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

In the matter of an Appeal from the Commercial High Court of Colombo Against the Judgment dated 24.07.2003.

Somerville and Company Limited
No. 137, Vauxhall Street,
Colombo 02.
Plaintiff

SC CHC APPEAL 20/2003

HC CIVIL 56/1998 (1)

Vs

1.Employees Trust Fund,
1st Floor, Labour Secretariat,
Colombo 05.

2. Public Enterprises Reform
Commission, West Tower,
World Trade Centre,
Colombo 01.
Defendants

AND

Employees Trust Fund, 1st Floor,
Labour Secretariat, Colombo 05.

1st Defendant Appellant

Vs

Somerville and Company Limited,
No. 137, Vauxhall Street,
Colombo 02.

Plaintiff Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
SISIRA J DE ABREW J. &
H. N. J. PERERA J.

COUNSEL : Rajiv Goonethillake, SSC for the 1st Defendant Appellant.
Chandaka Jayasundera instructed by Abdeen Associates for the Plaintiff Respondent.

ARGUED ON : 22.02.2017.

DECIDED ON : 03.04 .2017.

S. EVA WANASUNDERA PCJ.

Somerville & Company Limited was a company renowned for its skills and expertise to manage plantations. The Employees Trust Fund Board , at a particular time and era in the past was intending to maximize its profit earning capacity by diversifying its investments in more profitable ventures other than investing in securities such as Treasury Bills as was the normal practice. As such, the said Board wanted to invest money in buying shares in Mathurata Plantations Limited when the Government of Sri Lanka decided to sell 51% of the shares of the said company.

Somerville Stock Brokers Limited was a subsidiary company of Somerville & Company Limited. Somerville Stock Brokers Limited offered their services to the Employees Trust Fund Board to prepare the documentation for the bidding process to purchase shares of Mathurata Plantations Limited.The bidding process had two stages. Only the qualifying bidders at the technical evaluation stage would qualify to take their bids to the financial bidding stage which was conducted at the Colombo Stock Exchange. The Somerville & Company Limited and the Somerville Stock Brokers Limited carried out work along with the Employees Trust Fund Board in preparation of the documents to evaluate the

technical and financial capabilities of ETFB as a bidder. When bidding was done , at the technical evaluation stage, the Technical Evaluation Committee had permitted the ETFB to bid at the second stage **only if their proposal contains an arrangement to have the plantations which came under the Mathurata Plantations Limited managed by a reputed management company with estate management experience.**

To fulfil this condition to bid at the second stage, **the ETFB entered into an Agreement with Somerville & Company Limited requiring them to manage the plantation** *through another subsidiary which was to be incorporated subsequently*.

The Public Enterprise Reform Commission (PERC) was functioning as the facilitator in this exercise. Since the **arrangement between ETFB and Somerville & Company Limited was acceptable to PERC** on the basis that ETFB was financially capable of providing the necessary funds for the required purchase of 51% of shares of Mathurata Plantations Limited and that the persons whose services were intended to be obtained had management capabilities of managing the plantations and there was a formal management structure in place, ETFB was qualified on the second attempt to bid at the Colombo Stock Exchange. ETFB had made the highest bid for shares and was able to secure the purchase of 51% of the shares of the Mathurata Plantations Limited. So, ETFB was successful at the end.

Then Somerville Stock Brokers submitted an invoice for the services rendered. ETFB did not pay the same since in its opinion the charges were high. ETFB paid a certain amount which Somerville Stock Brokers accepted later without prejudice to what it claimed was due.The dispute continued.

In the meantime, Mathurata Plantations Limited was not handed over to Somerville Company Limited. The problem was caused due to the security deposit not being determined. The managers of Mathurata Plantations Limited at the time of divestiture of the shares was a company called Crop Management Limited. That company continued to manage the plantation on revised remuneration terms with the concurrence of the Secretary to the Treasury.

When these problems were continuing, **the ETFB made a change of policy.** That was to withdraw all their equity investments in commercial enterprises. Therefore the **ETFB decided to sell its shareholding in the Mathurata Plantations Limited.**

It is at this juncture that Somerville & Company Limited instituted action in the Commercial High Court of Colombo against ETFB on the Agreement entered into between the parties. It was firstly for the purpose of stopping the sale of shares and secondly praying for declarations that ETFB was in breach of the conditions of the Agreement, for specific performance and for damages caused to the Plaintiff Company. Court did not grant interim relief. The sale of the shares held by ETFB went through, thus **ETFB earning a profit from the sale of the shares**. ETFB had purchased the shares of the Mathurata Plantations Ltd. for Rs. 616 million and thereafter sold the said shares for Rs. 881 million **making a profit of Rs. 265 million.**

At the trial, Somerville & Company stated that it was only concerned about the **damages** it claimed that the ETFB was liable to pay **for breach of contract and unjust enrichment.** ETFB was the 1st Defendant and the PERC was the 2nd Defendant. Later on PERC was released since no relief was prayed against PERC. The learned **High Court Judge** at the end of the trial **held** that the Plaintiff Somerville & Co. was **not entitled to compensation for unjust enrichment but was entitled to damages for breach of contract amounting to Rs. 21.9 million to be paid by ETFB**. The ETFB has appealed to this court from that judgment.

The grounds of appeal contained in the Petition of Appeal are contained in paragraph 6(a) to (k) of the Petition dated 18.09.2003. In summary the 1st Defendant Appellant, Employees Trust Fund (hereinafter referred to as the 1st Defendant) has submitted that the Plaintiff Respondent, Somerville & Company Ltd. (hereinafter referred to as the Plaintiff) has got judgment in its favor from the Commercial High Court because the learned High Court Judge had misdirected himself on the facts placed by evidence of the Plaintiff and the Defendant as well as the applicable legal position.

At the hearing of this Appeal, the counsel for the 1st Defendant pointed out to court that in paragraph 10 of the Answer of the Defendant dated 11.09.1998, the Defendant had pleaded that the High Court had no jurisdiction to hear and determine the action. The reason for that plea had been that in the Agreement

marked as A3 which is the base on which the Plaintiff's case was founded had an Arbitration Clause, as the last clause thereof to read as "If at any time, any question dispute or difference of opinion in relation to, or in connection or pertaining to with the Agreement or any part thereof shall be referred to Arbitration in accordance with the Rules of Arbitration under the UNCITRAL Rules of Arbitration." Yet, I find that no specific issue had been raised on this argument and neither party had pursued that either, at any time. The 1st Defendant argued that the issue number 22 which reads as " In any event is the action of the Plaintiff misconceived in law?", has been answered by the trial judge as "No" and on that account he has taken a wrong view with regard to jurisdiction. I am of the view that the said issue cannot be taken as a specific issue on jurisdiction. If the 1st Defendant wanted to pursue the matter he could have requested the trial judge to take it up as a preliminary issue but the 1st Defendant had failed in that regard.

Many dates had passed before the trial was taken up on the ground that parties were trying to get the matter settled. Finally as there was no adjustment, the trial had commenced.

The Court had recorded 10 admissions. Among other things, documents A2, A4, A5 and the receipt of letters A6 and A7 were admitted. It was admitted that in October,1996 the 2nd Defendant offered for sale, the shares of Mathurata Plantations. The 1st Defendant had commenced negotiations to purchase 51% of the share capital of Mathurata Plantations through Somerville Stock Brokers Private Limited. The 1st Defendant was permitted to purchase 51% of the share capital of Mathurata Plantations.

Thereafter the learned trial judge had allowed to record 10 issues of the Plaintiff and 34 issues of the 1st Defendant. Since the Plaintiff had prayed for reliefs only againt the 1st Defendant, the issues of the 2nd Defendant – PERC, was not allowed. Later on, the 2nd Defendant was discharged from the proceedings. The trial was taken up with Somerville and Company Limited as Plaintiff and Employees Trust Fund as the 1st Defendant. They were the only two contesting parties. The learned Commercial High Court Judge held with the Plaintiff at the end of the trial and being dissatisfied with the said judgment the 1st Defendant has appealed to this Court.

On behalf of the Plaintiff, the company secretary, Shalini Yasmini Dias gave evidence. She produced the document marked A3 annexed to the Plaint in evidence and marked the same as P4a. That was the agreement between the Plaintiff and the 1st Defendant which is the foundation of this action. This Agreement had been signed by the Directors of the Plaintiff company and the Directors of the EPF Board. By this agreement, **the 1st Defendant** agreed to appoint the **Plaintiff as the managing agent** of the Mathurata Plantations. The 2nd Defendant PERC upon being satisfied with this management agreement marked P4a and the management capabilities of the Plaintiff, permitted the 1st Defendant to bid at the Colombo Stock Exchange for the 51% shares in Mathurata Plantations. This was informed by the 2nd Defendant PERC to the 1st Defendant by letter P6.

It was **not disputed** that after securing 51% of the share capital of Mathurata Plantations, the **1st Defendant failed and neglected to hand over the management of Mathurata Plantations to the Plaintiff** even though the Plaintiff requested that it be done. Instead of handing over to the Plaintiff as agreed , the 1st Defendant handed over the management of Mathurata Plantations **to Crop Management Services Private Limited** which company was already managing the said Plantation before the Plaintiff bought 51% of the shares. This was in complete violation of the said Agreement P4a.

The Clause B of the Agreement P4a reads as follows:
" **Being convinced** that Somerville and Company will have necessary skills and the expertise and also the ability to procure them as and when needed for management of the assets and business of the Company **, the parties agreed that Employees Trust Fund Board will appoint Somerville and Company Limited** to manage the assets and business of the company subject to the terms and conditions herein set out **in the event of Employees Trust Fund Board purchasing 51% of stake. "**

After ETFB bought the shares consequent to this agreement having been sent to the Technical Evaluation Committee and the said committee having had accepted the Plaintiff as a company capable of managing estates, the 1st Defendant cannot be heard to say that " the Plaintiff had no experience in the management of estates" and therefore the Plantation was not handed over to the Plaintiff. Such a stance by the 1st Defendant is against the weight of the evidence before the trial

court not only by the witnesses who gave evidence on behalf of the 1st Defendant but also by the witnesses who gave evidence on behalf of the Plaintiff. The former Chairman of the 1st Defendant Denzil Gunaratne while giving evidence admitted that if not for the Agreement P4a, the 1st Defendant would not have succeeded in securing 51% of the shares of the Mathurata Plantations. He gave the reason for abrogating the management agreement unilaterally, as unpleasentness between parties which was created due to the disagreement on the brokerage fee which was demanded by Somerville Stock Brokers Limited. It is a separate legal entity even though it was a subsidiary company of the Plaintiff. He further said that the 1st Defendant made use of the Plaintiff purely for the purpose of obtaining permission of the 2nd Defendant and to prequalify to bid for the purchase of the 51% shareholding of the Mathurata Plantations.

I have gone through the evidence of the witnesses of both sides who gave evidence before the trial court. I am of the view that the 1st Defendant had failed to perform its contractual obligations towards the Plaintiff as agreed by the agreement P4a.

However, the 1st Defendant's counsel argued that P4a is a pre-incorporation contract because it was entered into prior to the 1st Defendant taking over the shares of Mathurata Plantations and therefore that agreement cannot be enforced in law. I observe that this pre incorporation contract was a condition to bid at the second stage of bidding which takes place at the stock exchange on the floor. Without a contract such as this, the 1st Defendant would never have been able to bid and receive the 51% shares of the Mathurata Plantations. After having used that contract or agreement to get at the goal, the same party who got the benefit of such an agreement cannot in law turn around and state that the said Agreement is not valid in law.

The next argument of the 1st Defendant was that the Agreement relied upon by the Plaintiff cannot be enforced since it is 'lex non cogit ad impossiblia' or in other words it is not possible to enforce it only by and between the parties who agreed upon the conditions thereof. It was pointed out to court that to appoint a Managing Agent to the Mathurata Plantations the 1st Defendant was required to get the consent of the Secretary to the Treasury who had the golden share. Having arrived at an Agreement to get 51% of the shares, and after having used the same to get the shares, now the 1st Defendant states that it is impossible to

appoint a Managing Agent without the consent of the golden share holder. I am of the view that such a condition exists **as part of procedure** in appointing a Managing Agent and if and when the 1st Defendant decides to appoint the Managing Agent in conformity with the Agreement, the golden share holder is duty bound to grant its consent. The procedural law is there in place not for the purpose of any breach of any contract between the parties but for smooth functioning of the events agreed upon. This cannot be taken as an excuse for not performing its obligations undertaken by the Agreement. I hold that the 1st Defendant had no justifiable grounds to refrain from appointing the Plaintiff as the managing agent of Mathurata Plantations Limited.

Next arises the question of how much was the loss which occurred to the Plaintiff due to the 1st Defendant's failure to honour the terms and conditions of the Management Agreement. It is an accepted fact that the 1st Defendant had earned a profit of Rs. 265 million after the sale of the 51% of the Mathurata Plantations shares in the share market subsequently. It was also accepted that the Plaintiff had advanced Rs. 1.4 million on behalf of the 1st Defendant to prevent the cancellation in terms of the relevant regulations and rules since non payment of the said sum within the stipulated time would have rendered void the bid made by the 1st Defendant.

Even though the plaintiff had claimed compensation on the basis of unjust enrichment, the Plaintiff had not pleaded in the Plaint that the 1st Defendant had got unjustly enriched at the expense of the Plaintiff. No issue either had been raised on unjust enrichment. There was no evidence regarding how the Plaintiff got impoverished as a result of the sale of 51% of shareholding of Mathurata Plantations to some other party by the 1st Defendant. The learned High Court Judge had put aside the claim of the Plaintiff against the 1st Defendant on unjust enrichment on the basis that the necessary ingredients , namely that the party claiming should prove how the other party got enriched as well as how the party claiming got impoverished at the same time , was not pursued in the proper way. I cannot find any error in that decision of the learned High Court Judge.

Yet, the learned High Court Judge had correctly come to a finding that damages for breach of the agreement was due from the 1st Defendant to the Plaintiff. It is trite law that damages for breach of contract are intended **to compensate the**

party who suffered as a result for the losses suffered including the profit that party would have made if the contract was not breached.

The evidence before court was that the Plaintiff had suffered loss by being denied the management fees and the earnings the Plaintiff would have been entitled to in terms of the agreement. In terms of Clause 6.1 of the Agreement P4a, the managing agent's fees was upto a profit of Rs. 100 million was 7.5% and from Rs. 100 million to Rs. 150 million was 5% and over that amount was 2.5%. The agreed period was for 2 years initially. The witness of the Plaintiff gave evidence as to how the management fees can be calculated in accordance with Clause 6.1. Shalini Dias witness of the Plaintiff, the company secretary, produced document P14 which was prepared by utilizing the figures published by the Plantation Management Monitoring Division of the JEDB. According to P14, the management fees for the

first year of management which was deprived to the Plaintiff, was calculated to be Rs. 10.95 million. For the second year a 10% increase of fees was claimed. For fees as trade practices P14 contained a claim of Rs. 6.3 million. I observe that the Agreement P4a does not have any mention of fees as trade practices or any increase of fees for the second year at 10% above the fees for the first year.

The learned High Court Judge has doubled the fee for the first year (which was proved and not objected to or cross examined to disprove the same by the 1st Defendant's counsel in the trial court) thus calculating for two years and concluded that the Plaintiff is entitled to Rs. 21.90 million as damages for breach of contract. I quite agree with the said quantity as damages for breach of contract since the judge has analyzed it very well going by the clauses in the main document which is the Agreement P4a. The learned Judge has answered each and every issue, namely issues 1 to 7 in favour of the Plaintiff, issue 8(a) to (c) , issues 9 to 19 , issues 20(a) and (b), issues 21(a) and (b), issues 22 to 24, issue 25(a) and (b), issues 26 to 28, issues 29(a) and (b), issues 30(a) and (b) and issue 31. He has considered issues 32 to 40 and concluded that those issues are not relevant to the instant action filed by the Plaintiff. He has answered issues 41, 42(a) to (c) and 43(a)to (c). Thereafter he states that issue No. 43(d) and (e) are answered in the negative against the 1st Defendant. Issue No. 44 is answered as 'does not arise'. The learned trial judge has taken the effort to analyze the evidence before court

and answered the issues with great care. I am of the view that the learned High Court Judge has not erred in his judgment dated 24.07.2003. It is a well considered judgment of 42 type written pages.

I hold that the learned High Court Judge has **not misdirected himself** on facts of the instant case and the law regarding the breach of a contract and the consequences arising thereafter. The compensation also has been calculated in the most suitable manner.

This Appeal is dismissed with costs in this court as well as costs in the Commercial High Court. I affirm the Judgment of the learned High Court Judge.

Judge of the Supreme Court

Sisira J De Abrew J.
I agree.

Judge of the Supreme Court

H.N.J.Perera J.
I agree.

Judge of the Supreme Court