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

In the matter of an appeal.

S.C.Appeal No: SC CHC 39/06
CHC Case No: 107/2001(1)

SEYLAN BANK LIMITED
No. 69, Janadhipathi Mawatha,
Colombo 1. Presently at "Ceylinco-Seylan Towers", No. 90,Galle Road,
Colombo 03.

PLAINTIFF

VS.

1. **CLEMENT CHARLES EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

2. **WEERAKKODY ARATCHIGE NIMALA EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

3. **BRAHMANA MUDALIGE BASIL PETER**
   Suduwella Farm,Suduwella,
   Madampe.

4. **BODAWALA MARASINGHALAGE SARATH KARUNATHILAKE MARASINGHE**
   Rest House,Chilaw.

DEFENDANTS

AND NOW

SEYLAN BANK LIMITED
No. 69, Janadhipathi Mawatha,
Colombo 1. Presently at "Ceylinco-Seylan Towers", No.90,
Galle Road, Colombo 03.

PLAINTIFF-APPELLANT

VS.

1. **CLEMENT CHARLES EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

2. **WEERAKKODY ARATCHIGE NIMALA EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

1ST AND 2ND DEFENDANTS-RESPONDENTS

BEFORE: S.Eva Wanasundera, PC, J
Upaly Abeyrathne, J.
Prasanna Jayawardena, PC, J.

COUNSEL: S.R. De Livera instructed by De Livera Associates for the Plaintiff-Appellant.
K. Nawaratne with Ms. T.E. Senadheera instructed by N. Wickramasinghe for the 1st and 2nd Defendants-Respondents.

ARGUED ON: 17th November 2016.

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Appellant on 05th July 2016.
By the 1st and 2nd Defendants-Respondents on 17th July 2014.

DECIDED ON: 01st August 2017.

Prasanna Jayawardena, PC, J.

The plaintiff-appellant bank ["the plaintiff"], *inter alia,* carries on the business of Finance Leasing. The 1st and 2nd defendants-respondents ["the 1st and 2nd defendants"] are husband and wife. They operate a poultry farm and also engage in agriculture, public transport and vehicle hire.

On 12th December 1997, the plaintiff and the 1st and 2nd defendants entered into a written Lease Agreement by which they agreed that, the plaintiff shall lease, to the 1st and 2nd defendants, the *"01 UNIT BRANDNEW COLOMBO RIDER 40 SEATER BUS CH/NO. 5000-97-004 EN NO. 00106"* sold and supplied by *"SATHOSA*

MOTORS, CEYMO AUTOMOBILE MANUFACTURERS, NO. 25, VAUXHALL STREET, COLOMBO 2" which is described in the schedule to the Lease Agreement ["the vehicle"] and that the said Lease will be subject to the *"terms, covenants and conditions"* set out in the Lease Agreement. The defendants agreed to pay, to the plaintiff, as rent for the lease of the vehicle, an aggregate sum of Rs. 2,865,540/- in 60 monthly rentals of Rs.47,759/- each. They also agreed to pay interest at 23.725% *per annum* on any delayed payments. It was agreed that, the plaintiff was entitled to terminate the Lease Agreement if the defendants failed to pay any monthly rental within seven days of it becoming due for payment. It was also agreed that, upon such termination, the defendants shall pay, to the plaintiff, the arrears of rentals together with any accrued interest and also the rentals that fall due from the date of termination onwards. Further, the defendants promised to return the vehicle to the plaintiff if the Lease Agreement was terminated and agreed that, the plaintiff was entitled to retake possession of the vehicle if the defendants did not return it.

The plaintiff states that, the defendants paid only the first monthly rental but made no further payments thereafter. The plaintiff states that, therefore, the plaintiff terminated the Lease Agreement and demanded that the defendants pay all the monies due under the Lease Agreement and return the vehicle. However, the defendants did not pay any monies to the plaintiff.

On 04th May 2001, the plaintiff instituted this action against the 1st and 2nd defendants in the Provincial High Court of Western Province holden in Colombo and exercising Commercial [Civil] Jurisdiction, praying for the recovery of the monies said to be due to the plaintiff from the 1st and 2nd defendants under and in terms of the Lease Agreement. The 3rd and 4th defendants abovenamed were also joined as defendants on the basis that they were liable to pay these monies as guarantors. However, at the trial, the plaintiff did not proceed against the 3rd and 4th defendants.

As set out in the plaint, the plaintiff's case against the 1st and 2nd defendants was, in brief, that: the plaintiff and the 1st and 2nd defendants entered into the aforesaid Lease Agreement; the defendants failed and neglected to pay the monthly rentals due to the plaintiff thereunder; therefore, the plaintiff terminated the Lease Agreement; the plaintiff demanded payment of the monies due under the Lease Agreement and the return of the vehicle; the 1st and 2nd defendants did not pay the monies that were demanded; therefore, a Cause of Action has accrued to the plaintiff to sue the defendants to recover the sum of Rs.4,218,798/50 said to be due and owing as at 17th August 2000 upon the Lease Agreement, together with interest at 24% *per annum* from 18th August 2000 onwards on a sum of Rs.2,770,022/-, as set out in the Statement of Account filed with the plaint marked **"B"**.

In their answer dated 30th September 2001, the 1st and 2nd defendants denied liability to pay these monies. When the case was taken up for trial on 03rd December 2003, the defendants moved to amend their answer. The plaintiff objected. By an Order dated 25th April 2005, the learned trial judge refused the defendants' application to

amend the answer. Thus, the case proceeded to trial upon the answer dated 30th September 2001 filed by the 1st and 2nd defendants.

It is relevant to mention here that, in this answer, the defendants did not claim that the Lease Agreement had been frustrated. As a matter of interest, the proposed amended answer tendered by the defendants also did not include an averment to that effect.

On the next trial date, the plaintiff framed seven issues which, in essence, were: (a) whether the 1st and 2nd defendants agreed to the terms and conditions set out in the Lease Agreement ?; (b) whether the defendants failed to pay the monthly rentals due thereunder ?; (c) whether the plaintiff terminated the Lease Agreement ?; (d) whether the sum prayed for in the plaint is due and owing from the defendants upon the Lease Agreement ?; whether the defendants failed to pay these monies to the plaintiff ?; (e) and whether, if the aforesaid issues are answered in the affirmative, the plaintiff is entitled to judgment as prayed for in the plaint ? The 1st and 2nd defendants framed four issues. These issues were, in essence: (a) whether the Lease Agreement cannot be admitted in evidence for the reason that it has not been duly stamped ?; (b) whether the Statement of Account filed with the plaint marked **"B"** was incorrect ? and (c) whether, if the aforesaid issues are answered in the defendants' favour, the plaintiff's action should be dismissed ? The defendants did *not* frame an issue on whether the Lease Agreement had been frustrated

On the same day, learned counsel for the 1st and 2nd defendants objected to the admission of the Lease Agreement in evidence at the trial, on the ground that it had not been duly stamped. Learned counsel for the plaintiff moved for time to verify whether the Lease Agreement had been duly stamped. On the next date of trial, counsel submitted that, the Lease Agreement had been duly stamped.

Thereafter, an officer of the plaintiff bank gave evidence on the lines of the plaint and produced the documents marked "පැ1" to "පැ11". During the cross examination of this witness, the 1st and 2nd defendants produced several letters exchanged between the plaintiff, the 1st and 2nd defendants and the Supplier, marked "වි1" to "වි5". The plaintiff closed its case after this witness completed his evidence.

The 1st defendant gave evidence and produced more letters exchanged between the plaintiff, the 1st and 2nd defendants and Sathosa Motors ["the Supplier"], marked "වි6" to "වි11". The defendants did not call any other witnesses and closed their case leading in evidence, the documents marked "වි1" to "වි11".

The parties tendered written submissions. The learned trial judge delivered judgment dismissing the plaintiff's action with costs. The plaintiff appealed to this Court.

In his judgment, the learned trial judge discussed the pleadings and the issues raised by the parties and then stated that, there was ample evidence which established that defects in the vehicle prevented the defendants from paying the

monthly rentals due under the Lease Agreement. The learned judge commented that, the plaintiff had not objected to the reception of this evidence despite there being no issues framed by the parties on whether defects in the vehicle prevented the defendants from paying the monies due under the Lease Agreement. The learned trial judge went on to state that, in these circumstances, the Court was entitled to frame the following two additional issues at the stage of judgment.

[12] Did the latent defects in the bus bearing no. 62-6841 which the 1st and 2nd defendants were given under and in terms of the agreement marked "පැ2" result in the frustration of the said agreement marked "පැ2" ?

[13] If the above issue no. 12 is answered in the affirmative, should the plaintiff's action be dismissed with costs ?

After raising these two additional issues in the judgment, the learned trial judge proceeded immediately to answer these two issues and cited the decision in HAMEED vs. CASSIM [1996 2 SLR 30], as authority for this course of action.

When considering the evidence relevant to the two additional issues, the learned trial judge stated that, the plaintiff's witness testified at p.19 of the proceedings of 08th February 2005 that, the chassis and the body of the vehicle had separated while the vehicle was being driven – *"පැමිණිල්ල වෙනුවෙන් සාක්ෂි දී ඇති `මොහොමඩ් රිස්වාන්' නැමැති සාක්ෂිකරු සාක්ෂි දෙමින්, මෙම නඩුවට අදාළව බද්දට ගෙන ඇති දේපළ වන බස් රථය ධාවනය වන අවස්ථාවෙහිදී බොඩිය සහ චැසිය දෙකට වෙන් වී ගිය බව ප්‍රකාශ කර ඇත (ඒ සඳහා බලන්න 2005 පෙබරවාරි 08 වන දින සාක්ෂි සටහන් වල 19 වන පිටුව)"*. The learned judge goes on to mention that, the 1st defendant said that the vehicle could not be used due to numerous defects in the vehicle and that the letters marked "වි2" and "වි3" produced by the 1st and 2nd defendants establish that, there were numerous defects in the vehicle. The learned judge also says that, the letter marked "වි4" establishes that the plaintiff was ready to take the vehicle back due to these defects. The learned trial judge then concludes that, there was clear evidence that, the vehicle separated into two, which indisputably established that the vehicle could not be used – *"බස් රථය බරපතල දෝෂ වලට ලක් වී ඇත. විශේෂයෙන්ම බස් රථය දෙකට වෙන් වීම සම්බන්ධයෙන් වන කරුණ පැහැදිලි සාක්ෂි මගින් හෙළිදරව් වන්නේ නම්, එම බස් රථය පාවිච්චියට නුසුදුසු බස් රථයක් බව නොකිවමනාය "*.

Having made the aforesaid observations with regard to the evidence, the learned trial judge states that, the condition of the vehicle was such that it could not be used and concludes that, therefore, the Lease Agreement marked "පැ2" had been frustrated.

After concluding that the Lease Agreement marked "පැ2" had been frustrated, the learned trial judge briefly considered the evidence with regard to the sum claimed by the plaintiff. The learned judge was of the view that the plaintiff had satisfactorily explained the amounts set out in the Statement of Account marked "පැ7" and that

there was no reason why the High Court should not accept the evidence of the plaintiff's witness in this regard. However, the learned trial judge mentions that, there was no need to closely examine these amounts since the Court had previously held that the Lease Agreement had been frustrated. With regard to the defendants' claim that the Lease Agreement had not been duly stamped, the learned trial judge observed that neither party had produced a Gazette which set out the Stamp Duty which was payable. Here too, the learned trial judge mentions that, there was no need to further examine this issue in view of the Court's determination that the Lease Agreement had been frustrated.

The learned trial judge then proceeded to answer, in the plaintiff's favour, the plaintiff's issues with regard to whether the 1st and 2nd defendants had agreed to the terms and conditions set out in the Lease Agreement but failed to pay the monthly rentals due from them and whether the Lease Agreement had been terminated. However, presumably in view of the determination that the Lease Agreement had been frustrated, the High Court answered, in the negative, the plaintiff's other issues with regard to whether the monies claimed in the plaint are due and owing from the defendants to the plaintiff upon the Lease Agreement and whether the plaintiff is entitled to judgment against the 1st and 2nd defendants. Thereafter, the learned trial judge has answered the defendants' issues with regard to the alleged inaccuracy of the Statement of Account and the alleged lack of due stamping of the Lease Agreement, against the defendants.

Since the learned trial judge had, earlier on in the judgment, taken the view that the Lease Agreement had been frustrated, he answered the two additional issue no.s [12] and [13] in the affirmative and dismissed the plaintiff's case, with costs.

It is immediately clear that, the central questions to be decided in this appeal are: *firstly*, whether the learned trial judge erred when he framed the two additional issues at the stage of judgment *and immediately proceeded to answer* these two issues; and *secondly*, whether in any event, the learned trial judge erred when he answered those two additional issues in the affirmative.

With regard to the first question, although section 149 of the Civil Procedure Code was not cited in the judgment of the High Court, it is apparent that, the learned trial judge was relying on section 149 as giving the Court authority to frame the two additional issue no.s [12] and [13]. Section 149 states, *"The court may, at any time before passing a decree, amend the issue or frame additional issues on such terms as it thinks fit"*. No doubt, this provision permits a trial judge to frame additional issues at any time before passing the decree if he is of the view that such additional issues are required to enable the Court to arrive at *"the right decision of the case"* in terms of section 146 of the Civil Procedure Code. However, unlike section 146 which gives clear pointers to the procedure to be followed when framing issues at the commencement of the trial, section 149 is silent on the procedure to be followed when a trial judge decides, in the course of a trial, that additional issues are necessary.

In this regard, in instances where a trial judge frames additional issues while the parties are in the process of presenting their evidence, the parties will have notice of these additional issues and will have the opportunity to lead evidence on the additional issues and make submissions regarding them. But, the position will be different where a trial judge decides to frame additional issues only at the stage of writing the judgment, which is after the parties have closed their cases. In such instances, the parties will be denied that opportunity, unless the Court temporarily suspends the preparation of the judgment and affords the parties an opportunity to lead evidence on the additional issues and make submissions thereon, before the trial judge resumes preparing his judgment.

In the present cases, the learned trial judge has framed the additional issue no.s [12] and [13] at the stage of writing the judgment and has decided these two issues *without* giving the parties an opportunity to lead evidence on the additional issues and make submissions regarding them. As mentioned earlier, the High Court appears to have relied on the decision of the Court of Appeal in HAMEED vs. CASSIM, as authority for doing so.

In HAMEED vs. CASSIM, the plaintiff was the landlord of a premises of which the defendant was the tenant. The provisions of the Rent Act No. 7 of 1972 applied to the premises. The plaintiff filed action for the ejectment of the defendant on the grounds of reasonable requirement. During the course of his judgment, the District Judge framed an additional issue on whether the plaintiff could have and maintain the action in view of the provisions of section 22 (7) of the Rent Act. The plaintiff appealed. In appeal, counsel for the plaintiff contended that, the District Court was not entitled to raise an additional issue at the stage of judgment. Ranaraja J rejected that contention and held that, section 149 of the Civil Procedure Code gives the Court the discretion to frame additional issues at any time before passing a decree and that, accordingly, the District Court had the power to frame an additional issue even at the stage of judgment.

However, Ranaraja J pointed out that, the discretion vested in the Court to frame additional issues at the stage of judgment should be exercised only where it is necessary to do so in the interests of justice, which is, primarily, to ensure that the correct decision was reached. Thus, Ranaraja J stated [at p.33] *"Bertram C.J. in Silva v Obeysekara commenting on the discretion of a judge to allow issues after the commencement of the trial observed, `No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings.' The provisions of section 149 considered along with the observation of Bertram C.J. certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case."*.

I would, with respect, entirely agree with this cautionary restriction which Ranaraja J placed on the exercise of a trial judge's discretion to frame additional issues *at the stage of judgment*. This restriction is necessary since the scope and ambit of the trial had been defined by the admissions and issues which were framed at the commencement of the trial, in terms of section 146 of the Civil Procedure Code. The parties are only aware of those issues and have presented their cases for adjudication, based on those issues. Those admissions and issues have identified and mapped what the parties believed was the battle field on which they are to contest the trial. In STATE OF GUJARAT vs. JAIPALSINGH JASWANTSING ENGINEERS AND CONTRACTORS [1994 1 Guj. LR 258 at 261], Vaidya J in the High Court of Gujarat used a different metaphor to make a similar observation and said *"….. issues are backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings*, *the trial court and even the appellate court – as to what is the controversy, what is evidence and where lies the way to truth and justice."*. Therefore, a trial judge who intends to frame additional issues *at the time of judgment*, must be conscious of the fact that the framing of these additional issues may result in the case being decided on issues the parties did not contemplate when they led evidence. To use the metaphors mentioned earlier, the additional issues could shift the battle to a new field which the parties had not been asked to march upon or push the contest to an alley which had not been lit by the issues the parties could see.

Thus, while a trial judge does have the discretion to frame additional issues *at the stage of judgment*, that is a discretion which would, usually, be exercised sparingly and only in circumstances where it is necessary to do so to ensure that justice is done and the correct decision is reached by the Court. Other than in such circumstances, additional issues would not be raised *at the stage of judgment*. Thus, in JASRAJ FAOJI vs. MT. SUGRABAI [AIR 30 1943 Sind 242], the Sind Chief Court recognised that a Court should, usually, refrain from framing new issues after the parties had closed their cases. Davis CJ stated [at p. 243-244] *"Now, the procedure adopted by the learned Judge in resettling issues after the evidence was led and the arguments in large part heard, was not, we think, the correct procedure."*. Similarly, in the case of NAGUBAI AMMAL vs. B.SHAMA RAO [1956 AIR SC 593 at p.598] decided by the Supreme Court of India, Venkatarama Ayyar J stated, *"The true scope of the rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence."*.

Further, since the framing of additional issues *at the stage of judgment* may result in the case being decided on issues regarding which the parties have not led evidence on or, perhaps, even contemplated, equity demands that, a trial judge who wishes to frame an additional issue *at the stage of judgment*, suspends the preparation of his judgment and give both parties notice of the additional issues which the Court has framed. If the additional issues are issues of law, the parties should be given an opportunity to make submissions. If the additional issues are issues of fact or issues of both fact and law, the parties should be given an opportunity to lead evidence on

that issue and make submissions thereon. The preparation of the judgment may be resumed only after these steps are concluded. Ranaraja J expressed similar views in HAMEED vs. CASSIM [at p.33] when His Lordship stated, *"….. the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon."*

A Court has ample jurisdiction to follow this procedure. In fact, section 165 of the Civil Procedure Code permits a Court to recall any witness *"whenever in the course of the trial it thinks it necessary for the ends of justice to do so."* While considering the comparable provision in India, the Delhi High Court in SURESH KUMAR vs. BALDEV [AIR 1984 439] stated that, a Court has the discretion to recall a witness at any stage before the judgment is pronounced. In MADUBHAI AMTHALAL vs. AMTHALAL NANALAL [AIR 1947 156], the Bombay High Court held that, a Court which is considering its judgment may recall a witness to clear up an ambiguity or omission. In any event, quite apart from section 165 which permits a Court to call a witness at any stage, there is no provision in our Civil Procedure Code which expressly prohibits or militates against a trial judge hearing evidence and submissions on additional issues which are framed at the time he is preparing the judgment. Therefore, a Court will also have the inherent power to adopt this procedure to achieve the ends of justice, in terms of section 839 of the Code.

In this connection, it hardly needs to said that, a failure on the part of the trial judge to take these precautions will cause grave injustice. Further, a trial judge who fails to give the parties an opportunity to lead evidence on and be heard on additional issues raised in the judgment, will be ignoring the *audi alteram partem* rule.

Finally, for the sake of completeness, it should also be mentioned that, there may be some limited instances in which, *because* the record makes it manifestly clear that the facts and law underpinning additional issues which are raised at the time of judgment, were at the forefront of the minds of both parties at the trial and that both parties were fully aware of the need to lead evidence and address the law on matters relating to those additional issues, a Court has the discretion to proceed to answer those additional issues without suspending the preparation of the judgment and giving the parties a further opportunity to be heard on those additional issues. This limited exception was referred to by Venkatarama Ayyar J in NAGUBAI AMMAL vs. B.SHAMA RAO, when the learned Judge, having outlined the general rule cited above, went on to mention, [at p.598], *"But that rule has no application to a case where the parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce relating evidence thereto."*. SUNDERSINGH vs. RAJARAM [AIR 1991 MP 59] and AGRAWALLA vs. BHARAT COKING COAL LIT [AIR 1989 SC 1530] are other decisions where this exception was referred to. However, this limited exception will apply *only* where it is indisputably clear from the record that, *both* parties were fully aware that the questions raised in the additional issues framed in the judgment, were in issue at the

trial but the parties have omitted to proceed to frame specific issues thereon. It is fitting to reiterate and emphasise that, the general rule is that parties must be given an opportunity to be heard on additional issues framed at the time of judgment.

When the principles set out above are applied to the present case, it is clear that, the two additional issues framed in the judgment regarding whether the Lease Agreement had been frustrated, were issues of both fact and law. It is also clear from a perusal of the evidence that, a claim that the Lease Agreement had been frustrated had not been expressly put to the plaintiff's witness and had not been expressly made by the 1st defendant when he testified. Further, the proceedings establish that, a question whether the Lease Agreement had been frustrated was not specifically raised or considered during the course of the trial before the parties closed their cases and the case was reserved for judgment. Thus, the plaintiff cannot be said to have been aware that a question of whether the Lease Agreement was frustrated, was in issue. This is not a case falling within the limited exception described earlier and referred to by Venkatarama Ayyar J in NAGUBAI AMMAL vs. B.SHAMA RAO.

Despite these circumstances, the learned trial judge has answered the two additional issues on frustration of the Lease Agreement, which were framed by him at the time the judgment was written, *without* giving the parties an opportunity to lead evidence on these two additional issues or to make submissions thereon. That has caused injustice to the plaintiff who, as entitled to, had presented its case guided by the eleven issues framed by the parties at the commencement of the trial, which did not include an issue on whether the Lease Agreement had been frustrated. Further, since a claim that the Lease Agreement had been frustrated had not been raised or considered during the trial, the plaintiff had no cause to think that there would be any issue for determination with regard to whether the Lease Agreement had been frustrated or to lead evidence or make submissions on that question. The plaintiff was entitled to have believed that, the High Court would deliver its judgment in conformity with De Silva CJ's observation in HANAFFI vs. NALLAMA [1998 1 SLR 73 at p.77] that, *"….. once issues are framed, the case which the court has to hear and determine become crystallized in the issues."*.

In these circumstances, the failure of the High Court to give an opportunity to the parties to present evidence and be heard on the two additional issues framed at the stage of writing the judgment, has caused a miscarriage of justice. Therefore, these two additional issue no.s [12] and [13] must be struck out by this Court and, the answers to these two issues, must be set aside.

Although the two additional issues have been struck out by this Court, it is, nevertheless, incumbent on this Court to examine whether there was sufficient evidence to indicate that the Lease Agreement marked "පැ2" had been frustrated. This has to be done since, the existence of such evidence may require this case to be sent back to the High Court to determine an issue on frustration of the Lease Agreement, after the parties are given an opportunity to be heard on that issue.

In this regard, a perusal of the judgment makes it clear that, the learned trial judge relied heavily on the testimony of the plaintiff's witness at p.19 of the proceedings of 08th February 2005, when the High Court reached the conclusion that the chassis and the body of the vehicle had separated. However, a reading of the evidence of the plaintiff's witness shows that, the witness has not admitted that the chassis and the body of the vehicle had separated. Instead, what occurred was that, while this witness was being cross examined by the learned counsel for the defendants, he was shown the letter dated 13th January 1998 marked ''**වි2**'' written by the defendants and asked whether it states that the chassis and the body of the vehicle has separated while it was being driven. The witness has replied stating that such a claim is made in the letter marked ''**වි2**'' but, the witness has *not* admitted the truth of that claim - *vide:* the following evidence at p.19 of the proceedings of 08th February 2005 soon after the letter marked ''**වි2**'', which stated *"At 9.00 a.m. the said bus broke down at Avissawella with the body separating from the chassis with the passenger load luckily no casualties.",* was shown to the plaintiff's witness:

ප්‍ර: ඒ ලිපියේ කියා තිබෙනවා මේ කල්බදු පහසුකම් මත ලබා ගත්ත වාහනය ආපසු ගැනීම සම්බන්ධව ?

උ : ඔව්.

ප්‍ර: තව දුරටත් කියා තිබෙනවා මේ බස් රථය ධාවනය කරන අවස්ථාවේදී බස් රථයේ බොඩිය සහ වැසිය දෙකට වෙන් වුණා කියලා?

උ : ඔව්.

This evidence of the plaintiff's witness only establishes that the defendants claimed in ''**වි2**'' that the chassis and the body of the vehicle had separated while the vehicle was being driven. This evidence does *not* establish the truth of that claim or that the plaintiff admitted that the chassis and the body of the vehicle had separated. With regard to the 1st defendant's evidence, apart from making a claim in the aforesaid letter marked ''**වි2**'' that the chassis and the body of the vehicle had separated and a similar claim when the 1st defendant gave evidence, the defendants did not adduce any reliable material to prove that such an incident occurred. Further, in their subsequent letter marked ''**වි9**'', the defendants have modified the aforesaid claim made in their first letter marked ''**වි2**''and have stated *"At about 9.00 a.m. the bus broke down at Avissawella with the body* ***almost*** *separating from the chassis,"* [emphasis added by me]. There is a significant difference between the claim made in ''**වි2**'' and the claim made in ''**වි9**''. The inference is that the first claim was exaggerated. Further, in both letters, the defendants say that, *"The bus was brought down to Colombo…."* . This would suggest that the vehicle was capable of being driven back to Colombo or, at worst, being towed back to Colombo. It is highly unlikely that a vehicle which is *"almost separating"* as claimed in ''**වි9**'', can be driven or even towed on a highway. In these circumstances, it can be reasonably inferred that, the second claim in the letter marked ''**වි9**'' was also in the nature of an exaggeration. In any event, the defendants have admitted that, the alleged defect they referred to in ''**වි2**'' was repaired and that, thereafter, the defendants used the vehicle on the Colombo-Badulla route. Thus, in their letter dated 27th May 1998 marked ''**වි9**'', the defendants state, *"After the bus was repaired and handed to me,*

we operated it on the Colombo-Badulla route…..". Further, if the chassis and the body of the vehicle had, in fact, separated while the vehicle was being driven, the defendants would have had ample evidence such as police entries, the driver's evidence and repair estimates to prove the occurrence of an event of that nature. The inability of the defendants to produce any such evidence, casts substantial doubt on the claim made by them.

For these reasons I am not inclined to place much credence on the defendants' claim that the chassis and the body of the vehicle had separated.

Next, it is useful to examine the letters marked "**වි1**" to "**වි11**" produced by the defendants. These letters have been marked and produced out of their chronological order. The result of this stratagem is that these letters do not present a clear picture at first glance. Perhaps, that was inadvertent. On the other hand, it may smack of a deliberate ploy to create a measure of confusion. Either way, an examination of these letters marked "**වි1**" to "**වි11**" in the order in which they were written, reveals the history of this transaction.

When these letters are looked at in chronological order, it is seen that the defendants had paid the first monthly rental in December 1997. Thereafter, the vehicle broke down in Avissawella on 11th January 1998 and was returned to the manufacturer for repairs. The defendants then wrote their letter dated 13th January 1998 marked "**වි2**", asking the plaintiff to give them an extension of time to pay the second monthly rental. Thereafter, by their letter dated 16th February 1998 marked "**වි6**", defendants requested the plaintiff to reschedule the payment of the monthly rentals since the defendants claimed that the vehicle was not fit to ply the Colombo-Badulla route and had to be, instead, used on short distance routes. Next, by their letter dated 02nd March 1998 marked "**වි3**", the defendants have stated that the vehicle needs extensive repairs and have offered to return the vehicle to the plaintiff. The plaintiff has replied by its letter marked "**වි1**" [the date is not legible] and letter dated 06th March 1998 marked "**වි7**", inviting the defendants to a discussion with regard to the defendants' request. After that discussion, the defendants have written their letters dated 25th March 1998 and 27th May 1998 marked "**වි8**" and "**වි9**" stating that they had handed over the vehicle to the manufacturer on 23rd March 1998 and requested the plaintiff to make a new vehicle available to the defendants, but that a new vehicle has not been provided.

This evidence establishes that, prior to the defendants handing over the vehicle to the manufacturer on 23rd March 1998, the defendants were using the vehicle. Thus, the defendants' letter dated 02nd March 1998 marked "**වි3**" reveals that the defendants were plying the vehicle on the Chilaw-Kurunegala route while the defendants' letters dated 16th February 1998 and 25th March 1998 marked "**වි6**" and "**වි8**" state that the defendants had been plying the vehicle on *"short distance routes"*.

After the defendants handed the vehicle to the manufacturer on 23rd March 1998, the manufacturer completed the repairs to the vehicle and wrote its letter dated 01st

July 1998 marked ‘‘**වි10**’’ to the defendants, notifying that the vehicle had been repaired and is now *“in very good running condition”* and requesting the defendants to collect the vehicle. It is apparent from the evidence that, the defendants took delivery of the repaired vehicle. In this connection, the 1st defendant has stated ‘‘ඉන්පසුව බස් රථය ලැබුන අවස්ථාවේ 1998.07.27 වැනි දින අපේ බස් රථය බාර ගත්තේ.’’ The reasonable assumption is that the defendants commenced using the vehicle after that. The defendants have not led any evidence to the contrary.

However, the defendants have not paid a single monthly rental after they paid the first rental in December 1997. It was in these circumstances that, the plaintiff sent the Letter of Termination dated 17th August 1998 marked “පැ4” terminating the Lease Agreement and demanding payment of the monies due thereunder. The defendants replied by their letter dated 29th August 1998 marked ‘‘**වි11**’’ denying liability to pay any monies to the plaintiff. Later, there was a further discussion between the parties after which the plaintiff wrote its letter dated 13th October 1998 marked “**වි4**’’ stating that, the plaintiff will release the defendants from all liabilities under the Lease Agreement if the defendants returned the vehicle. The defendants then wrote their letter dated 15th October 1998 marked ‘‘**වි5**’’ addressed to the manufacturer and copied to the plaintiff, stating that the defendants would hand over the vehicle to the manufacturer.

But, the defendants did not return the vehicle. Thus, the defendants chose not to make use of the plaintiff’s offer, made in ‘‘**වි4**’’, to release the defendants from their liabilities under the Lease Agreement provided the defendants hand over the vehicle. Instead, the defendants chose to continue to use the vehicle after it was repaired and handed over to them on 27th July 1998.

It was in these circumstances and long after the plaintiff terminated the Lease Agreement on 17th August 1998 by the letter marked “පැ 4’’ that, the plaintiff repossessed the vehicle in March 1999 and instituted this action for the recovery of the balance monies due under the Lease Agreement.

Next, to consider the defects in the vehicle, the letters written by the defendants refer to the vehicle breaking down on 11th January 1998 after which is was repaired and returned to the defendants. The letters also refer to defects in the lights, the front and rear windscreens not being properly fixed, repairs to the front hub, oil leaks, and defects in the front shock absorbers. These are all defects which can be repaired. As mentioned earlier, the evidence is that, these defects were repaired and the vehicle was handed back to the defendants on 27th July 1998. The evidence indicates that the defendants continued to use the vehicle after that. In these circumstances, it is not possible to reasonably conclude that, the defects in the vehicle rendered the vehicle unusable.

Weeramantry [Law of Contract, para 791] commenting on instances where a contract may be frustrated by the destruction or damage to the subject matter of the contract, states, *“For this purpose, it is not necessary that there should be a total or*

complete destruction of subject matter of the contract. It is sufficient, if the subject matter is affected in such a way that the main purpose of the contract is defeated or cannot be performed. Thus even where there is an impairment or destruction not of the entirety but of some attribute or quality which is essential to the particular contract, the contract is discharged in the same way for the reason that performance is impossible.".

When this principle is applied to the present case, it has to be kept in mind that, the contract between the plaintiff and the defendants was nothing more than a contract by which the plaintiff leased the vehicle to the 1st and 2nd defendants subject to the *"terms, covenants and conditions"* set out in the Lease Agreement. The vehicle was the subject matter of the contract. The evidence establishes that, the defects in the vehicle were repaired and the vehicle [*ie:* the subject matter of the contract] was usable. In fact, the defendants themselves have said that they were using the vehicle on the Chilaw-Kurunegala route and *"short distance routes"*. The Lease Agreement did not contain any term or condition specifying a specific route that the vehicle was required to ply on or make it a condition of the Lease Agreement that the vehicle must be able to ply the Colombo-Badulla route. Thus, evidence establishes the subject matter of the contract [*ie:* the vehicle] was not affected in a manner which prevented the performance of the Lease Agreement. Accordingly, upon an application of the principle set out by Weeramantry, the Lease Agreement cannot be considered to have been frustrated.

The learned trial judge appears to have also taken the view that, the plaintiff's letter dated 13th October 1998 marked ''**වි4**'' establishes that, the plaintiff was willing to take the vehicle back because the plaintiff had recognized that defects in the vehicle made it unusable. However, with great respect to the learned judge, I am unable to agree that such a conclusion can be correctly drawn. This letter was written after the Lease Agreement was terminated and before the plaintiff repossessed the vehicle. By this letter, the plaintiff has only stated that, if the defendants hand over the vehicle, the plaintiff will release the defendants from their liability to pay the balance monies payable under the Lease Agreement, which had been demanded by the Letter of Termination marked "ෂැ4". The plaintiff has gone to specify in ''**වි4**'' that the monies paid till then by the defendants, will not be refunded. Thus, in the light of the history of this transaction, it is clear that ''**වි4**'' is a letter by which the plaintiff offered a concession to the defendants in terms of which the plaintiff offered to release the defendants from their liability to pay the balance monies payable under the Lease Agreement provided the defendants return the vehicle as demanded the Letter of Termination marked "ෂැ4". Presumably, ***if*** the defendants had returned the vehicle as requested by ''**වි4**'', the plaintiff could have sold the vehicle and recovered all or most of the balance monies which were then due under the Lease Agreement. However, as stated earlier, the defendants did not make use of this concession offered by the plaintiff and did not return the vehicle. Thus, the letter marked ''**වි4**'' cannot be regarded as evidence that the plaintiff had recognised that the contract was frustrated.

Further, it is necessary to mention the established principle that, where parties to a contract make an express provision with regard to the party who is to bear the risk of the occurrence of a specified event, the occurrence of that event will not result in the frustration of the contract, unless there is supervening illegality. Thus, Weeramantry [Law of Contract, para 793] states, *"The parties are at liberty to make express provision in the contract for allocating the risk of unforeseen events. Where such provision is made, the risk of unforeseen events will be borne by the party who undertakes it in terms of the contract, and the contract is not deemed frustrated by the happening of the event expressly provided for."*.

When the Lease Agreement marked "පැ2" is examined in the light of this principle, it is seen that, Clause 3 of the Lease Agreement specifies that, the defendants shall be responsible *"for the selection of the Supplier"* of the vehicle *"and all other matters on connection with the obtaining and use of"* of the vehicle [which the defendants requested the plaintiff to purchase and then lease to the defendants under the Lease Agreement]. In fact, when he gave evidence, the 1st defendant admitted that he chose the vehicle after examining it. Thereafter, Clause 4.1 of the Lease Agreement, places the onus on the defendants to *"inspect"* the vehicle before issuing the Acceptance Receipt. The 1st defendant has signed the Acceptance Receipt marked "පැ3" by which he stated, *inter alia,* that, the defendants acknowledged receipt of the vehicle *"in good order and condition"*. Clause 4.2 stipulates that, in the event of the defendants issuing an Acceptance Receipt, that document would be conclusive evidence that the defendants have examined the vehicle and *"found it to be complete and satisfactory and fit for such purpose for which it may be required."*. Clause 4.2 goes on to make it clear that, the defendants agreed that the plaintiff is not liable for any defect or fault in the vehicle. Clause 5 further states that the defendants agrees that, the plaintiff does *not* lease the vehicle *"….. subject to any condition or warranty express, implied or statutory which are hereby expressly excluded and extinguished….."* and that, the plaintiff *"makes no representation with regard to the quality or fitness"* of the vehicle. Next, by Clause 6 (a), the defendants have agreed that, the defendants are responsible for maintaining the vehicle in good repair and proper working condition and that the defendants are responsible for any *"damage thereto howsoever occasioned (including fair wear and tear).".* Clause 6 (a) also stipulates that, any loss or damage to the vehicle shall *not* impair the defendants' obligations and liabilities under the Lease Agreement and that the defendants' obligations and liabilities under the Lease Agreement *"shall continue in full force and effect"* notwithstanding any damage to the vehicle. Clause 8.1 states that, the defendants *" ….. shall bear the entire risk of loss or damage to the equipment or any part thereof from whatsoever cause arising (including wear and tear)"*.

Thus, by these contractual provisions, the defendants have not only acknowledged the fact that they chose the vehicle but have agreed that the plaintiff is not liable for any defect or shortcoming with regard to the quality of that vehicle or its fitness for use that may later become apparent. The defendants have agreed to bear the risk of any such defects or shortcomings with regard to the quality of the vehicle or its

fitness for use. The defendants have also agreed that, any defects in the vehicle will not affect their liability under the Lease Agreement.

To sum up, the evidence referred to above does not suggest that the Lease Agreement marked "ඵ2" was frustrated. Further, the principle of law referred to above precludes the defendants from raising a defence of frustration of the Lease Agreement on the basis of alleged defects in the vehicle. Therefore, there is no need for this case to be sent back to the High Court for determination of an issue as to whether the Lease Agreement marked "ඵ2" was frustrated. Further, for purposes of record, I hold that, the learned trial judge erred when he answered the two additional issue no.s [12] and [13] in the affirmative.

With regard to the other issues before the High Court, the learned trial judge has correctly answered, in the plaintiff's favour, the plaintiff's issues with regard to whether the 1st and 2nd defendants were bound by the Lease Agreement, whether the 1st and 2nd defendants had failed to pay the monthly rentals and whether the plaintiff has terminated the Lease Agreement.

Next, with regard to the amount claimed by the plaintiff and set out in the Statement of Account marked "ඵ7" and the defendants' issues alleging that this amount was incorrect, the learned trial judge was of the view that the plaintiff had satisfactorily explained the amounts set out in the Statement of Account marked "ඵ7" and that there was no reason why the Court should not accept the evidence of the plaintiff's witness in this regard. Accordingly, he answered the defendants' issue in the negative.

However, since the judgment of the High Court states that, the amount claimed by the plaintiff was not closely examined because the High Court had held that the Lease Agreement was frustrated, it is necessary to examine whether the plaintiff is entitled to recover the sum prayed for in the plaint. When the Statement of Account marked "ඵ7" is scrutinised, it is seen that, although the plaintiff's witness stated in his evidence that the plaintiff repossessed the vehicle in 1999, the plaintiff has not given credit for the value of the vehicle in the Statement of Account. In the absence of any claim by the plaintiff to the contrary, it is fair to assume that, in the ordinary course of business, the plaintiff has sold the vehicle after it was repossessed. The plaintiff's reticence to reveal the sum received upon the sale, leads me to consider it reasonable to assume that the plaintiff would have received a sum of Rs.1,458,000/- which is the *"Stipulated Loss Value"* of 90% of the *"Cost of Equipment"* of Rs.1.620,000/- as mentioned in the Statement of Account marked "ඵ7" read with the Item (9) of the Schedule to the Lease Agreement marked "ඵ2".

Therefore, this sum of Rs.1,458,000/- has to be deducted from the sum of Rs.2,770,022/- which the Statement of Account marked "ඵ7" states is the sum due under the Lease Agreement as at 18th August 1998. The net sum due will then be Rs.1,312,022/-. In terms of the contract, the plaintiff is entitled to recover interest on this sum at 23.725% *per annum* from 18th August 1998 onwards. However, it is seen

that, as a result of the delay in the final determination of this case, the interest that will become due on Rs.1,312,022/- from 18th August 1998 onwards will be far in excess of the capital sum of Rs.1,312,022/-. Although the general rule is that, a plaintiff is entitled to recover interest from the date of decree till the date of payment, I am of the view that, in the circumstances of this particular case, it is fit and proper and equitable to limit the interest that may be recovered to a sum equivalent to the capital sum of Rs.1,312,022/-. Thus, the total sum which the plaintiff is entitled to recover from the 1st and 2nd defendants will be Rs. 2,624,044/-.

Lastly, with regard to the defendants' issue suggesting that the Lease Agreement had not been duly stamped, the defendants led no evidence to substantiate that claim. The learned trial judge correctly answered that issue against the defendants.

For the aforesaid reasons, the plaintiff-appellant's appeal is allowed and the judgment of the High Court is set aside. Judgment is entered for the plaintiff-appellant and against the 1st and 2nd defendants-respondents in a sum of Rs.2,624,044/- together with costs in the High Court. The High Court is directed to enter decree accordingly. In the circumstances of this case, each party will bear their own costs of appeal.

Judge of the Supreme Court

S.Eva Wanasundera, PC. J.
I agree

Judge of the Supreme Court

Upaly Abeyrathne J.
I agree

Judge of the Supreme Court