

**IN THE SUPRME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application for Leave to Appeal under and in terms of Article 128 (4) of the Constitution against an Order of the High Court of the Western Province Sitting in Colombo in the exercise of its Civil Jurisdiction in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No: 10 of 1996 as amended from the Order dated 14.05.2013.

SC Appeal 80/2015
SC/HC/LA Application
No: 31/2013
HC (Civil) Case No: 220/2011/MR

1. People's Merchant PLC,
Formerly known as
People's Merchant Bank PLC,
No:21, Nawam Mawatha,
Colombo 02.
Formerly at
Level 2, Hemas Building,
Braybrooke Place, Colombo 02.

2. PMB Financial Services
(Private) Limited,
Formerly known as
PMB Credit Card Company
Limited,
No: 21, Nawam Mawatha,
Colombo 02.
Formerly at
Level 2, Hemas Building,
Braybroke Place, Colombo 01.

Plaintiffs

Vs

1. ABC Credit Card Company
Limited,
No: 117, Hunupitiya Lake
Road, Colombo 02.

2. Navigation Maritime
Colombo (Private) Limited,
14th Floor, East Tower,
World Trade Centre,
Echelon Square, Colombo 01.
**(Presently No: 117, Hunupitiya
Lake Road, Colombo 02.)**

3. Tholkamudiyanselage John
Shiran Indranath
Dissanayake,
No: 21, Simon
Hewavitharana Road,
Colombo 03.

Defendants

AND NOW BETWEEN

ABC Credit Card Company
Limited,
No: 117, Hunupitiya Lake
Road, Colombo 02.

1st Defendant – Appellant

Vs.

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Formerly known as
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Plaintiffs-Respondents

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14th Floor, East Tower,
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**(Presently No: 117, Hunupitiya
Lake Road, Colombo 02.)**

2nd Defendant- Respondent

4.Tholkamudiyanselage John
Shiran Indranath
Dissanayake,
No: 21, Simon
Hewavitharana Road,
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3rd Defendant- Respondent

AND

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1st Defendant – Appellant

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(Presently No: 117, Hunupitiya Lake Road, Colombo 02.)

3. Tholkamudiyanselage John Shiran Indranath
Dissanayake,
No: 21, Simon
Hewavitharana Road,
Colombo 03.

Defendants

AND NOW BETWEEN

Tholkamudiyanselage John
Shiran Indranath
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No: 21, Simon
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3rd Defendant – Appellant

Vs

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(Presently No: 117, Hunupitiya,
Lake Road, Colombo 02.)

Defendants- Respondents

Before: Priyantha Jayawardena PC, J
Achala Wengappuli, J
K. P. Fernando, J

Counsel: S. A. Parathalingam PC with Nishkan Parathalingam and Ms. Upeka Sooriyapatabadige for the 1st Defendant-Appellant and the 2nd Defendant-Respondent in SC/Appeal/80/2015, for the 2nd Defendant-Appellant and the 1st Defendant-Respondent in SC/Appeal/81/2015 and for the 1st and 2nd Defendants-Respondents in SC/Appeal/82/2015

Nihal Fernando PC with Harshula Seneviratne for the 3rd Defendant-Respondent in SC/Appeal/80/2015 and SC/Appeal/81/2015 and for the 3rd Defendant-Appellant in SC/Appeal/82/2015

Manoj Bandara with Nayomi Chethana for the Plaintiff-Respondent for SC/Appeal/80/2015, SC/Appeal/81/2015 and SC/Appeal/82/2015

Argued on: 3rd May, 2023

Decided on: 9th August, 2023

Priyantha Jayawardena PC, J

Facts of the case

This is an appeal filed in respect of an Order made by the High Court of the Western Province (hereinafter referred to as the “Commercial High Court”) overruling an objection to the jurisdiction of the said court on the basis that the alleged cause of action pleaded in the Plaintiff arose from a delict and also arose prior to entering into the commercial transaction. Therefore, the said court does not have jurisdiction to hear and determine the action.

Plaintiff’s case

The plaintiffs-respondents in SC/Appeal No. 80/2015 (hereinafter referred to as the “plaintiffs”) filed action in the Commercial High Court and pleaded that the 1st defendant-appellant in SC/Appeal No. 80/2015 (hereinafter referred to as the “1st defendant company”) was facing financial difficulties due to the collapse of the Golden Key Credit Card Company, and the depositors of the said company were demanding the return of their deposits. At that stage, the 1st defendant company had made a proposal to the 1st plaintiff company to take over its assets and liabilities.

Further, pursuant to the negotiations between the plaintiffs and the defendants, they had entered into an agreement bearing No. 1717 dated 6th of March, 2009 for the plaintiffs to purchase the shares of the 1st defendant company in order to take over the assets and liabilities of the 1st defendant company. A copy of the said agreement was produced annexed to the Plaintiff marked as “A1”.

In the Plaintiff, the plaintiffs further stated that the plaintiffs purchased the said company based on the representations made by the defendants and the warranties given by them in Clause 4 (iii) of the said agreement marked “A1”. Further, it was pleaded that the defendants made representations and gave warranties in respect of the corporate status, records and related entries, financial statements of PMB Credit Card Company (2nd plaintiff company), details of the depositors and liabilities.

Furthermore, the Annexures ‘C(II)’ and ‘C(III)’ annexed to the said agreement (“A1”) were the only Financial Statements provided to the 2nd plaintiff by the 1st defendant, and the plaintiffs had relied on the said Financial Statements in purchasing the 1st defendant company, particularly on the credit card receivables of the 1st defendant company, in arriving at the valuation of the assets and liabilities of the said defendant company.

The plaintiffs further stated that they bought the 1st respondent company based on the warranties and representations stated in the said agreement (“A1”). However, the said agreement contained incorrect information, and as a result of that, they suffered a loss and damages of Rs. 206,036,188/- due to the breach of warranty and misrepresentation contained in Clause 4(iii) of the said agreement in respect of the credit card receivables of the 1st defendant company.

Moreover, the plaintiffs alleged that they would not have entered into the said agreement to take over the assets and liabilities of the 1st defendant company if not for the credit card receivables shown in Annexures ‘C(II)’ and ‘C(III)’ to the said agreement.

The plaintiffs further stated that the defendants had neglected and/or refused to pay the said loss and damages amounting to Rs. 206,036,188/- despite the several demands that were made to them. In the circumstances, the plaintiffs stated that a cause of action has accrued to them to sue the defendants jointly and severally for a sum of Rs. 206,036,188/-.

Trial of Issues

The defendants filed three separate answers. Thereafter, the trial commenced by marking the admissions and the 1st defendant, *inter alia*, admitted the jurisdiction of the Commercial High Court. (During the hearing of this appeal, it was submitted that there was a patent lack of jurisdiction and therefore, the said admission has no effect). However, the 2nd and 3rd defendants denied the jurisdiction of the Commercial High Court on the basis that the alleged cause of action pleaded in the plaint did not arise from a commercial transaction but from a delict. Further, the alleged cause of action arose prior to entering the commercial transaction.

Further, the defendants admitted that the agreement dated 6th of March, 2009 produced along with the Plaintiff marked as “A1” and its annexures marked as ‘C(II)’ and ‘C(III)’.

Thereafter, several issues were raised by the parties. Once the issues were framed, all the parties had agreed to try the following issues as preliminary issues of law in terms of section 147 of the Civil Procedure Code and filed written submissions;

“(16) (a) *Has the Plaintiffs not set out a cause of action against the 2nd Defendants?*

 (b) *If so, has the 2nd Defendant been improperly joined as a Defendant and entitled to be discharged from these proceedings?*

(20) *As set out in paragraph 1 of the Answer of the 3rd Defendant;*

 (a) *Does the Plaintiff ex-facie not disclose a cause of action against the 3rd Defendant?*

 (b) *Has the 3rd Defendant been wrongly joined as a Party to this case?*

 (c) *Should the 3rd Defendant be discharged from this Case in limine?*

(26) *Does this Court not have jurisdiction under the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 to hear and determined this action against the 2nd and 3rd Defendant?*

(27) *If so, should the Plaintiff's action be dismissed in limine?”*

After the parties filed their written submissions, the Commercial High Court delivered the Order dated 11th of May, 2013 and held that a cause of action had arisen out of a commercial transaction pleaded in the Plaintiff. Hence, the objection to the jurisdiction of the court was overruled. It was

further held that issues Nos. 16 and 20 would be answered at the end of the trial, as it is necessary to hear the evidence to answer those issues.

Being aggrieved by the Order of the Commercial High Court, the 1st defendant in the said case sought leave to appeal from this court and this court granted leave to appeal on the following questions of law:

- “(i) Has the said Order dated 14th May, 2013 marked and annexed as ‘X14’ failed to properly understand the ambit and/or scope and/or limitations of the relevant provisions in the High Court of the Provinces (Special Provisions) Act No. 10 of 1996?
- (ii) Has the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ failed to properly construe the cause of action as averred and/or maintained by the 1st and 2nd respondents?
- (iii) Has the said Order dated 11th May, 2013 marked and annexed hereto as ‘X14’ failed to properly construe the cause of action as pleaded by the 1st and 2nd respondents and thus wrongly conclude that the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) did have jurisdiction to hear and determine the 1st and 2nd Respondents Case?
- (iv) Has the Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ failed to consider whether the cause of action as pleaded by in the plaint arose out of a commercial transaction within the meaning, scope and ambit of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996?
- (v) Is the cause of action as pleaded and/or preferred in the plaint, a cause of action founded on the premise of a misrepresentation prior to entering into any commercial transaction, and if so, has the High Court of the Western Province (exercising Civil Jurisdiction and holden at Colombo) wrongly come to the finding that it has jurisdiction to try and determine the same?
- (vi) Does the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 confer jurisdiction on the High Court of the Western Province (Exercising Civil Jurisdiction) to try and/or determine matters arising out of an alleged misrepresentation which took place prior to any commercial transaction?

- (vii) Has the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ erred in its findings by virtue of misrepresenting the case of the 1st and 2nd respondents and failing to give due consideration to the wording and/or scope and/or meaning of the relevant provisions and/or stipulations of the High Court of the Provinces (Special Provision) Act No. 10 of 1996?
- (viii) Has the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ erred in its findings because of *inter alia* failing to fully understand and/or comprehend the case of the 1st and 2nd Respondents?
- (ix) Has the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ wrongly come to the finding that the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) does have jurisdiction to try and determine the 1st and 2nd Respondent’s case, and then contradictorily answer issue No. 26 in the affirmative?
- (x) Has the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ failed to properly and/or appropriately evaluate the submissions made by the Petitioner?
- (xi) Is the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ flawed in its reasoning and/or logic?
- (xii) Is the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ wrong and/or contrary to law?
- (xiii) Is the said Order dated 14th May, 2013 marked and annexed hereto as ‘X14’ misconceived?”

At the hearing of the instant appeal, the court informed the parties that it would consider the question of law in respect of the jurisdiction of the Commercial High Court to hear the case, and all the parties agreed that it was the core issue in the instant appeal. Further, they agreed to have one judgment in respect of all three appeals.

Submissions of the 1st and 2nd defendants in SC/Appeal/80/2015

The learned President's Counsel for the 1st and 2nd defendants submitted that the cause of action as set out in the Plaintiff is based on an alleged misrepresentation and the incorrect warranty made by the defendants to the plaintiffs.

Further, the cause of action pleaded in the Plaintiff has not arisen out of a commercial transaction. Moreover, according to the averments in the Plaintiff, the alleged cause of action of the plaintiffs had arisen due to misrepresentation made by the 1st and/or 2nd and/or 3rd defendants, which induced the plaintiffs to enter into the said agreement marked and produced as "A1" annexed to the Plaintiff. Thus, the alleged cause of action is a delict, and therefore, the Commercial High Court does not have jurisdiction to hear the case.

It was further contended that the alleged misrepresentation had arisen prior to entering into the said agreement marked "A1". Hence, the cause of action as pleaded in the Plaintiff had arisen prior to entering the said agreement.

Therefore, it was submitted that the Commercial High Court lacks jurisdiction to hear and determine the plaintiff's case.

Submissions of the 3rd defendant in SC/Appeal No. 80/2015

The learned President's Counsel for the 3rd defendant submitted that, according to the averments of the Plaintiff, it is evident that the plaintiffs' purported claim is based on an alleged misrepresentation and the incorrect warranty given to the plaintiffs. Thus, the purported cause of action pleaded by the plaintiffs did not arise from a commercial transaction and therefore, it did not fall within the scope of the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996. Therefore, the Commercial High Court does not have the jurisdiction to hear and determine the said action as it did not arise from a 'commercial transaction'.

Submissions of the plaintiffs in SC/Appeal No. 80/2015

The learned counsel for the plaintiffs submitted that the averments in the Plaintiff are in respect of a breach of a misrepresentation and a warranty contained in the Agreement No. 1717 produced and marked as “A1” and not prior to entering into the said agreement.

It was further submitted that the case of the plaintiffs is in respect of a breach of agreement arising from a commercial transaction, and the defendants admitted entering into the said agreement (“A1”). Further, the 1st defendant admitted that the said agreement was a commercial transaction by admitting the jurisdiction of the court at the time of making admissions at the trial.

It was further contended that, in any event, the misrepresentation led to the entering into the commercial transaction, and therefore, the Commercial High Court is vested with the jurisdiction to hear and determine the action. Hence, in the foregoing circumstances, the order of the Commercial High Court answering the said issues Nos. 16 and 20 in favour of the plaintiffs is correct, and the Commercial High Court has jurisdiction to hear and determine the action filed by the plaintiffs.

Has the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) erred in law by holding that it had jurisdiction to hear and determine the action filed by the respondent

The Commercial High Court held that the cause of action pleaded in the Plaintiff had arisen out of a commercial transaction, and thus, the court did have jurisdiction to hear the action filed by the plaintiff.

However, the defendants submitted that the cause of action pleaded in the plaintiff is based on an alleged misrepresentation and the breach of warranty given prior to entering into the commercial transaction under reference. Further, misrepresentation is a delict and therefore, it does not fall within the definition of a commercial transaction. Thus, the alleged cause of action pleaded in the Plaintiff did not fall within the First Schedule to the High Court of the Provinces Act, and therefore, the said court does not have jurisdiction to hear and determine the case. Thus, it is necessary to consider the following in the instant appeal:

Whether the alleged cause of action arose;

- (1) prior to entering into the agreement contract sought to be enforced,
- (2) as a result of misrepresentation and warranties given by the defendant, which is a *delict*, and
- (3) from a commercial transaction.

Jurisdiction of the Commercial High Court

A High Court was established under the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 (hereinafter referred to as the “High Court of the Provinces Act”) to hear and determine all actions, *inter alia*, where a cause of action has arisen out of a commercial transaction.

Section 2(1) of High Court of the Provinces Act states:

“Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act, if the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No. 17 of 1982 the registered office of the Company is situated, within the province for which such High Court is established.

[emphasis added]

The First Schedule to the said Act as amended by Gazette No. 943/12 dated 1st of October, 1996 states as follows:

1) All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export and import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding three million rupees or such other

amount as may be fixed by the Minister from time to time, by Notification published in the Gazette, other than actions instituted under the Debt Recovery (Special Provisions), No. 2 of 1990.

- 2) *All applications and proceedings under the Companies Act, No. 07 of 2007.*
- 3) *All proceedings required to be taken under the Intellectual Property Act, No. 36 of 2003 in the High Court established under Article 154P of the Constitution.*

[emphasis added]

At present, the threshold to hear and determine matters in the Commercial High Court was increased to Rs. 50 Million by Gazette No. 2312/26 dated 28th of December, 2022.

Cause of action pleaded in the plaint

In the Plaintiff, the plaintiffs plead that they entered into an agreement produced marked as “A1” with the defendants to take over the assets and liabilities of the 1st defendant company. However, due to the alleged breach of a misrepresentation and the warranty contained in Clause 4(iii) of the said agreement produced with the Plaintiff marked as “A1”, the plaintiffs had suffered damages of Rs. 206,036,188/-.

Clause 4 (iii) of the said agreement states;

“The Company had provided and/or will provide to PMB Credit Card true correct and complete copies of the Accounts of the Company (“Financial Statements”) and that such Financial Statements are in accordance with generally accepted accounting principles.”

In this regard, the learned President’s Counsel brought the attention of this court to paragraph 14 of the plaint, which stated;

“The Plaintiffs reiterate that the Plaintiffs would not have entered into the aforesaid Agreement to take over the liabilities of the 1st Defendant up to a maximum of Rs. 785 Million if not for the credit card receivables of the 1st Defendant reflected in Annexures C(II) and C(III) to the Agreement bearing No. 1717 represented to the

Plaintiffs as true and correct Financial Statements of the 1st Defendant prepared in accordance with generally accepted accounting standards.”

In the circumstances, the plaintiffs stated that they instituted action in the Commercial High Court against the defendants, claiming damages jointly and severally for the misrepresentation and breach of warranty that resulted in them purchasing shares of the said company.

It is pertinent to note that the misrepresentation and the incorrect warranty referred to in the Plaintiff were matters that took place during negotiations. Further, such matters had led to entering into the commercial transaction under consideration. Hence, it needs to be considered whether the cause of action pleaded in the Plaintiff relates to a misrepresentation and giving an incorrect warranty prior to entertaining the said commercial transaction, and therefore, the Commercial High Court has no jurisdiction to hear and determine the case.

In the instant appeal, the plaintiffs stated that they entered into the said commercial transaction on the premise that the defendants had provided them with accurate and complete copies of the 1st defendant's financial statements; records and related entries, corporate status, and the details of the depositors, credit card receivables, and liabilities. However, the defendants failed to disclose the true figures of the assets and liabilities of the 1st defendant company including the receivables from the credit cards issued by the said company.

Finality Clause

It is pertinent to note that there is a finality clause in the agreement marked as 'P1. Clause 14 of the said Agreement states;

“This Agreement, including the Schedules and Annexures hereto, sets forth the entire agreement between the Parties on this subject and supersedes all prior negotiations, understandings and agreements between the Parties concerning the subject matter.”

[emphasis added]

Thus, the finality clause mentioned above excludes negotiations, understandings, and agreements between the parties prior to entering the said agreement. However, the said Clause states that the Schedules and Annexures to the agreement consist of the entire agreement. Hence, anything

relating to or arising from the said Schedules or Annexures should be considered part and parcel of the agreement produced with the Plaintiff marked as “A1”.

A careful consideration of the plaint shows that the plaintiffs had instituted the action against the defendants, claiming damages jointly and severally on the basis of misrepresentation and breach of warranty referred to in Clause 4 (iii) of the said agreement and Annexures C(II) and C(III) to it. Thus, I am of the view that the alleged misrepresentation and breach of warranty referred to in the plaint are false within the scope of the said agreement filed along with the Plaintiff marked as “A1”, as the annexures to the agreement are integral parts of the said agreement.

Whether the misrepresentation pleaded by the plaintiff amounts to a delict

Section 3 of the Introduction of Laws of English specifies the instances where English Law is applicable. In this context, it is pertinent to note that after the Dutch invasion of the coastal areas of Sri Lanka, the contracts and agreements were governed by Roman Dutch Law. However, after Sri Lanka became a colony of the British, our law of contract was superseded by English Law. Hence, at present, contracts and agreements are governed by the Roman Dutch Law supported by English Law.

Further, in ‘*The Law of Contracts*’ by C G Weeramanthry, Volume 1(reprinted in 1999) at pages 78 to 80 states;

“Having reduced our sphere of inquiry to obligations recognised by the law, we must note that the term ‘obligation’ embraces not merely contractual but delictual or tortious obligations as well. It consequently becomes essential to distinguish obligations arising from contract from obligations arising from delict.

A contractual obligation differs in nature from a delictual obligation in at least three respects.

Firstly, contractual obligations arise from agreement between parties. In order to succeed, the plaintiff must depend on agreed terms, whereas in a delictual action the plaintiff does not and cannot spring from mere agreement between the parties.

Secondly, duties arising from contract are owed to the parties to the contract (or their assignees), whereas delictual obligations are owed to a large and

indeterminate class of person. The actual breach may however be by a specified individual, and enforcement of the duty therefore takes place against specified individual.

Thirdly, a delictual obligation imposes negative duties, that is to say, duties of forbearance, while a contractual obligation may impose positive or negative duties, this requiring either acts or forbearances.

A circumstance which tends to blur these distinctions between contract and delict is the fact that the very same situation may give rise to both contractual and delictual obligations. Thus where a common carrier causes damage by his negligence to goods entrusted to him, he would be liable in contract and alternatively in delict. A fraudulent misrepresentation in regard to the quality of goods may found an action in damages for breach of contract or an action in delict based on deceit.

The distinction between the two types of claim leads to the application of different principles and to the production of different results depending on whether the action is framed in contract or in tort. Thus the law of contract is concerned only with actual damages, whereas the law of delict sometimes awards exemplary damages. The law of contract is not concerned with pain of mind. Further, the form of action may have consequences on the question of remoteness of damage, for the tests of remoteness are different in contract and in tort. Most important of all, different criteria would determine the all-important question whether or not a cause of action has arisen."

[emphasis added]

Hence, a careful consideration of the facts and circumstances of the instant appeal shows that the cause of action pleaded in the Plaintiff arose from a misrepresentation and a breach of warranty that are incorporated in the said agreement marked as "A1".

Further, the cause of action pleaded in the Plaintiff has not arisen from a delict. In any event, misrepresentation, fraud, etc. that lead to entering into a commercial transaction cannot be considered as a delict as such matters lead to entering into an agreement or contract in respect of a commercial transaction fall within the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

In this regard, Mark Fernando, J in ***Cornall and Company Limited v Mitsui and Company Limited [2000] 1 SLR 57*** held that cases filed to claims damages arising from a commercial transaction can be heard by the Commercial High Court, i.e.;

*“In the context, that word **only** requires that the action “relates to”, or “is connected with”, or “involves”, a debt, **damage** or demand (exceeding the prescribed amount); and that is consistent with its dictionary meanings.”*

[emphasis added]

Conclusion

In the circumstances, I am of the view that the alleged cause of action pleaded in the Plaintiff comes within the purview of the said High Court of Provinces (Special Provisions) Act No. 10 of 1996 and therefore, the Commercial High Court has the jurisdiction to hear the case under reference.

Has the said Order dated 11th May, 2013 marked and annexed hereto as ‘X14’ failed to properly construe the cause of action as pleaded by the 1st and 2nd respondents and thus wrongly conclude that the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) did have jurisdiction to hear and determine the 1st and 2nd Respondent’s Case?

No

In light of the above, the other questions of law need not be considered.

The appeal is dismissed. I order no costs.

Judge of the Supreme Court

Achala Wengappuli, J

I Agree

Judge of the Supreme Court

K. P. Fernando, J

I Agree

Judge of the Supreme Court