but to people who engage in entrepreneurial and commercial activity in our own country. One of the reasons for the exacerbation of this problem, Mr. Speaker, is a very wide jurisdiction of the District Courts. These commercial matters have to be adjudicated upon by the District Courts of our country and the District Courts are already burdened with a great variety of work involving money chums, contracts, frauds, testamentary jurisdiction, a whole variety of matters. So, commercial matters are just one among many items that they have to deal within the course of their day to day work. We think the time has come to make a departure from that practice and to bring into existence a separate forum which has special responsibility for the resolution of commercial disputes. Mr. Speaker, that is why we propose that this jurisdiction should henceforth be exercised by the High Court of the country.”

[Parliamentary Debates (Hansard), Volume 104 – No. 10, 22nd March, 1996, 1174]

Hence the Commercial High Court was established to reduce the jurisdiction of the District Court and vest exclusive jurisdiction over commercial matters in the Commercial High Court with a view to provide speedy resolution to such disputes.

Section 2(1) of the said Act reads:

“Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the *Gazette* appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified the First Schedule to this Act, if the party or parties defendant to such action resides or reside, or the cause a action has arisen, or the contract sought to be enforce was made, or in the case of applications or proceeding under the Companies Act, No 17 of 1982 the registered office of the Company is situated, within the Province which such High Court is established.”

The jurisdiction so vested in the Commercial High Court has two components, namely:

(1) Subject Matter Jurisdiction

(2) Territorial Jurisdiction

The subject matter jurisdiction is set out in the First Schedule to the Act while the territorial jurisdiction is set out in section 2(1) of the Act. The resulting jurisdiction is rendered exclusively to the Commercial High Court.

The territorial jurisdiction depends upon where the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceeding under the Companies Act, No. 17 of 1982 the registered office of the Company is situated.

The matter before the Court does not involve the territorial jurisdiction of the Commercial High Court. The only issue is its subject matter jurisdiction.

Therefore, the decision in this case revolves around the interpretation to be given to Item (1) of the first schedule to the Act which, as amended, reads as follows:

“All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export of merchandise, services affreightment, insurance, mercantile agency, mercantile usage and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding twenty million rupees or such other amount as may be fixed by the Minister from time to time, by Notification published in the Gazette, other than actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990.”

The fundamental requirement for the Commercial High Court to have jurisdiction is that *the cause of action* must have *arisen out of a commercial transaction*.

The learned counsel for the Respondent drew our attention to the decision of this Court in *D.A.D. Engineering (Pvt) Ltd. v. Subhasinghe* (S.C. Appeal 45/2015, S.C.M. 15.12.2017] where it was held that the jurisdiction assigned to the Commercial High Court is a special jurisdiction and therefore the provisions of the Act will have to be strictly adhered to when the Commercial High Court is exercising the jurisdiction conferred on it. I do not believe the Court intended that the provisions of the Act should be interpreted narrowly.

On the contrary, the Court has consistently held that the jurisdiction of the Commercial High Court must be interpreted broadly [*Cornel & Company Limited v. Mitsui and Company Limited and Others* [2000] 1 Sri.L.R. 57]. In *Seneviratne and Another v. State Bank of India* [S.C. (C.H.C.) Appeal 53/2006, S.C.M. 17.12.2014] the Court held that the term "commercial" should be interpreted in a broad sense having regard to the many activities which are an integral part of banking and commerce.

Accordingly, in my view, the words *cause of action has arisen out of commercial transactions* in Item (1) must be given a broad interpretation. It is further supported by the use of the word "All".

The genus of Item (1) is a *commercial transaction*. Item (1) sets out certain classes of cause of actions which by definition falls within it. It is not intended to be comprehensive, as the term used is "including". One such class of cause of action is *cause of action relating to banking*. When the cause of action *relates* to banking, by definition it becomes a cause of action arising out of commercial transactions.

The learned counsel for the Respondent submitted that the Commercial High Court is vested with, what I refer to as subject matter jurisdiction, only where the cause of action arises from a commercial transaction as set out in the Schedule to the Act i.e., cause of action which arises pertaining to a contract. He further contended that in a delictual action, the cause of action consists of three conditions, namely:

- (1) The defendant owed a duty of care towards the plaintiff
- (2) The defendant breached this duty of care negligently
- (3) As a result, the plaintiff suffered damages

On this basis, he submitted that the action of the Respondent is not a commercial transaction but delictual.

When examining the pleadings before the Court, the following facts appear to be uncontested between the parties:

- (1) Appellant maintained an account with the Respondent.
- (2) From time-to-time money was transferred to and from this account.
- (3) Somewhere in 2016, the Appellant instructed the Respondent to transfer a certain sum of money from this account to the account of Passion Shipping Company Limited maintained at Standard Chartered Bank, Hong Kong.

Admittedly the Appellant's cause of is delictual. Nonetheless the right question is whether the cause of action *relates* to banking and not whether the cause of action is delictual. In answering this question Court will have to look not to the mere form, but to the grounds of the plaint and to the media on which the plaintiff asks for judgment.

The Appellant claims that the instructions given as a customer to its bank, the Respondent, was negligently breached in the transfer of funds from its account to the account of Passion Shipping Company Limited maintained at Standard Chartered Bank, Hong Kong.

The expression '*banking*' embraces every transaction coming within the legitimate business of a banker [*Tennant vs. Union Bank of Canada* (1894 AC 31)]. In *Indian Bank vs. Acuity Stock Brokers (Pvt) Limited* [(2011) 2 Sri.L.R. 149 at 155-6] Suresh Chandra J. held:

“There is no clear-cut demarcation of the transactions that one has with a Bank being classified as Banking Transactions. It is usual to consider lodging money into a bank account, withdrawing money, adding interest to an account, direct debits, deducting bank charges, basically any sort of activity involving a change of money in an account is a banking transaction which are usually listed in a bank account statement.”

Clearly the transaction upon which the Appellant bases its cause of action is a banking transaction. The damages are claimed for breach of an alleged duty of care based on the banker-customer relationship. Hence the media upon which the Appellant has instituted this action is no doubt a banking transaction.

Applying the broader interpretation to Item (1), I hold that all causes of action relating to banking in which the debt, damage or demand is for a sum exceeding twenty million rupees or such other amount as may be fixed by the Minister from time to time, by notification published in the Gazette, is within the subject matter jurisdiction of the Commercial High Court except actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990.

Accordingly, I hold that the cause of action of the Appellant is related to banking and falls within the subject matter jurisdiction of the Commercial High Court.

This conclusion is supported by the incongruous consequences of upholding the submissions of the Respondent.

In terms of section 3 of the Civil Law Ordinance No. 05 of 1852, in all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of banks and banking, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted.

In general, English law recognizes concurrent liability for breach of contract as well as tort. According to Burrows on *Remedies for Torts and Breach of Contract* (2nd Ed., page 4, Butterworths, 1994), on the same facts and in relation to the same loss, the plaintiff may be able to show not only that the defendant has broken his contract but also that he has committed the tort of negligence. He goes on to state that (at page 5) if the standard of liability is not more onerous, there should be in principle be no objection to the plaintiff choosing to obtain judgment either for the breach of contract or for the tort of negligence, depending on which is more favorable to him.

In *Henderson v. Merrett Syndicates Ltd.* [(1995) 2 A.C. 145 at 193-4 (HL)] Lord Goff held:

“..the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy: but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.”

This general principle has been applied in relation to law of banking. Under English law, there are many situations where a Bank is liable to its customer for breach of contract as well as in tort.

For example, in *Barclays Bank plc v. Quincecare Ltd. and Another* [(1992) 4 All ER 363 at 375-6] Steyn J. held:

“Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer’s cheques as against the money of the customer’s in the banker’s hand the relationship is that of principle and agent: see Westminster Bank Ltd v Hilton (1926) 43 TLR 124 at 126 per Lord Atkinson. Similarly, when the bank in the present case acted on an order to transfer by immediate money transfer money from Quincecare current account to Philip Evans & Co in Bournemouth, the bank was acting as Quincecare’s agent. As agent the bank owed fiduciary duties to Quincecare: see Bowstead on Agency (15th edn) pp 156-160. Prima facie every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal. Bowstead p 144. There is no logical or sensible reason for holding that bankers are immune from such elementary obligation. In my judgement it is an implied term of the contract between the bank and the customer that the bank orders. Moreover, notwithstanding what was said in Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1985] 2 All ER 947 at 957, [1986] AC 80 at 107, a banker may in a case such as present be sued in tort as well as in contract: See Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm) [1978] 3 All ER 571, [1979] Ch 384. But the duties in contract and tort are coextensive, and in the context of the present case nothing turns on the question whether the case is approached as one in contract or tort.”

Furthermore, according to Odgers on *Paget’s Law of Banking* [15th Ed., page 662, LexisNexis] wrongful dishonour of payment order will usually render the bank liable to the customer for breach of contract, and it may also constitute the tort of libel.

Therefore, upholding the Respondent's submission creates uncertainty and confusion in the way the system works. A customer who may have a cause of action for breach of contract and a delictual claim against a bank relating to a banking transaction, will have to institute action in the District Court if he chooses the delictual claim and in the Commercial High Court if he chooses the breach of contract claim. The District Court

action will provide for two appeals while the Commercial High Court action will provide only for one appeal.

In *Shannon Realties Ltd. v. Ville de St. Michel* [(1924) A.C. 185, 192-3] it was held:

“Where the words of a statute are clear they must, of course, be followed; but, on their Lordships’ opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating: and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.”

Moreover, the jurisdiction of the District Court will not be reduced in relation to commercial matters as intended by the legislature. Instead of a speedy resolution of commercial disputes, there will be a multiplicity of proceedings in both original and appellate courts which runs contrary to the legislative intent.

For example, there may be banking transactions between a customer and a bank where by contract the delictual liability of the bank is sought to be limited or avoided. Where the customer seeks to sue on the delictual liability, he will have to institute an action in the District Court. If the Bank wants to avoid delictual liability based on the contractual stipulations that may have to be done in a separate action in the Commercial High Court as any cross claim in the District Court action based on the exclusion of liability by contractual terms will be a matter for the Commercial High Court according to the Respondent.

For all the foregoing reasons, I answer the question of law in the affirmative and set aside the judgment of the Commercial High Court dated 19.12.2019.

I answer issue Nos. 8 as follows:

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(ආ) පැන නොනගී

The Appellant is entitled to the costs of this appeal.

Appeal allowed.

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT