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

K. Dharmasiriwardena
No. 119, Thalangama North,
Thalangama.

Plaintiff

Vs.

S.C. C.H.C. Appeal No. 24 of 2004

Pure Beverages Company Ltd.
No. 149A, Vaxuall Street,
Colombo 02.

Defendant

AND Between

Pure Beverages Company Ltd.
No. 149A, Vaxuall Street,
Colombo 02.

Defendant-Appellant

Commercial High Court Case No.
H.C. (Civil) 16/99(1)
Nature : Money

Vs.

K. Dharmasiriwardena
No. 119, Thalangama North,
Thalangama.

Plaintiff-Respondent

Before Hon. Shiranee Tilakawardena, J.

Hon. K.Sripavan, J.

Hon. Chandra Ekanayake, J.

Counsel : Chandana Prematilake for the Defendant-Appellant

Lakshman Perera with Upendra Walgampaya for the Plaintiff-Respondent.

Argued on : 06.09.2011 & 30.01.2012

Written Submissions
Filed : By the Plaintiff-Respondent on 03rd May 2012.
By the Defendant-Appellant on 09th May 2012

Decided on : 04.10.2012

Sripavan. J.

This is an appeal from the Judgment of the Commercial High Court dated 20.01.04 awarding a sum of Rs. 1.2 Million in favour of the Plaintiff-Respondent (hereinafter referred to as the "Plaintiff") as damages together with interest at 20% from the date of termination of the agreement marked **'P1'** until the date of decree and thereafter legal interest and costs.

The Plaintiff by plaint dated 26.02.1999 instituted action against the Defendant-Appellant (hereinafter referred to as the "Defendant") claiming a sum of Rs. 3.5 Million as damages on the basis that the Defendant wrongfully and unlawfully terminated the Exclusive Distributor Agreement (hererinafter referred to as the Agreement) marked **'P1'** with effect from 08.12.95 by way of a notice of termination dated 08.11.95 marked **'P2' .** The said notice of termination was issued by the Defendant in terms of clause 6 of the said Agreement which reads as follows:-

> *"This Agreement may be terminated by either party giving one month's written notice in the manner hereinafter provided to the other of its' intention to terminate the Agreement."*

Clause 13 of the Agreement specifies the manner in which a notice is to be given to the other party, as follows:-

> *"Any notice required to be given hereunder shall be deemed sufficient and duly given if addressed and sent by registered post or delivered personally either party hereto at their respective addresses aforesaid."*

The main contention of the Plaintiff was that although Clause 6 of the Agreement requires giving one month's notice in order to terminate the Agreement, the said notice marked **P2** did not give him the required notice as the notice dated 08.11.95 reached the Plaintiff only a couple of days later by registered post, thereby giving him less than one month's notice from 08.12.95. The Plaintiff also contended that **P2** did not set out the reasons for termination. Though, respect for Rule of law requires the observance of minimum standards of openness, fairness and accountability in administration, it must be noted that Clause 06 of the Agreement did not require any reason to be given by either party for the termination of the Agreement with one month's notice to the other. Failure to give reasons therefore will not render the termination wrong or unlawful, though it is desirable to give reasons.

On the other hand, the Defendant contended that the position of the Plaintiff in attacking the notice of termination is of a highly technical nature and in any event would not affect the validity of the said notice, as the Plaintiff had not questioned the validity of such notice nor had spoken of any serious material prejudice caused by the negligible lapse, if any, on the part of the Defendant. Counsel contended that although the Defendant Company acted

under Clause 06 of the Agreement, it had every right to summarily terminate the Agreement under Clause 8 for the contravention of the terms and conditions and the failure to satisfactorily maintain the distribution of the products and for having acted in a manner prejudicial to the interests of the Defendant Company. Thus, Counsel submitted that the termination is still justified under Clause 8 of the Agreement notwithstanding any deficiency if any in the notice of termination.

With regard to the notice, the Court has to decide whether Clause 6 of the Agreement has been complied with and that the said Clause had to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory; in which case disobedience will be treated as an irregularity not affecting the validity of what has been done. The whole scope and purpose of the Agreement must be considered and one must assess the importance of the said Clause which, is claimed to have been disregarded and the general object intended to be secured. Although nullification is the general and usual consequence of disobedience, breach of a Procedural Clause is likely to be treated as a mere irregularity, if the departure from its terms is of a trivial nature or if no substantial prejudice has been suffered by those whose benefit the requirement was introduced. It seems to me that the purpose of giving one month's time to either party of a impending termination of the Agreement is to allow time for both parties to take appropriate steps within the said time to meet that eventuality. If the Plaintiff was not prepared to accept the notice he should have returned it to the Defendant. This had not been done and that shows that the Plaintiff had accepted the notice given under Clause 6 as a valid notice. The Plaintiff in his appeals dated 15.11.95 and 7.12.95 marked **P3**

and **P4** respectively did not take any objection that the notice of termination was wrongful on the basis that he did not have one month's time from the receipt of **P2.**

In any event, in terms of Clause 13 of the said Agreement any notice required to be given shall be deemed sufficient and duly given if addressed and sent by registered post... "to either party hereto at their respective addresses...." It is not disputed that the termination notice dated 8th November 1995 **(P2)** was sent to the address of the Plaintiff by registered post. Hence , I am of the view that the notice is deemed to have been duly given to the Plaintiff in compliance with Clause 13. In fact, the Plaintiff by letter dated 15th November 1995 **(P3)** addressed to the Managing Director of the Defendant Company state thus:-

> *"Your letter bearing Reference S. 154/Mktg. Div. Dated 8th Nov. 1995 sent to me informing me of your decision to terminate my Distribution Agreement with effect from 8th December, came as a shock and surprise to me, ..."*

Learned Counsel for the Plaintiff strenuously contended that document **P2** did not refer to Clause 5(i) which could be the only ground on which termination could occur under Clause 6 of the Agreement. I am unable to agree with this submission. Clause 5(i) of the Agreement is reproduced below for easy reference and convenience.

> *"That the distributorship <u>shall</u> be terminated by the Company <u>forthwith</u> in the event of any dispute which may affect the smooth running of the distributorship or business of the Company."*

(emphasis added)

There is much significance in the use of the word "forthwith" in Clause 5(i). The Black's Law English Dictionary (Eighth Edition) defines "forthwith" as "immediately; without delay".

In *Re D.S.E.F.R. Senanayake* 75 N.L.R. 215, the Supreme Court held that where an application for ejectment in respect of any Government quarters is made ex-parte, in a regular and proper form under the Government Quarters (Recovery of Possession) Act, the Magistrate has, in the first instance, no option but to issue writ of possession forthwith, instead of serving notice on the party against whom the application for a writ is made, in view of the provisions contained in Section 7 of the said Act which reads that "*the Magistrate shall forthwith issue, and if .....re-issue a writ of possession...*" (emphasis added) . Thus, under Clause 5(i), the distributorship termination shall take effect immediately.

The significant difference between Clause 5(i) and Clause 6 is that in Clause 5(i) the termination is couched in mandatory terms and takes effect immediately, whereas in Clause 6 the termination is discretionary and takes effect at a future date upon giving one month's written notice.

I therefore hold Clause 6 is a standalone Clause and termination under Clause 6 is independent of the termination under Clause 5(i).

Chandak in "Law of Notices" , 3rd Edition 1978, page 7, cites the case of *Union of India* vs. *Komal Chand (*1966, , M.P.L.J. Notes, page 150) where a Counsel by mistake sent the office copy of the notice, which was not signed,

and retained the original signed copy in his own record, it was held that the notice was not defective, it was only a case of mistake or inadvertence. This Indian case was followed in *Mrs. I.R. Jayasena* vs. *B. Udenis* (1986) C.A.L.R. 665 and the Court observed that an unsigned notice terminating a lease was not invalid as long as it was clear from the notice who the sender was.

I therefore hold that the High Court has misdirected itself when it took the view that the notice marked **P2** was not a valid notice of termination under Clause 6 of the Agreement.

The next matter to be considered is that having validly terminated the Agreement in terms of Clause 6 is the Defendant Company entitled to pay any damages to the Plaintiff distributor. The Court has to give its mind to the intention of the parties when the Agreement marked **P1** was signed by both parties.

Clause 10 of the said Agreement reads thus:-

> *"In the event of this Agreement being terminated by the Company in terms of Clause 6 or 8, the Company shall not be liable to pay any sum of money by way of damages, compensation or otherwise to the Distributor or to his retailers or stockists in respect of loss of business or goodwill or for any other reason whatsoever "*

Even the Plaintiff has admitted this fact at pages 22-23 of the proceedings of 11.02.2000. The task of the Court is to extract the intention of the parties

both from the terms of their correspondence and from the circumstances which surround and follow it. Thus, it would appear that whenever there is evidence that the parties have acted upon the faith of a written document, the Court prefers to assume that the document embodies a definite intention to be bound and will strive to implement its terms. The language used in Clause 10 interpreted in the light of the dealing between the parties showed a sufficient intention to be bound by the said Clause. It is therefore obvious that that in terms of Clause 10 the Plaintiff is not entitled to any damages from the Defendant Company.

For the reasons stated above the appeal is allowed and the judgment of the Commercial High Court dated 20.01.04 is set aside. The action of the Plaintiff is accordingly dismissed. I do not propose to make any order for costs considering the facts and circumstances of this case.

Judge of the Supreme Court

Shiranee Tilakawardene, J

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J

I agree.

..Judge of the Supreme Court