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

S.C. CHC. Appeal 02/11
for S.C. H.C. L.A. No. 67/10
HC (Civil) 126/1998 (01)

In the matter of an Application Leave to Appeal.

Sri Lanka Co-operative Marketing Federation Ltd.,
Co-operative Square,
No. 127, Grandpass Road,
Colombo 14.
DEFENDANT-PETITIONER (JUDGMENT DEBTOR PETITIONER)

Vs.

The State Trading Corporation of India,
Jawahar Vypar Bhawan,
1- Tolstoy Marg, New Delhi – 110 001, India and of Chennai House,
4th Floor, 7 Esplanade,
Chennai 600108,
India.
PLAINTIFF-RESPONDENT (JUDGMENT CREDITOR RESPONDENT)

BEFORE : **TILAKAWARDANE, J**
AMARATUNGA, J &
SURESH CHANDRA, J

COUNSEL : S.A. Parathalingam, PC with Athula Perera for Defendant-Petitioner-Petitioner.
Kushan D' Alwis with Ayendra Wickramasekara and Jayaruwan Wijayalath for Plaintiff-Respondent instructed by K.U. Gunasekara.

ARGUED ON : 07.07.2011

DECIDED ON : 03.02.2012

Hon Shiranee Tilakawardane J

The Defendant – Petitioner (hereinafter referred to as the Petitioner) has preferred this appeal to set aside the order of the Commercial High Court dated 12.11.2010, whereby the learned judge of the High Court allowed the Plaintiff – Respondent's (hereinafter referred to as the Respondent) application for a writ pending appeal. The Application made by the Petitioner objecting the issuance of writ pending the appeal, was refused consequent to the Petitioners failure to establish substantial losses that is likely to incur if the writ is allowed.

Admittedly on or about the 9th December 1996 the Petitioner had placed an order with the Respondent (a state trading corporation of India carrying out imports and exports) for 100 metric tons of dried chillies at the price of US$ 1,300/= per metric ton by container or break bulk vessel. The shipment was made from Tuticorin to Colombo. The transaction was marked X1, the Respondent affirmed that X1 did not specify the mode of payment. In such instances where the mode of payment is not mentioned it is internationally understood that DP (document against payment) will be used.

The document against payment, one of the payment methods exercised in international trade, where the exporter ships the goods and then gives the

documents such as the Bill of Lading to their bank which will forward them to the buyer's bank in their local territory.

The Respondent averred that prior to the shipment taking effect; inspections were carried out as to the overall standard of the exports. On or about 7th January 1997, after the shipment was effected the Petitioner had requested for the mode of payment set out in the bank bills to be changed to read as DA (documents against acceptance) payable after 30 days from the date of Bill of Lading. Subsequently the Petitioner made a second request, to extend the period of payment to 60 days from the date of Bill of Lading.

It is asserted by the Respondent that upon the new terms of payment agreed by the parties the Petitioner was required to pay the Respondent for four shipments, 60 days from the date of Bill of Lading a sum of US$130,000 /= which the Petitioner had neglected to pay.

The Petitioner denying the Respondents claims held that the Respondent had failed to notify the Petitioner the date of the shipment, the documents relating to the shipments was incorrect as it was not in keeping with the terms agreed and had not been rendered to the Petitioners Bank until the 31st December 1996 and as a result of the undue delay in producing the correct documentation the shipments were subject to heavy demurrage charges, and therefore the Petitioner had not accepted the goods.

The learned Judge of the Commercial High Court Judge delivered the judgement in favour of the Respondent on 5th November 2008. The Petitioner aggrieved by the Learned Commercial High Court Judges judgment appealed on several grounds of law. Thereafter, the Respondent applied for the writ pending appeal in terms of Section 761 and 763 of the Civil Procedure Code. The Petitioner objecting to the writ pending appeal prayed inter alia for the Respondents application to be refused. At the inquiry the Petitioner did not submit oral evidence and accordingly it was agreed by the parties that the matter may be disposed by way of written submissions.

Hence, by order dated 12th November 2010 the learned Judge of the Commercial High Court allowed the Respondents application for writ pending appeal.

The Petitioner filed an application for Special Leave to Appeal before this Court on which Special leave to appeal was granted on 10th February 2011 on the following questions of law:

1) Is the Petitioners action on the face of it prescribed in law?
2) Have the Courts failed to consider Section 763 of the Civil Procedure Code and is the reference in the journal entry for a sum of Rs. 250,000/= to be deposited by the Respondent as security before the execution of the decree wrong in law?
3) Is the sum of Rs 250,000/= as security insufficient and disproportionate to the Respondents claim of US$ 130,000/= and legal interest from 18th February 1997?

In the light of aforementioned questions of law this Court granted permission for the parties to tender written submissions. Having received and reassessed such submissions, this Court has examined and analyse the above questions of law.

In regard to the first question of law, the Petitioner states that the present transaction was classified as “goods sold and delivered” and as a result the document marked X1 is not a written contract but a transaction for the sale of goods, as per Section 8 of the Prescription Ordinance. Therefore, the Respondents failure to institute action within a period of one year from the breach of such agreement caused the action to be prescribed in law. Section 8 of the Prescription Ordinance states as follows;

> “*No action shall be maintainable for or in respect of any goods sold and delivered ....or for work and labour done..., unless the same shall be brought within one year after the debt shall have become due”.*

Whereas, the Respondent alleges that the transaction was based on written conditions and is relevant to Section 6 of the Prescription Ordinance which reads as follows;

> "*No action shall be maintainable..., upon any written promise, contract, bargain or agreement...unless such action shall be brought within six years from the date of the breach ...of such written promise, contract, bargain or agreement..*"

In order to determine whether the present transaction is a written contract or a transaction for the sale of goods it is important to examine the documents marked as 'X10- X13 (A) & (B)'. 'X10' – Petitioners request for the mode of payment set out in the bank bills to be amended to read as documents against acceptance payable after thirty days from the date of Bill of Lading , 'X11'- Petitioners second request for the mode of payment set out in the bank bills to read as documents against payable after sixty days from the date of Bill of Lading, 'X12- X13 (A) & (B)'- Revised drafts made by the Respondent in order to comply with the Petitioners requests. This Court accepts that the said documentation are written conditions agreed by the parties and that the transaction was based on it.

To further illustrate the provision of Section 6 of the Prescription Ordinance a comparison of the literature of Section 5 of the Limitation Act 1980 of England and Wales seems appropriate. Section 5 of the Limitation Act 1980 provides that;

> *'An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued'.*

It is clear that the provisions of the legislation are alike, as the language of Section 5 of the Limitation Act 1980 exemplifies the following '*Time runs from the breach of contract. When this depends on the nature of the obligation*

sued on and the terms of the contract, and also on whether a repudiatory breach is accepted by the claimant' [Sime, S (12th ed. 2009), 'A Practical Approach to Civil Procedure', Oxford University Press, Oxford, p 95].

It is perhaps relevant to observe a series of cases which established the time period an action for a breach of contract/ agreement ought to be instituted. Lord Esher MR's statement in Coburn v Colledge [1897] 1 QB 702 at p 705 G is referred in the case of Henry Boot construction Ltd v Alstom Combined Cycles Ltd [2005] 1 WLR 3850;

> *'Where A does work for B at B's request on terms that A is entitled to be paid for it, his right to be paid for it (ie his cause of action) arises as soon as the work is done "unless there is some special term of the agreement to the contrary'.*

In Reeves *v Butcher* [1891] 2 QB 509 at p 511, Lord Justice Lindley held;

> *'The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.'*

Accordingly, the opinion of this Court is that, in the light of the aforesaid judgments, the interest of justice mandates this court to agree with the opinion with the learned Judge of the Commercial High Court. The Respondent has instituted the first action at the earliest time at which an action could be brought and such action was instituted within a period of 6 years of the breach of the written contract as specified in Section 6 of the Prescription Ordinance.

As the second question of law the Petitioner averred that the learned Judge of the Commercial High Court failed to consider Section 763 of the Civil Procedure Code and that the reference in the journal entry for a sum of

Rs.250,000/= to be deposited by the Respondent as security before the execution of the decree is wrong in law.

The Respondent stresses that the Petitioner has failed to provide sufficient cause to enable the court to determine the quantum of security and refers to His Lordship Justice Mark Fernando's judgment in the case of A.D.H Perera v Gunawardena [1993] 2 SLR at p31;

> *' In any event, mere assertions of the judgement-debtor's opinion that serious loss would result, unsupported by averments of fact in regard to the nature of the business, its turnover and profits (or losses), the difficulties and expenses which relocation would occasion, and similar matters, are insufficient. The material upon which such assertions were based should have been made available to enable the Court to assess the loss, and to determine, in relation to the judgment-debtor, whether such loss was substantial; and also to determine the quantum of security'.*

Section 763 (1) & (2) of the Civil Procedure Code states;

> (1) '*In the case of an application being made by the judgement-creditor for execution of a decree which is appealed against, the judgement-debtor shall be made respondent.*
> *If, on any such application, an order is made for the execution of a decree against which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property and for the due performance of the decree or order of the Court of Appeal'.*
> *(2) 'The Court may order execution to be stayed upon such terms and conditions as it may deemed fit where-*

(a) the judgement debtor satisfies the court that substantial loss may result to the judgement-debtor unless an order for stay of execution is made, and

(b) security is given by the judgment-debtor for the due performance of such decree or order as may ultimately be binding upon him'.

While this Court accept the Respondents point of law, it is important to determine as to whether the Petitioner has placed sufficient evidential support, establishing substantial losses, in order to guide the Courts to determine an appropriate quantum of security in the favour of the Petitioner.

This Court notes the following Indian Judgments that have defined the term 'substantial loss'. Learned Judge Vivian Bose A. J. C in the case Anandi Prashad v. Govinda Bapu, AIR 1934 Nag 160 (D) held;

'It is not enough merely to repeat the words of. the Code and state that substantial loss will result; the kind of loss must be specified, details must be given, and the conscience of the Court must be satisfied that such loss will really ensue. The words "substantial loss" cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule, it is clear the words "substantial loss" must mean something in addition to and different from that.'

In the case of Bansidhar v Pribhu Dayal, AIR 1954 Raj 1, Learned Judge Dave held;

'In order to get the substantial loss i.e., it should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances'.

In the light of the foregoing case law this Court finds that the burden of proof is on the Petitioner (judgement – debtor) to establish substantial losses if the writ is issued. The Petitioner was given the opportunity to enlighten the courts by specifying the losses with necessary details to satisfy the conscience of the Courts. However, the Petitioner merely established the ordinary losses which is subjected to any judgement - debtor and failed to provide extraordinary losses that the court could determine as substantial losses. The Petitioner decided only to provide written submissions instead of leading oral evidence at the writ inquiry. Therefore, this Court is in agreement with the learned Judge of the Commercial High Court and holds that the Petitioner has not established substantial cause for the courts to determine an appropriate security. Since the learned Judge had made an order in the journal entry dated 12th November 2010 for the sum of Rs.250,000/= to be deposited as security in favour of the Petitioner, notwithstanding the Petitioners failure to establish substantial cause as specified in Section 763 of the Civil Procedure Code.

As the third question of law Petitioner states that the sum of Rs 250,000/= as security is insufficient and disproportionate to the Respondents claim of US$ 130,000/= and legal interest from 18th February 1997. The Petitioner asserts that the security specified in the journal entry is not sufficient to safeguard the interest of the Petitioner and the amount of security that the Court ought to have awarded should be in proportionate with the sum of money specified in the decree. The Petitioner further allege that since the Respondent is a foreign corporation without legal presence in Sri Lanka the Petitioner would not be able to recover the money paid under the decree if the judgment is entered in its favour. Whilst the Respondent states that the learned judge is not obliged in law to award a sum of security which is direcly proportionate to the sum contained in the decree. To authenticate this position, the Respondent refer this Court

to the two following cases: Waharaka Sobitha Unnanse v Amunugama Piyaratana Unnanse, 55 NLR at page 249 and Ekanayake v Ekanayake [2003] 2 Sri.L.R at page 221.

In Waharaka Sobitha Unnanse case, His Lordship Justice Gratiaen held that;

> *'...the amount of security which a Judge may in his discretion fix as a condition of a stay of execution pending appeal should be such as would reasonably safeguard the interests of the judgement creditor in the event of the judgment appealed from being eventually affirmed by the this Courts'.*

In Ekanayake case, His Lordship Justice Amaratunga stated the following;

> *'Execution is a process for the enforcement of a decreed right. Mere technicalities shall not be allowed to impede the enforcement of such rights in the absence of any prejudice to the judgment debtor'.*

While this Court considers the assertions of the Petitioner and Respondent this Court refers to the following cases held in the Supreme Court of India; Sihor Nagar Palika Bureau v Bhabhlubhai Virabhai & Co [2005] 4 SCC 1,and B.P. Agarwal & anr. vs. Dhanalakshmi Bank Ltd. & ors [2008] 3 SCC 397

In Sihor Nagar Palika Bureau case it was held that;

> *'In an appeal against a decree for payment of amount the appellant shall, within the time permitted by the Appellate Court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit...a deposit or security as above said, is a condition precendent for an order by the Appellate Court staying the execution of the decree. A bare*

reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the Appellate Court to direct either deposit or the amount disputed in the appeal or to permit such security in respect thereof being furnished as the Appellate Court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. In as much as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there of course, a discretionary power and is meant to be exercised in appropriate cases.'

In B.P. Agarwal & anr case affirming the above decision held the following;

'The appellate court, indisputably, has the discretion to direct deposit of such amount, as it may think fit'.

Accordingly, the opinion of this Court is that the learned Judge of the Commercial High Court has not made an error in law but had provided safeguards to protect the Petitioner regardless of the Petitioners failure to provide substantial cause as a precondition to obtaining security in his favour.

For the aforesaid reasons this appeal to set aside the order dated 12th November 2010 is dismissed and the judgment of the Commercial High Court is affirmed.

JUDGE OF THE SUPRME COURT

AMARATUNGA, J

I agree

JUDGE OF THE SUPRME COURT

SURESH CHANDRA, J

I agree

JUDGE OF THE SUPRME COURT