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

In the matter of an Appeal from the judgement of the High Court of the Western Province holden in the Colombo.

Sri Lanka Telecom Ltd,
Lotus Road,
Colombo 01.

Plaintiff

Vs.

Global Electroteks Limited,
Unit C 17, Poplar Business Park,
10, Preston Road London E14 9 RL,
United Kingdom.

Defendant

SC (CHC) Appeal No.05/2011

HC (Civil) No. 207/2003 (1)

AND NOW

Sri Lanka Telecom Ltd,
Lotus Road,
Colombo 01.

Plaintiff - Appellant

Vs.

Global Electroteks Limited,
Unit C 17, Poplar Business Park,
10 Preston Road London E14 9 RL,
United Kingdom.

Defendant – Respondent

Before: **Sisira J. de Abrew J.,**
Murdu N.B.Fernando, PC J. and
S. Thurairaja PC J.

Counsel: Dr. K. Kanag-Isvaran PC with Lakshman Jayekumar instructed by Julius and Creasy for the Plaintiff – Appellant.

Manoj Bandara with Hasitha Gamage instructed by Sudath Perera Associates for the Defendant- Respondent.

Argued on: 08.02.2021

Decided on: 31.05.2021

Murdu N.B. Fernando, PC. J.

This appeal arises from the judgement of the High Court of the Western Province holden in Colombo ("the High Court") dated 03-09-2010.

By the said High Court judgement, the learned judge of the High Court dismissed the action filed therein subject to taxed costs.

Being aggrieved by the said judgement, the Plaintiff-Appellant ("the Plaintiff") came before this Court by Petition of Appeal dated 14-10-2010 and moved inter-alia to set aside the judgement of the High Court and to grant relief as prayed for in the plaint.

The factual matrix of this application *albeit* brief is as follows;

01. The Plaintiff-Appellant, Sri Lanka Telecom entered into a Telecommunication Services Agreement ("the agreement") with the Defendant-Respondent ("the Defendant"), a company based in the United Kingdom dated 29-06-2001. This agreement was executed by the Chief Executive Officer of Sri Lanka Telecom and the Directors of the Defendant company B.A.C Abeywardena and R.S. Jayatilleka and was for providing inter connection services;

02. By the said agreement **"P1"**, the Defendant being the 'customer' of the 'operator' Sri Lanka Telecom the Plaintiff, originates a voice call or data transmission ("traffic /calls") on the licensed system of Sri Lanka Telecom, which culminates or terminates with a customer of another operator, operating another licensed system in another country and *vice versa.* This process of 'interconnection' is achieved by installing a communication link between the systems of the respective operators.

03. In terms of said agreement, the Plaintiff agreed and under took to provide the Defendant traffic/calls and the Defendant agreed and under took to obtain the interconnection services at the below mention rates.

    - <u>For traffic/ calls originating from Sri Lanka.</u>

        - for the 1st 100,000 minutes per month at the rate of US $ 0.30 cents per minute;

        - for the next 100,000 to 500,000 minutes per month at the rate of US $ 0.25cents per minute; and

        - for the next 500,000 to 1,500,000 minutes per month at the rate of US $ 0.20 cents per minute.

        - The above rates were subject to the Defendant bringing a minimum volume of 1,500,000 minutes traffic/calls per month. (If the Defendant fails to bring such traffic, the defendant is liable to pay for the full committed fee for the traffic/calls.)

    - <u>For traffic/calls originating from the United Kingdom.</u>

        - US $ 0.20 cents per minute for any volume of traffic/calls and there was no committed volume of traffic.

04. The agreement was valid for a period of one year. The industry norm was each party invoice the other and the party that owes the greater amount set-off the sum owed to itself and make good the balance owed to the other party.

05. In the instant case, there was an imbalance of two-way traffic between Sri Lanka and the United Kingdom. Traffic originating from United Kingdom was greater and the Defendant had to make payment to the Plaintiff, Sri Lanka Telecom. The payments were based on the monthly invoices, monthly incoming telephone statements, monthly outgoing telephone statements and monthly net settlement statements issued by the Plaintiff.

06. Although the agreement was for a period of one year, even after the validity of the agreement ended on 29-06-2002, the parties continued with the aforesaid process and business relationship. The Plaintiff billed the Defendant as per the rates given in the agreement and the Defendant made the payments, intermittently, without any protest or objection to the invoices tendered. The outstanding sum was always reflected in the net settlement statements issued by the Plaintiff.

07. This process continued until December 2002, at which point the Defendant requested for a variation of the rates by a letter dated 24-12-2002.

08. Thereafter, on 07-01-2003, the Plaintiff suspended the inter-connection services and on 14-02-2003 terminated the said services.

09. On 06-08-2003, the Plaintiff, Sri Lanka Telecom filed action in the High Court for recovery of the sum of US $ 4,623,168.88 or its equivalent in Sri Lankan Rupees for the services provided by the Plaintiff to the Defendant.

10. The Defendant in its answer denied the said charges but took up the position that fresh rates were negotiated between the parties and payments were made by the Defendant to the Plaintiff at the rate of US $ 0 .10 cents per minute.

11. At the trial, the Plaintiff led the evidence of three witnesses. The 3rd witness was the Chief Executive Officer of Sri Lankan Telecom, a Japanese national whose cross-examination could not be concluded as he was no longer available in Sri Lanka.

12. The Plaintiff closed its case at that point, marking in evidence a number of documents. The Defendant did not lead any evidence but in cross examination of

the Plaintiff's witnesses, marked three documents. Both parties tendered written submissions.

13. Thereafter judgement was entered dismissing the plaint filed by the Plaintiff. The judgement was delivered not by the judge who heard the evidence but by the learned judge who succeeded the said judge.

Having referred to the background of this case, I would now move on to examine the judgement delivered by the learned High Court Judge.

Firstly,

The case presented by the Plaintiff before the High Court was that although the agreement entered into between the two parties was for a period of one year with provision to extend, it was not extended as stipulated therein and that impliedly the terms and conditions of the said agreement were abided by and complied with by the parties, until the agreement was suspended and thereafter terminated.

The case presented by the defendant was that consequent to the ending of the validity period of the agreement on 30.06.2002, fresh rates were negotiated and the parties transacted without a written contract but on an oral contract and the said contract survived, until it was suspended by the Plaintiff in January 2003.

Secondly,

With regard to the jurisdiction of the High Court to hear and determine this application, the case of the Plaintiff was that the Court had jurisdiction to hear and determine this matter since the parties continued with the business relationship based upon the agreement **P1**, which expressly provided for such jurisdiction.

The case for the Defendant, on the other hand was that the Court had no jurisdiction to entertain this action, as the agreement had no force after the due date and also that the Defendant being a company based in the United Kingdom cannot be sued in Colombo.

The learned High Court Judge, after referring to the key aspects of the instant case and the admissions recorded, indicated (vide page 14 of the judgement), that the issue of jurisdiction depends on the validity of the terms and conditions of the agreement **P1** and therefore the pivotal issue is the agreement **P1** and proceeded to examine the terms and

conditions of **P1** agreement. The learned judge thereafter came to the finding that the agreement **P1** was not extended in accordance with the terms and conditions of the agreement **P1**.

Thereafter, the learned judge, went on to examine whether there was *Consensus ad Idem* between the parties to continue with the terms and conditions of the agreement and having referred to the answer of the Defendant and the evidence led pertaining to the continuation of business relationship even after 30-06-2002, held (vide page 22 of the judgement) that it can be reasonably presumed that there was an agreement between the parties, even after 30-06-2002.

Then, the learned judge examined a number of invoices issued and dispatched by the Plaintiff to the Defendant using the same rates agreed and stipulated in the agreement **P1.**The learned judge also examined the monthly incoming and outgoing telephone statements, the relevant documents of proof of dispatch of invoices and statements and also a number of telegraphic transfers made by the Defendant to Plaintiffs' NRFC account at Bank of Ceylon, Colombo being payments made subsequent to 30-06-2002 i.e. after the one year validity period of the agreement **P1** ended. He also refers to the fact that there was no evidence whatsoever to establish and show that the Defendant objected to, in any manner, to any of the invoices or statements sent after 30-06-2002 and at page 24 of the judgement holds as follows: -

> *"If there is no other evidence and as there was no objection to the rates used in invoicing, this Court could have come to the conclusion that, by conduct parties agreed to continue with and abide by the rates agreed in P1 and the payments made were part payments."*

If I may pause at this moment and re-coup the learned judge's analysis, he refers to the fact that agreement **P1** was not extended as per the stipulated format, nevertheless by consent the business relationship continued and that there was *Consensus ad Idem* to continue with the rates referred to in the agreement **P1**.

Having said that, the learned judge in my view approbates and reprobates. He goes from one factor to another.

He refers to a piece of evidence elicited in the cross-examination of the Plaintiff's witness and comes to the final conclusion that the rate of payment was US $ 0.10 cents per minute and that is the rate at which the Defendant made the payment and there is no acceptable

evidence to show that the Plaintiff objected to the payments made by the Defendant based upon the said rate of US $ 0.10 cents per minute, at any given point of time.

The learned judge does not analyze how the US $ 0.10 cents per minute came into effect or from which date it came into being or who initiated it or as to whether it was a negotiated and accepted rate between the parties. He goes on the basis it is the new rate agreed by the parties. The Defendant not leading evidence or not presenting its case under oath appears not to be a material factor or a significant factor. In my view, these are factors that a judge ought to consider, scrutinize, weigh and thereafter on a balance of probability come to a finding. The judgement should clearly show the thought process and analysis of the judge.

The learned judge thereafter, reproduces portions from the plaint and answer and relies upon the evidence of Mr. Anan the CEO of Sri Lanka Telecom, whose evidence, the learned judge disregarded in toto at the beginning of the judgement and also refers to bits and pieces of evidence and finally comes to the conclusion, that by conduct of the parties it can be presumed that there was consensus between the parties and thus agreement to provide inter-connection services continued even after the agreement **P1** ended.

Nevertheless, the learned judge, thereafter adverts to the fact that the Plaintiff has failed to prove that the rates payable were the same as in the agreement **P1**. He goes onto state that the Plaintiff has founded his cause of action on the agreement **P1** and that the Plaintiff's Chief Executive Officer has failed to establish by his letter **P12**, that there was *Consensus ad Idem,* at the 'beginning of the dispute' and therefore the Plaintiff is 'disentitled' to the claims in the plaint. (vide pages 24 to 29 of the judgement)

The learned Judge thereafter proceeds to answer the issues in favour of the Defendant and specifically answers issues 34 and 35 (raised by the defendant) as follows: -

34. As pleaded in the paragraph 10 of the answer after the expiration of the agreement marked P1,

(a) Did the Plaintiff agree for the rate of US $ .10 cents per minute, if the traffic for a consecutive three months exceed 5,000,000 minutes per month?

Answer – not proved

(b) Did the Defendant achieve the target of 5,000,000 minutes for the months of August, September, and October 2002?

Answer - does not arise

(c) Had the Defendant made payments to the Plaintiff on the basis of US $ .10 cents per minute?

Answer – Yes, after 30-06-2002

35. As pleaded in paragraph 11 of the answer did the Defendant request the Plaintiff to prepare a new written agreement incorporating the understanding reached after 30th June 2002 as there was no written agreement?

Answer – Yes, according to P10

Before proceeding further, I wish to emphasize that this appeal is a direct appeal and that there are no specific questions of law on which leave was granted. Therefore, I intend to examine the judgement in its entirety to ascertain whether the evidence supports the findings made by the learned judge.

The Plaintiff, Sri Lanka Telecom is an exclusive international gateway through which international connection services can be brought to Sri Lanka. The Defendant Company is duly licensed in the United Kingdom to provide telecommunication services, including international connection services, through authorized carriers and can bring calls originated in the United Kingdom to Sri Lanka through Sri Lanka Telecom, the Plaintiff in the instant case. There is no dispute between the parties, that for such purpose and process the Telecommunication Service Agreement **P1** was executed between the parties, whereby the Defendant committed to bring a minimum volume of 1,500,000 minutes traffic per month at the rate of US $ 0 .30 cents for the first 100,000 minutes, US $ 0 .25 cents for the next 100,000 to 500,000 minutes and US $ 0 .20 cents for the balance 500, 00 to 1,500,000 minutes to Sri Lanka from the United Kingdom.

Similarly, Sri Lanka Telecom agreed to pay the Defendant at the rate of US $ 0.20 cents per minute for any volume of traffic, without a committed volume originating from Sri Lanka to the United Kingdom.

This process continued from 29-06-2001 to 30-06-2002 in accordance with the terms of the agreement **P1**. Clause 2.3 for the agreement referred to the period of agreement to be one year and Clause 2.4 referred to the mode and manner in which the agreement could be extended by the parties, specifically with mutual consent and in writing, provided a notice is received 60 days prior to the expiry of the agreement.

There is consensus between the parties that the agreement **P1** was not extended as contemplated under Clause 2.4 referred to above. However, the business relationship continued and the process of incoming and outgoing international calls from Sri Lanka to the United Kingdom continued. Thus, impliedly the agreement continued and the parties were bound to each other to make payments for the incoming and outgoing traffic.

Was it at the same rate or was there a variation in the rate? Or more precisely, what is the rate at which the calls were placed and made subsequent to June 2002?

That is the only question that begs an answer from this Court.

The Plaintiff's position is, it is at the same stipulated rate referred to in the agreement **P1**. In order to buttress its position, the Plaintiff marked in evidence the monthly invoices **[P15(a) to P15(r)]** monthly incoming and outgoing telephone statements [**P17(a) to P17(r)** and **P18(a) to P18(r)]** and monthly net settlement statements **[P16(a) to P16 (q)]** together with supplementary statements **[P18(r) and P18(q)],** courier receipts **[PF(1) to PF(13)],** telegraphic transfers **[P19(a) to P19 (s)]** and Bank Statements pertaining to Plaintiffs NRFC account to establish payments made by the Defendant [**P21(a) to P21(l)].**

The said documents were not objected to by the Defendant at any stage. i.e., at the time of issue or at the time of marking in evidence. These invoices and statements clearly indicated the accounting procedure and the outstanding balance sum that the Defendant had to pay the Plaintiff, reason being the traffic from the United Kingdom to Sri Lanka was far greater than the traffic originating from Sri Lanka together with the fact that the Defendants' payments were always intermittent and never on time.

In fact, the learned judge accepts and acknowledges, that the said documents marked and produced by the Plaintiff, were neither challenged nor objected to by the Defendant. Hence, it is not necessary to examine the accuracy of each and every invoice and statement. Suffice it to state that the Plaintiff's case was the business relationship and the process continued, subject to the stipulated rates in the **P1** agreement. i.e .at US $ 0.30 cents per minute for the first 100,000 minutes, US $ 0.25 cents per minute for the next 100,000 to 500,000 minutes and US $ 0.20 cents per minute for 500,000 to 1,500,000 minutes.

The Defendant on the other hand, in his answer takes up the position that consequent to the expiry of **P1** agreement, parties negotiated and arrived at the rate of US $ 0 .10 cents per minute to be the new rate and that the Defendant therefore, made the payments at US $ 0 .10 cents per minute from July 2002 onwards.

However, the Defendant failed to give evidence before the High Court to substantiate this material factor. In my view, the said failure on the part of the Defendant to give evidence firstly, with regard to the date and manner of negotiations and secondly, the date on which such negotiated rate would come into effect is a crucial factor to be reckoned when, determining this case.

Nevertheless, the learned judge accepted the position of the Defendant and emphatically stated that the Defendant made the payment at US $ 0 .10 cents per minute from July 2002. (vide page 24 of the judgement) and thus disregarded the position taken up by the Plaintiff, that the applicable rate was the rates stipulated in the agreement **P1**.

However, it should be borne in mind that the learned judge, when answering issue No. 34 (a) specifically accepted that the Plaintiff did not agree to the rate of US $ 0 .10 cents and answered the said issue as *has not been proved* and when answering issue 34(b) pertaining to the Defendant achieving the target stated *does not arise*.

Thus, in my view, the learned judge approbates and reprobates. On one hand, the learned judge denies that the Plaintiff accepted the new rate and that achieving the target does not arise and on the other hand, answering issue No.35 states that the new agreement should be based on the letter **P10** which speaks of the Defendant achieving the target in response to the alleged letter **P11** said to be issued under the hand of the Chief Executive Officer of the Sri Lanka Telecom.

Therefore, it would be in the best interest of justice, if the variation of rate of payment is considered in greater detail. These rates are reflected in certain documents and the said documents will now be examined.

Firstly, the agreement **P1**. There isn't an iota of doubt that the agreement **P**1 was not extended. Similarly, it is not in dispute that the parties continued with the business relationship and the process of interconnection of telephone services between the two countries continued until the agreement was suspended by the Plaintiff in January 2003.

According to the documents led before the High Court such suspension took place, by letter dated 07-01-2003 issued under the hand of Mr. Shuhei Anan, Chief Executive Officer of Sri Lanka Telecom. This letter of suspension was marked in evidence as **P12**.

By the aforesaid letter, the writer, Chief Executive Officer of Sri Lanka Telecom refers to another letter written by the Defendant dated 24-12-2002 and categorically denies the contents of the said letter. That letter too, was marked in evidence as **P10**.

It is observed that the dispute between the two parties triggered upon receipt of the said letter **P10** and it is intended to consider the said letter now.

By the said letter, **P10**, B.A.C. Abeywardena, the Managing Director of Global Electroteks Ltd., the Defendant company, requests a new agreement incorporating a certain rate and a period. An excerpt of the letter is as follows: -

> *"We are pleased to inform you that we have achieved the target of sending over five million minutes in three consecutive months…"*
>
> *"Therefore, we shall thank you to prepare a new agreement according to the rates and period mentioned in your letter dated 30-06-2002 and to revise the invoices accordingly" (emphasis added)*

This letter was received by the Plaintiff through one of its officers. The evidence of Mr. Herath, the Plaintiff's 1st witness before the High Court (vide proceedings dated 30-06-2005) was that the aforesaid Defendant's letter **P10** was handed over to him by the Defendant, B.A.C. Abeywardena himself on 24-12-2002 together with *another unsigned letter purported to be of Sri Lanka Telecom, dated 30-06-2002*, marked and produced at the trial, as **P11**.

The witness, even under cross-examination maintained that the said unsigned letter **P11** is a forgery and a fabrication and the Chief Executive Officer of Sri Lanka Telecom did not offer the Defendant any concessions as stated in the said letter **P11**. The learned Presidents Counsel for the Appellant brought to the attention of Court that even the name of the Chief Executive Officer is erroneously typed in the said letter **P11** as well as in the letter **P10**, written by B.A.C. Abeywardena, Managing Director of the Defendant company and thus, adverted strongly, the contents of **P10** were designed to enrich the Defendant and the Defendant alone.

On the other hand, the letter **P11** is the bedrock of the Defendant's case. **P11** is the document, the Defendant relies upon to establish the rate of US $ 0.10 cents per minute to be the new negotiated rate offered by the Plaintiff and **P10** is the Defendant's communique indicating the achievement of the target by him. Thus, the Defendant's contention is that in view of achieving the target referred to in the letter **P11**, payments were made accordingly.

However, upon a careful reading of the afore quoted paragraph in **P10**, the letter the Defendant wrote to the Chief Executive Officer of Sri Lanka Telecom, it is apparent that the ***Defendant sought a revision of invoices and preparation of a new agreement incorporating a new rate and period only on 24-12-2002***. i.e., six months after the duration of the agreement **P1** ended in June 2002.

Thus, it is *sine qua non* that until then, the rates stipulated in the agreement **P1 s**hould apply.

In the said circumstances, in my view, the learned judge misdirected himself in accepting the Defendants version and coming to the conclusion *that the Defendant made the payments at US $ 0 .10 cents per minute from July 2002.* (vide page 24 of the judgement)

Secondly, the documents **P10, P11, P12** referred to above and marked in evidence by the Plaintiff, are in my view the most crucial and material documents with regard to the Defendants version of this case. Hence, this Court would decipher and examine the said documents in depth to understand the case presented by the Defendant which the learned judge accepted to the detriment of the case of the Plaintiff.

The Plaintiff's contention was that issuance of **P12** the letter of suspension was necessitated in view of receipt of **P10** and **P11** on 24-12-2002. The Plaintiff emphasize that **P11** is a forgery and a fabrication and that the new rate and period referred to therein, which the Defendant is relying upon in **P10** to revise and prepare a new agreement was never offered by the Plaintiff to the Defendant.

Hence, let us look at **P11** now. The letter **P11** is on a Plaintiff's letterhead. However, it is unsigned. It carries the name of Shuhei Anan, the Chief Executive Officer. The name is erroneously spelt. The letter is ***offering an extension of the agreement P1 for a period of three-years* a**t ***the rate of US $ 0 .10 cents per minute,*** if the Defendant would bring traffic to the tune of 5,000,000 minutes per month consecutively for three months before December 2002. If not, the letter states Sri Lanka Telecom may be compelled not to extend the contract with B.A.C. Abeywardena, Managing Director of Global Electroteks Ltd. beyond December 2002.

Even if the letter **P11** is not a genuine document as alleged by the Plaintiffs' witnesses, it is the corner stone of the Defendant's case. However, in my view the letter **P11** will not assist the Defendant. It is to the detriment of the Defendant and it is fatal for the defendant's case. It emphatically accepts that the agreement **P1** is still in existence. In such a background, the learned judge's assumption that the Defendant paid for the traffic at US $ 0 .10 cents per minute from July 2002 is beyond comprehension. It is not based on any legal principles, industry norms or commercial practices. It is neither a reasonable assertion or a logical conclusion. In my view, the learned judge has based his findings on unsubstantiated material.

In any event, according to the Defendant himself, the target was achieved by bringing the required traffic only at the end of October 2002, the three consecutive months being August, September and October 2002. Then, how could the Defendant make payment from

July 2002, at US $ 0.10 cents per minute prior to the ending of the said three-month period? what is the rational or justification for the Defendant to start making payments on a fresh rate? Hence, I am of the view that the learned judge's assumption with regard to the new rate is erroneous and without merit. Therefore, on the said fact alone, the impugned judgement cannot stand and should be reviewed by this Court.

As observed earlier in this judgement, the learned High Court Judge correctly held that the agreement **P1** was not extended, that the Plaintiff periodically invoiced and informed the Defendant the outstanding sum, the Defendant did not object or challenge such sum and hence, accepted the veracity of the sum stated. However, thereafter the learned judge completely changed his stand and accepted the Defendants version that fresh rates were negotiated and that the Defendant paid the Plaintiff according to the new rates negotiated between the parties.

Similarly, it is observed that the learned judge relied on the evidence of Mr. Shuhei Anan, the Chief Executive Officer, to dismiss the case of the Plaintiff. It is a matter of concern that the evidence of the said witness was rejected by the learned judge upon the basis it was incomplete and not subject to a full cross-examination. The learned judge, in my opinion did not analyse the case of the Plaintiff in its entirety. At one point of time, he says court cannot give weightage to **P11** and thereafter places much reliance on certain pieces of evidence of the Plaintiff's witnesses with regard to the documents **P10** and **P11**, whereas, the said witnesses emphatically re-iterate that **P11** is a forgery and a fabrication and there was no consensus whatsoever by the Plaintiff to grant a new reduced rate to the Defendant, for providing inter connection facility.

In such a background, I hold that the finding of the learned judge does not stand to reason and hence the judgement of the High Court is unsustainable in facts and in law. Moreover, the learned judge has misdirected himself in rejecting the plaint after acknowledging that the documents led by the Plaintiff to substantiate its case was neither challenged nor controverted by the Defendant. Hence, on the grounds discussed herein, I see merit in the submissions of the learned President's Counsel for the Plaintiff, that the appeal should be allowed.

Having referred to the findings of the learned Judge, I wish to look at the agreement **P1** once again. The Plaintiff rests its case on this agreement. The jurisdiction of the Court was invoked on the agreement. The course of action is also based on this agreement.

There is no ambiguity whatsoever that the agreement was for a period of one year and it was not extended, in writing, at the end of the one-year period on 30-06-2002, as stipulated by Clause 2.4 of the agreement.

In such a circumstance, **can the Plaintiff invoke the jurisdiction of the High Court** based on the agreement? The learned Judge answered issues 1 and 2 raised by the Plaintiff and issues 30, 31 and 32 raised by the Defendant pertaining to jurisdiction in favour of the Defendant and upheld that the High Court has no jurisdiction to hear and determine this action upon the ground that there was no valid agreement.

Hence, the crucial issue that this Court has to determine is, even if there wasn't an existing agreement in writing, was there C*onsensus ad Idem* between the parties? Was there an implied contract to proceed with the business relationship and provide inter connection services? Were the parties by their conduct bound to each other to honour the terms and conditions of the agreement **P1**? If so, did the High Court have jurisdiction to hear and determine this application?

In the instant matter for determination before this Court, the question pertaining to jurisdiction is inter connected with implied contracts. What are implied contracts? This is best explained in the book, **Chitty on Contracts.**

In Volume I titled, **General Principles [31st Ed] in Chapter I - 096** it is stated as follows:

Express and implied contracts

> *"Contracts maybe either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated…* ***There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contact still bound them after the term has expired. In such a case the Court may infer that the parties have agreed to renew the express contract for another term.*** *Express and implied contracts are both contracts in the sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct.'' (emphasis added)*

As evident from the above quoted passage, an implied contract can be inferred when an express contract to last for a fixed term ends, but the parties continue to act as though the contract still binds them.

In the instance case too, a similar situation arose. Consequent to the validity of the agreement **P1** ended the two parties, the Plaintiff and the Defendant, continued to act as though the agreement impliedly bound them. The process of providing international telephone connections continued. Two-way traffic moved between the United Kingdom and Sri Lanka. Impliedly both parties acted in terms of the said agreement **P1** which lapsed after one year.

It is not necessary at this juncture to get involved in an academic analysis of the rights and obligations of parties in an implied contract or to delve into the relationship of parties of an implied contract and specifically dissect the the relationship of the two parties of the instance case, since the Defendant categorically accepts such relationship by its bald statement in the answer, *"after 30th June 2002, the parties thus acted without any written contract only on oral contract"* (vide paragraph 9(c) of the answer).

Thus, the Defendant categorically admitted that there was an oral agreement or an implied contract between the parties based or arising out of the initial agreement **P1** to provide inter connection services. Therefore, I am of the view that the High Court had jurisdiction to hear and determine this application based upon such implied contract.

Hence, I hold that the finding of the learned judge that the High Court did not have jurisdiction to hear and determine this application is erroneous. There was a valid agreement implied in nature between the parties and based upon the said implied contract, the High Court had jurisdiction to hear and determine this application.

At this juncture, I pause for a moment to examine the contention of the learned Counsel for the Defendant with regard to jurisdiction.

In a nutshell, his argument was that the agreement **P1** has no force or effect in law as it has expired. Hence, no cause of action can arise therein to invoke the jurisdiction of the High Court. If action is to be instituted on the oral contract referred to by the Defendant, it ought to be in terms of Section 9 of the Civil Procedure Code. i.e., either at the registered office of the Defendant in the United Kingdom or where the cause of action arose, once again in the United Kingdom, based on the Roman Dutch Law doctrine, 'creditor must seek the debtor'. Hence, he argued that the learned Judge correctly analyzed the legal position in determining the question of territorial and competent jurisdiction.

Upon a careful perusal of the impugned judgement, I cannot see, an analysis of the jurisdiction upon the contention put forward by the learned Counsel for the Defendant. In answering issue one, the learned judge makes a very bald statement. I reproduce the learned judges' words in *verbatim*. "jurisdiction - *not proved. (as the plaintiff failed in proving the*

validity of P1 after 30th June 2002 and a cause of action that arose within the jurisdiction of this Court)

Thus, in my view, the contention of the Defendant that the High Court did not have jurisdiction is without merit and the said submission should be rejected in *limine*.

I would also wish to advert to another significant factor pertaining to **proof of documents.**

As was discussed earlier, the Plaintiff based its case on the agreement **P1** and implied continuation of the business relationship, upon the same terms and conditions as in **P1** even after the validity period ended on 30-06-2002. The Plaintiff marked in evidence, a number of invoices, traffic statements and net settlement statements to establish the said business relationship and continuation of process of interconnection of international telephone facilities. These documents were neither challenged nor controverted by the Defendant nor its Managing Director, B.A.C. Abeywardena at any point of time. Moreover, it is observed that the Defendant opted not to give evidence before the High Court and be subjected to cross examination on its stand or on the above referred documentation.

This Court on numerous occasions have categorically held that such a course of action in not challenging or controverting important pieces of evidence is an additional factor that a court should take into consideration in favour of a person who leads such evidence.

In **Edrick de Silva V. Chandradasa de Silva, reported in 70 NLR 169,** HNG Fernando, C.J. at page 174, went onto observe as follows: -

> *"But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it add a new factor in favour of the plaintiff. There is then an additional 'matter before Court', which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted".*

Hence, based upon the aforesaid *ratio decidendai*, I am of the view, that the Defendant's **failure to controvert or challenge the documents** especially the monthly invoices, incoming and outgoing telephone statements, net settlement statements issued by the Plaintiff, **is an admission by the Defendant of its content being true and accurate.**

In fact, the learned Judge at page 24 of the impugned judgement (supra) acknowledges that the Defendant did not challenge or controvert the documents. Nevertheless, thereafter the learned Judge goes on a voyage of its own to come to the final conclusion, which is factually erroneous in my view, that the negotiated rate was US $ 0 .10 cents per minute, after 30-06-2002.

The Counsel for the Defendant also brought to the attention of Court two judgements. **Fradd v. Brown and Company 20 NLR 282,** a judgement of the Privy Council and **Alwis v. Piyasena Fernando 1993(1) SLR 119** a judgement of this Court, wherein it was held that it is rare that a decision of a trial judge on a primary point of fact is overruled in appeal and it is well established that primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal.

However, as I have already observed the impugned judgement was not delivered by the trial judge who heard and saw the demeanour of the witnesses but by another learned judge who succeeded the trial judge thereafter.

In any event, in a series of judgements the Appellate Courts have held that failure to comply with the mandatory requirements in Section 187 of the Civil Procedure Code vitiates a judgement.

In **Warnakula v. Jayawardena [1990] 1 SLR 206**, the Court of Appeal observed as follows: -

> *"The learned Counsel for the plaintiff-appellant submitted to Court that the learned District Judge had failed to consider and analyse the evidence. He further submitted that the learned District Judge had failed to give reasons for the findings and had totally failed to consider the complaints and the documentary evidence produced in this case.*
>
> *There is force in the submission of Counsel. The learned District Judge had failed to evaluate and consider the totality of evidence. His judgement was not in compliance of Section 187 of the Civil Procedure Code. He has given a very short summary of the evidence of the parties and witnesses and without giving reasons he had stated that he prefers to accept the evidence of the*

defendant-respondent as it was satisfactory and thereafter proceeded to answer the issues."

In a more recent judgement of this Court, **Suntel Limited V. Electroteks Network Services (Pvt) Ltd. S.C. (CHC) App 53/2012 S.C minutes dated 12-12-2018**, it was observed:

"This overall paucity of reasons and loose ends apparent on the face of it, renders that the judgement to be violative of Section 187 of the Civil Procedure Code."

"The learned High Court Judge has only given bare answers to the issues raised. We may assume the learned Trial Judge was satisfied that the claim of the defendant-respondent observed to be decreed. But the judgement of the learned Trial Judge was not final; it was subject to appeal and unless there was a reasoned judgement recorded by the Trial Judge an appeal against the judgement may turnout be an empty formality"

Hence, while appreciating the submission of the learned Counsel for the Defendant that the findings of a Trial Judge should not be lightly disturbed in appeal, it is apparent in the instant case, that the thought process of the judge is not transparent for this Court to uphold the impugned judgement.

The Plaintiff filed the instant case before the High Court to recover a sum of US $ 4,623,168.88 on its equivalent in Sri Lankan Rupees, on a commercial transaction within the scope of ambit of the High Court of Provinces (Special Provision) Act No. 10 of 1996.

The Plaintiff's cause of action was to recover the balance monies due and owing to the Plaintiff from the Defendant as set out in the invoices and statements of account led in evidence before court through the Plaintiff's witnesses.

The said documents were neither challenged nor controverted by the Defendant. In fact, the Defendant's main ground of defence was that payment for services provided should be done not on the rates stipulated in the plaint and established through the invoices and documents led in evidence but on a new negotiated rate. As already observed by this Court the said defence is unsubstantiated and baseless and has no force or effect in law.

The Plaintiff has established beyond doubt that business relationships continued between the Plaintiff and Defendant post June 2002, until the Plaintiff first suspended and thereafter terminated the Telecommunication Services Agreement, initially executed on 29-06-2001.

The Plaintiff has also specifically pleaded the total outstanding sum, giving credit to all the payments made by the Defendant, during the period in issue of the business relationship, beginning from July 2001 to January 2003.

The evidence led before the High Court as already adverted, established that the aforesaid sum is due and owing to the Plaintiff from the Defendant. Moreover, the Defendant has failed to challenge or contradict any of the documents led in evidence pertaining to the total outstanding sum.

In the aforesaid circumstances, I allow the appeal and set aside the judgement given by the learned High Court Judge dated 03-09-2010. Accordingly, judgement is entered in favour of the Plaintiff-Appellant, in a sum of US $ 4,623,168.88 together with legal interest thereon from the date of action till date of decree and thereafter on the aggregate sum decreed until payment is made in full to the Plaintiff- Appellant.

For the above reasons I allow the appeal and (a) set aside the judgement of the High Court (b) enter judgement in favour of the Plaintiff-Appellant as prayed for in the Petition.

Appeal is allowed. Parties will bear their own costs of this appeal.

Judge of the Supreme Court

Sisira J. de Abrew, J.,

I agree

Judge of the Supreme Court

S. Thurairaja, PC, J.,

I agree

Judge of the Supreme Court