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

LOLC Factors Limited,
100/1, Sri Jayawardenapura
Mawatha, Rajagiriya.
Plaintiff-Appellant

SC APPEAL NO: SC/CHC/APPEAL/20/2015
CHC NO: HC (CIVIL) 89/14/MR

Vs.

1. Airtouch International (Private) Limited,
   No. 290/2, Torrington Avenue,
   Colombo 05.
2. Horagampitagamage Panduka Nihal Attygalle,
   No. 03, Dharmapala Mawatha,
   Rajagiriya Road, Rajagiriya.
3. Jayaweera Arachchige Dhanushka Malinda Perera
4. Dharshinee Suneetha Kumari Peries
   Both of No. 290/2,
   Torrington Avenue,
   Colombo 05.

Defendant-Respondents

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Hiran De Alwis with Randhini Fernando for the Plaintiff-Appellant.
Defendant-Respondents are absent and unrepresented.

Argued on: 31.01.2024

Written Submissions:

By the Plaintiff-Appellant on 14.02.2024

Decided on: 03.04.2024

Samayawardhena, J.

Background

The plaintiff filed this action in the Commercial High Court against the four defendants seeking to recover a sum of Rs. 8,004,744/58 with interest thereon from 01.07.2013 till the date of the decree and thereafter on the aggregate amount of the decree till payment in full. The plaintiff's case is based on the cheque discounting agreement marked P1 entered into between the plaintiff and the 1st defendant. The account statements were marked P2 and P3. The letter of demand sent to the 1st defendant was marked P4. The 2nd-4th defendants were the guarantors to the said agreement. Those guarantees were marked P5, P5(a) and P5(b). The letters of demand sent to the guarantors were marked P6, P6(a) and P6(b).

Summons were served on all four defendants but none of them came forward to contest the plaintiff's case. According to the journal entry dated 06.05.2014, the Commercial High Court fixed the case for *ex parte*

trial against all the defendants and directed the plaintiff to lead evidence by way of an affidavit.

The journal entry dated 01.10.2014 reveals that, the affidavit evidence (of the senior executive of the plaintiff company), together with the originals of the aforesaid documents, was tendered to Court on that date and the case was fixed for the *ex parte* judgment on 05.11.2014.

I must add that the documents tendered with the affidavit were not new documents. They were part of the plaint filed in Court and served on the defendants with summons.

The learned High Court Judge by judgment dated 05.11.2014 dismissed the plaintiff's action. Hence this appeal by the plaintiff.

Although this Court issued notices on all the defendants on several occasions, they did not participate in the hearing before this Court either.

The Commercial High Court dismissed the plaintiff's action on two grounds:

(a) Notwithstanding the plaintiff's assertion in the affidavit evidence that both the plaintiff and the 1st defendant are incorporated companies, the plaintiff failed to provide documentary evidence to prove their incorporation and registration;
(b) The Chief Legal Officer of the plaintiff company has signed the proxy on behalf of the plaintiff company instead of the directors.

The burden of proof in an ex-parte trial

In a civil case the standard of proof is on a balance of probabilities. What does this mean? In *Miller v. Minister of Pensions* [1947] 2 All ER 372 at 374, Lord Denning declared:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.*

Are there degrees of proof within the standard of proof of the balance of probabilities? Theoretically, the answer is in the negative, but practically, such degrees do exist.

In *Bater v. Bater* [1950] 2 All ER 458, it was held that there may be degrees of probability within the civil standard of proof of balance of probabilities; the degree of proof must be commensurate with the occasion and proportionate to the subject-matter. In this case, wife sought for divorce on the ground of cruelty. The Court of Appeal held that it was not a misdirection for the trial judge to have stated that the petitioner must prove her case beyond reasonable doubt. Bucknill L.J., with whom Somervell L.J. agreed, considered that "a high standard of proof" was necessary due to the significance of the case to both the parties involved and the community. Denning L.J. stated at page 459:

> *The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof is required in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. <u>So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard</u>. The*

> *degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter."*

The issue in *Hornal v. Neuberger Products Ltd.* [1957] 1 QB 247 was the standard of proof in a civil claim for fraudulent misrepresentation. The Court of Appeal held that the trial judge's approach on standard of proof was correct. Denning L.J. referred back to the views he had articulated in *Bater v. Bater* and stated at page 258:

> *[T]he standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law.*

Hodson L.J. fully concurred with those views, supplementing them at page 264:

> *Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.*

Morris L.J. added at page 266:

> *It is, I think, clear from the authorities that a difference of approach in civil cases has been recognized. Many judicial utterances show*

this. The phrase 'balance of probabilities' is often employed as a convenient phrase to express the basis upon which civil issues are decided. It may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities on these topics. But perhaps they illustrate that 'the life of the law is not logic but experience.' In some criminal cases liberty may be involved; in some it may not. In some civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty. Good name in man or woman is 'the immediate jewel of their souls.'

But in truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities. This view was denoted by Denning L.J. when in his judgment in Bater v. Bater he spoke of a 'degree of probability which is commensurate with the occasion' and of 'a degree of probability which is proportionate to the subject-matter.'

In *Thomas Bates & Sons v. Wyndhams (Lingerie) Ltd.* [1981] 1 All ER 1077 at 1085, Buckley L.J. stated:

I think that the use of a variety of formulations used to express the degree of certainty with which a particular fact must be established in civil proceedings is not very helpful and may, indeed, be confusing. <u>The requite degree of cogency of proof will vary with the nature of the facts to be established and the circumstances of the</u>

> *case. I would say that in civil proceedings a fact must be proved with that degree of certainty which justice requires in the circumstances of the particular case. In every case the balance of probability must be discharged, but in some cases that balance may be more easily tipped than in others.*

A serious allegation necessitates a higher standard of proof compared to a less weighty claim. In *Re H and Others (Minors)* [1996] 1 All ER 1, the case concerned the care of children under the Children Act 1989 of the United Kingdom. Whilst acknowledging the degrees of the balance of probabilities, Lord Nicholls of Birkenhead in the House of Lords stated at pages 16-17:

> *The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*
>
> *Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability*

> *of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow's Will Trusts [1964] 1 W.L.R. 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."*

In *R (N) v. Mental Health Review Board (Northern Region)* [2006] QB 468, after an exhaustive review of earlier authorities, the Court of Appeal firmly held that although there is a single civil standard of proof on the balance of probabilities, its application is flexible. Richards L.J. at para 62 stated that this flexibility is referable to the quality of evidence required rather than degrees of probability:

> *Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.*

What I endeavored to demonstrate from the above discussion is that the civil standard of a balance of probabilities is flexible, to be applied with varying degrees of strictness depending on the gravity of the matter to be proved.

In an *ex parte* trial, the plaintiff's evidence remains unchallenged. Hence there is no necessity to adduce documentary proof for each and every item of evidence. This is especially true for establishing matters that even the defendant would not have contested had he appeared in Court to contest the case. A plaintiff cannot be placed in a disadvantageous position when the defendant refuses to come to Court in response to summons. Had the 1st defendant responded to summons and made its appearance in Court, it is unlikely that it would have contested the plaintiff's case on the basis that the plaintiff and the 1st defendant are not incorporated companies.

The senior executive of the plaintiff company in his affidavit evidence clearly states that they are incorporated companies. P1 and P3 state the registration number of the plaintiff company as PB 4633. If the 1st defendant is not an incorporated company, in the event the judgment is entered against the 1st defendant, the plaintiff will not be able to enforce the decree.

There is no reason for the learned High Court Judge to dismiss the plaintiff's action on the basis that certificates of incorporation and registration of the plaintiff and the 1st defendant have not been tendered with the affidavit evidence.

If the Court, in fact, had some doubt about the incorporation and registration of the plaintiff and the 1st defendant, the Court should have sought clarification from the plaintiff rather than unilaterally dismissing the action in its entirety.

Section 85(1) of the Civil Procedure Code reads as follows:

> *85(1) The plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court, if satisfied that the plaintiff is entitled to the relief claimed by him, either in its entirety or subject to modification, may enter such judgment in favour of the plaintiff as to it shall seem proper, and enter decree accordingly.*

In terms of section 85(1), what the plaintiff is required to do at the *ex parte* trial is to lead evidence to satisfy the court that he is entitled to the relief claimed; no higher degree of proof is required. If there is no satisfactory evidence, the Court shall dismiss the plaintiff's case.

As was observed by Vythialingam J. in *De Silva v. De Silva* (1974) 77 NLR 554 at 558 "*The evidence led in an ex parte trial is of the barest minimum*". There is no necessity to lead evidence in an *ex parte* trial as in a contested *inter partes* trial. However, this should not be construed to mean that in an *ex parte* trial, the Court, without any consideration of the evidence adduced, should mechanically enter judgment for the plaintiff.

In the Supreme Court case of *The Finance Company PLC v. Thushara and Others* (SC/CHC/APPEAL/5/2012, SC Minutes of 26.01.2017), Prasanna Jayawardena J. held that, in an *ex parte* trial, the plaintiff is only required to present evidence on a *prima facie* basis, demonstrating the constituent elements of his cause of action.

> *When determining whether or not burden of proof has been discharged in an ex parte trial, it has to be kept in mind that, a Plaintiff who adduces evidence at an ex parte trial is, usually, required to adduce only such evidence as is necessary to establish his case on a prima facie basis by establishing the constituent*

> *elements of his cause of action. This is subject to the Court seeing no reason to doubt the authenticity and bona fides of the evidence.*

Prima facie evidence means evidence that, on its face and without further explanation, is sufficient to establish a fact or raise a presumption of fact unless contradicted or rebutted.

Section 85(2) of the Civil Procedure Code reads as follows:

> *Where the court is of opinion that the entirety of the relief claimed by the plaintiff cannot be granted, the court shall hear the plaintiff before modifying the relief claimed.*

It is important to note that in terms of section 85(2), if the Court thinks that the entirety of the claim cannot be granted, it must afford the plaintiff an opportunity to be heard before modifying the relief claimed. The Court is not permitted to unilaterally modify the relief based solely on affidavit evidence. However, if the Court grants the plaintiff's relief in its entirety, it may unilaterally enter judgment based on affidavit evidence.

In *Brampy v. Peris* (1987) 3 NLR 34, the manner of leading evidence in an *ex parte* trial was discussed. Lawrie A.C.J. stated at page 36:

> *[W]hatever be the evidence it must be sufficient to satisfy the Judge, who is not bound to give a decree until he is satisfied. If he is dissatisfied, he should in an order point out in what respects the evidence already recorded is defective and then adjourn either to a day named or sine die. The plaintiff may put the cause on the roll when he is able to supplement the defective evidence.*

In the same judgment, Browne A.J. stated at page 37:

> *But in my opinion plaintiff on the occurrence of any doubt in the mind of the Judge as to his right to judgment should have opportunity given him to dispel that doubt ere his action were finally dismissed to the absolute extinction of his claim for ever, and I cannot see he had that opportunity here given him. I agree that the dismissal should be set aside and decree nisi entered for the plaintiff.*

When the defendant refuses to come to Court after service of summons along with a copy of the plaint which contains the claim against him, the judge need not form defences on behalf of the defaulter unless the judge is convinced that the plaintiff's claim is baseless.

In *Pathmawathie v. Jayasekera* [1997] 1 Sri LR 248 at 250, Weerasekera J. observed:

> *It must always be remembered by judges that the system of Civil Law that prevails in our country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties…In that situation our Civil Law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make a finding as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation.*

In the instant case, the plaintiff has led sufficient evidence to prove its case at the *ex parte* trial.

Defective proxy

The other reason the learned High Court Judge dismissed the plaintiff's action is that, on behalf of the plaintiff company, the proxy has been signed by the Chief Legal Officer of the plaintiff company. The registered attorney of the plaintiff company is not the said Chief Legal Officer.

If the plaintiff's proxy is defective, the Court cannot unilaterally dismiss the plaintiff's action on that ground. A defect in the proxy is not fatal but rather curable unless there is a positive legal bar.

The question of defective proxy has been addressed in numerous judgments of the superior Courts.

In *Udeshi and Others v. Mather* [1988] 1 Sri LR 12, the Supreme Court authoritatively held that, in the absence of a positive legal bar, the defective proxy can be cured. Atukorale J. held at page 21:

> *As pointed out by learned counsel for the appellants, in matters of this nature the question appears to be whether the proctor had in fact the authority of his client to do what was done on his behalf although in pursuance of a defective appointment. If in fact he had his client's authority to do so, then the defect is one which, in the absence of any positive legal bar, could be cured. On the contrary if in fact he did not have such authority of his client, the acts done and the appearances made on his behalf by the proctor would be void and of no legal effect. This commends itself to me as the better view. Accordingly I hold that in the circumstances of this case it was open to the 8 appellants to cure the defect, if there was any, in the proxies by tendering fresh proxies ratifying the steps already taken on their behalf by their attorney-at-law.*

Upon review of the majority of previous judgments on the point, in *Gunatilake v. Sunil Ekanayake* [2010] 2 Sri LR 191, J.A.N. De Silva C.J. stated at page 203, "*the fundamental question to be asked is whether the proctor had in fact the authority of his client to do what was done although in pursuance of a defective appointment*". In the above case, there was no proxy at all. But the Supreme Court held that if the Attorney-at-Law had

the authority to appear and make applications on behalf of the party for whom he appeared, the defect can be cured by filing a proxy.

In the instant case, a proxy was filed. The plaintiff company does not complain that its Chief Legal Officer or the registered Attorney has acted without its instructions.

In the course of writing the judgment, if the learned High Court Judge thought the proxy to be defective, he ought to have drawn it to the attention of the plaintiff first and thereafter, if necessary, given an opportunity to rectify the defect of the proxy.

The dismissal of the plaintiff's action unilaterally on the basis that the proxy is defective is erroneous.

The plaintiff in the instant case has later filed a fresh proxy in the Commercial High Court.

Conclusion

The learned Judge of the Commercial High Court erred on both grounds upon which he proceeded to dismiss the plaintiff's action after an *ex parte* trial. I set aside the judgment appealed from and allow the appeal with costs.

The Commercial High Court will now enter *ex parte* decree against all four defendants as prayed for in the prayer to the plaint.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court