

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

In the matter of an appeal under Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read together with Section 6 thereof, and Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (CHC) Appeal No. 106/2018

Commercial High Court of Colombo

Case No. HC (Civil) 05/2006(1)

(1) Gamini Lakshman Thammita

(2) Kamala Maanel Thammita

(3) Gehan Lalith Thammita

Carrying on business in partnership under the name, style and firm of “Tam Timber” at No. 10/20, Vidyakara Mawatha, Maharagama.

PLAINTIFFS

Vs

Merbok MDF Lanka (Private) Limited,
No. 41, Janadhipathi Mawatha,
Colombo 1.

DEFENDANT

And now between

(1) Gamini Lakshman Thammita [deceased]

(2) Kamala Maanel Thammita [deceased]

(3) Gehan Lalith Thammita

Carrying on business in partnership under the name, style and firm of “Tam Timber” at No. 10/20, Vidyakara Mawatha, Maharagama.

PLAINTIFFS – APPELLANTS

Vs

Merbok MDF Lanka (Private) Limited,
No. 41, Janadhipathi Mawatha,
Colombo 1.

DEFENDANT – RESPONDENT

Before: Arjuna Obeyesekere, J
Dr. Sobhitha Rajakaruna, J
Menaka Wijesundera, J

Counsel: Anish De Silva for the Plaintiffs – Appellants

Shamalie Jayatunga De Silva with Nimanga Senanayake for the Defendant – Respondent

Argued on: 16th September 2025

Written Submissions: Tendered on behalf of the Plaintiffs – Appellants on 13th October 2025
Tendered on behalf of the Defendant – Respondent on 10th October 2025

Decided on: 18th September 2026

Obeyesekere, J

- (1) The 1st Plaintiff – Appellant, together with his wife, the 2nd Plaintiff – Appellant and their son, the 3rd Plaintiff – Appellant [collectively referred to as the Plaintiffs] were carrying on business in partnership under the name, style and firm of ‘Tam Timber’. The primary business of the partnership was the uprooting of rubber trees, processing the said trees and the sale of the rubber wood harvested from the said trees.

- (2) The Defendant – Respondent [the Defendant] is a company incorporated under the Companies Act, and was engaged in the business of producing Medium Density Fibre boards at its factory in Horana by processing wood pulp obtained from culled rubber trees.
- (3) In January 2006, the Plaintiffs filed action against the Defendant in the High Court of the Western Province holden in Colombo exercising Civil jurisdiction [the Commercial High Court/High Court] claiming damages in a sum of Rs. 82,500,000. The pleaded cause of action of the Plaintiffs was that the Defendant made an offer that the contract for the uprooting and supply of 120,000 rubber trees that the Defendant had purchased from Elpitiya Plantations Limited [EPL] would be handed over to the Plaintiffs and that the Plaintiffs, having accepted the said offer, expended a large sum of money on purchasing equipment, plant and machinery, raised finance by the sale of an apartment belonging to the Plaintiffs, mobilised a workforce to meet the demands of the project and discontinued other business arrangements that it had with other clients in order to carry out the said contract, but that the Defendant breached the agreement by its failure to provide the entirety of the agreed amount of trees, delayed payment and interfered with the work carried out by it at EPL, resulting in the Plaintiffs suffering damages in the aforementioned sum.
- (4) The Defendant took up the position that even though the parties were in discussion to conclude a contract for the uprooting and supply of rubber trees situated at EPL, the parties could not reach agreement on several provisions and that there did not exist between the parties a legally enforceable agreement. The Defendant however conceded that it made available to the Plaintiffs a certain quantity of trees situated at EPL and permitted the Plaintiffs to harvest the said trees and supply the timber to the Defendant but stated that that was done on a casual or ad-hoc basis until such time a formal agreement was executed.
- (5) While the 3rd Plaintiff and a Manager from the finance company that had agreed to provide project finance to the Plaintiffs gave evidence for the Plaintiffs, the Defendant led the evidence of its Managing Director and a Manager from EPL.

- (6) By its judgment delivered on 18th June 2018, the High Court dismissed the action of the Plaintiffs on the basis that the parties had agreed that their negotiations shall be subject to the execution of a formal agreement, and in the absence of the parties reaching an agreement relating to the said 120,000 trees, there did not exist between the Plaintiffs and the Defendant a legally enforceable agreement, and hence, the Plaintiffs have failed to establish a cause of action against the Defendant.
- (7) Aggrieved, the Plaintiffs filed this appeal on 14th August 2018. The principle ground on which the learned Counsel for the Plaintiffs skillfully sought to impugn the judgment of the High Court was that the High Court erred when it failed to recognise that the Plaintiffs had accepted the offer made by the Defendant and that even though a formal written agreement was not executed, the requirements for a valid and legally enforceable agreement had been established by the Plaintiffs.

The need for parties to reach consensus

- (8) In “**The Law of Contracts**” [1967, Volume I, paragraph 84], Justice Weeramantry has pointed out that the constituent elements of a contract shall consist of five basic elements, they being (a) agreement between parties, (b) actual or presumed intention to create a legal obligation, (c) due observance of prescribed forms or modes of agreement, if any, (d) legality and possibility of the object of the agreement, and (e) capacity of parties to contract.
- (9) It was held by the Privy Council in **Noorbhai v Karuppan Chetty** [27 NLR 325] that “... *the very elementary proposition of law [is] that a contract is concluded when in the mind of each contracting party there is a consensus ad idem ...*”
- (10) Referring to *consensus ad item* or the meeting of the minds by which an agreement between parties becomes evident, Weeramantry has stated that “*An agreement is a manifestation of mutual assent by two or more persons to one another. In simpler terms, therefore, an agreement would mean a state of mental harmony regarding a given matter between two persons, as gathered from their own words or deeds. Contract generally connotes among other things an actual or notional meeting of minds, for in general without such a meeting of minds a contract does not come into*

being. Agreement on the other hand, primarily denotes such meeting.” [supra; paragraph 86]

- (11) *Consensus ad idem* is therefore a foundational element for a valid contract without which a contract is not legally enforceable. The meeting of minds signifies a mutual understanding of the terms of the contract and that each party has understood the terms and has accepted the contractual obligations arising therefrom. An inherent vagueness or ambiguity around the content of the contract is a manifestation of the lack of consensus. While the meeting of minds may not completely eradicate the possibility of difference in opinion, it simply means that all the different opinions were discussed and accommodated in a manner that does not overlook the interests of the parties to a contract.
- (12) In determining whether an agreement was reached, Courts use objective standards since legal interpretation favours clarity, completeness, and intent based on reasonable standards, with the question being whether a reasonable person in the position of each party believes there was mutual agreement between the parties. Thus, the filter applied is to determine the manner in which the terms and intentions were expressed in both actions and words, as a reasonable person would understand them. While it may not be possible to establish with absolute certainty that the parties had a true meeting of minds, Courts generally examine pre-contractual communications, negotiations and conduct, and examine the full scope of the agreement to find out whether the parties understood each other for a Court to enforce such agreement.

Consensus vis-à-vis the correspondence

- (13) This brings me to the factual circumstances of this case.
- (14) The Plaintiffs state that in early February 2002, they were invited for a discussion by the Defendant where they were informed that the Defendant had agreed to purchase 120,000 rubber trees from EPL and that the Defendant was keen to engage the services of the Plaintiffs to cull, log and transport the said trees to the factory premises of the Defendant.

- (15) Pursuant to the initial discussion, the Managing Director of the Defendant had made a conditional offer to the Plaintiffs by its letter dated 6th March 2002 [P2]. According to P2, which was the first written communication between the parties, the Plaintiffs were required *inter alia* to:
- (a) uproot the tree, cut the trunk to the specified length and transport the 120,000 trees to the factory premises of the Defendant within a period of 15 months;
 - (b) clear the debris according to the requirements of the Defendant and EPL.
- (16) While the Plaintiffs were allowed to sell the root and certain parts of the tree to a third party, the Defendant had offered a sum of Rs. 245 for each cubic metre of rubber wood that the Plaintiffs delivered to the Defendant. I have referred to P2 as a conditional offer for the reason that the Defendant had specified in P2 that:
- (a) *“We look forward to your response of our proposal and if you are agreeable, we propose that we proceed with drafting a formal agreement”;*
 - (b) *“The agreement shall be subject to, and only commence upon Merbok successfully concluding an agreement with Elpitiya, and being cleared to proceed with the logging operations at their estates”.*
- (17) The 3rd Plaintiff had visited the Elpitiya District and the estate on which the trees were situated, familiarised himself with the area, the condition of the trees and the availability of transport facilities, and thereafter conveyed to the Defendant by his letter dated 8th March 2002 [P3] detailed terms and conditions on which the work referred to in P2 could be carried out. The 3rd Plaintiff had further requested by P3 for an opportunity with the Defendant to discuss the matters raised by the Plaintiffs including the payment of a mobilisation fee of Rs. 5m. Thus, the Plaintiffs clearly indicated the need for further discussion prior to reaching a formal agreement.
- (18) It appears that P2 and P3 crossed each other since on the next day, i.e., 9th March 2002, the 3rd Plaintiff replied P2 by its letter of that date [P4] and requested that P4 be read in conjunction with the conditions contained in P3. While the Plaintiffs had accepted some of the terms set out in P2, the parties were at variance on the price, payment terms including the payment of a mobilisation fee, the sum of money that

could be retained out of the payments as a performance guarantee and the volume of timber that the Plaintiffs were entitled to keep from the trees that were to be culled. The fact that the parties were yet to reach an agreement on the applicable terms is clearly borne out by the last sentence of P4 where the 3rd Plaintiff had stated that he too is looking *“forward to finalizing these matters with you very soon.”* Thus, P4 too was nothing more than part of the correspondence exchanged between the parties.

- (19) Even though P4 was sent on 9th March 2002, the Defendant did not respond to P4 immediately. In the meantime however and in anticipation of entering into an agreement with the Plaintiffs, the Defendant:
- (a) Entered into an agreement with EPL on 27th March 2002 [**D16**] by which it had agreed to purchase a reduced quantity of 100,000 rubber trees; and
 - (b) Informed EPL by letter dated 17th May 2002 [**P5**] that the Plaintiffs had been awarded the contract of uprooting the rubber trees on their behalf, thus evidencing a clear intention on the part of the Defendant *“to enter into”* a contract with the Plaintiffs, provided however the parties were able to reach a consensus on the terms and conditions as clearly stipulated in P2 and acknowledged by the Plaintiffs in P3 and P4.
- (20) After a lull of almost three months from its previous round of correspondence, the Defendant, by its letter dated 1st June 2002 [**P6**] sent the Plaintiffs a *“draft of the agreement based on our previous discussions and letters exchanged for perusal and approval after which a formal agreement will be entered into.”* P6 witnessed a significant deviation from P2 in that the draft agreement attached to P6 [i.e., **P7**] only provided for 100,000 trees instead of the 120,000 that were initially discussed. Furthermore, P7 contained detailed provisions setting out the obligations of each party including a detailed pricing clause, and stipulated that, *“This agreement will commence on the date of its execution by both of the parties hereto.”* Thus, in the mind of the Defendant, the parties were still in negotiation and had not reached consensus on the terms and conditions subject to which the work was to be carried out.

- (21) The Plaintiffs have conceded that although the partnership had been engaged in the harvesting of rubber trees and had experience in that regard, it did not have the capacity to handle the large volume of trees that it was required to harvest for the Defendant under the intended agreement and that the Plaintiffs had therefore decided to incorporate a company to engage in the project with the Defendant. The Plaintiffs have also conceded that performance of the work for the Defendant required a large amount of money and thus, they had sought project finance from a finance company. The involvement of the finance company in the implementation of the project is reflected by the fact that P7 was responded to not by the Plaintiffs but by the Vice President – Legal of the said finance company who by letter dated 25th June 2002 [D4] conveyed the observations on P7 on behalf of the Plaintiffs.
- (22) I have examined the said observations [D5] and note that even as at that date, the parties were at variance *inter alia* on the following key provisions:
- (a) The price, with the finance company seeking an upward revision of the price on a periodical basis to reflect the increased cost of diesel and the adoption of the pricing formulae used by the Planters Association of Sri Lanka;
 - (b) The mobilisation advance;
 - (c) The retention monies;
 - (d) The quantity of timber that the Plaintiffs could retain from each tree.
- (23) It was admitted by the 3rd Plaintiff during cross examination that the Defendant did not respond to D4 and D5.
- (24) Of the correspondence that was tendered to the High Court, the final document relating to the finalising of the agreement that emanated from the Defendant is letter dated 10th August 2002 [P14c] where the Defendant informed the 1st Plaintiff that its Managing Director will be in Sri Lanka and that the agreement can be discussed and finalised.
- (25) However, that was not to be as borne out by the following letters sent by the Plaintiff to the Defendant:

- (a) Letter dated 27th August 2002 [P14d], where the Plaintiff had stated that, *“Discussions on the draft and finalization of the above agreement which was sent to you more than two months ago is long overdue. Numerous attempts that I made to meet up with you has failed so far, and I will be grateful if you could give me an early appointment to discuss these and other urgent matters on your very next visit to Sri Lanka”*;
 - (b) Letter dated 6th October 2002 [P14e] where the Plaintiff had stated that the agreement is not in place and has not been finalised although it was initiated on 6th March 2002 and that this should be done immediately.
- (26) While it is admitted by the parties that no formal written agreement was entered between the parties, neither party has contended that consensus was reached on the above matters in paragraph 22 nor have they offered any explanation for such failure to reach consensus. The only inference that I could draw from this failure on the part of the parties to reach an agreement is that the parties failed to reach consensus on the said matters.

Damages and reasons for the suspension of work

- (27) There are two matters that I must advert to at this stage.
- (28) The first is that even though the correspondence does not disclose that the parties reached consensus on the above matters, it is admitted that the Plaintiffs proceeded to cull 17183 trees identified by Elpitiya Plantations Limited, supplied the timber therefrom to the Defendant, and that the Plaintiffs had been paid for the work done. The Plaintiffs have however failed to provide details relating to the terms and conditions subject to which the supply of the said trees took place nor have the Plaintiffs produced any correspondence to establish that the said trees were part of the 120,000 trees that were the subject matter of P2.
- (29) The second matter that I wish to advert to is that although the Plaintiffs carried out the work, it is clear from the correspondence that the Plaintiff, Defendant and EPL encountered many difficulties in the execution of the works, with:

- (a) The Plaintiffs blaming the Defendant for not providing an adequate quantity of trees [*letters dated 7th February 2003 – P14f; 5th August 2003 – P14g; 14th August 2003 – P14h*] and for the delay in making payment to EPL [*letter dated 20th July 2002 – P14a*];
 - (b) The Defendant blaming the Plaintiffs for the delay in carrying out the work [*letter dated 25th February 2003 – D9*] and failing to clear the roots of the uprooted trees [*letters dated 8th March 2003 – D10; 28th July 2003 – D11*];
 - (c) EPL blaming the Defendant for not making the payment for the trees that it had purchased from EPL [*letter dated 30th July 2002 – P12*]; and
 - (d) EPL blaming the Plaintiff for not clearing the area on which the uprooted trees were situated [*letters dated 20th February 2003 – D8; 4th March 2003 – D13; 14th March 2003 – D14; 24th July 2003 – D15*].
- (30) The end result however is that the Plaintiffs suspended work in October 2003 and instituted action in the High Court for the recovery of damages.
- (31) Before proceeding to analyse the above correspondence and the evidence, I must state that I have examined the evidence led on behalf of the Plaintiffs and note that the Plaintiffs failed to lead any evidence to substantiate their claim for damages tabulated in P18, except perhaps with regard to the loss of profit as a result of not being able to cull the entire 120,000 trees. Even with regard to the said claim, it must be observed that D5 sought to reduce the number of trees to 100,000. Thus, while a claim could not have been maintained for 120,000 trees, the claim for loss of profits was based on the price that the Plaintiffs would have received for each cubic meter of timber but such claim has not factored the cost that must be incurred to cull, log and deliver the timber to the Defendant. Such costs were not disclosed even during the evidence of the 3rd Plaintiff.
- (32) During the hearing before us, the learned Counsel for the Plaintiffs submitted that the claim would be limited to loss of profits in a sum of Rs. 25m but did not provide a basis for such amount. Be that as it may, the necessity for me to consider the

entitlement for loss of profits would be dependent on whether there existed a legally enforceable agreement between the parties.

Has consensus been reached?

- (33) The question that needs to be determined by me is whether the High Court erred when it held that there was no legally enforceable agreement between the parties since the parties had not reached consensus on the principal terms and conditions subject to which the supply of the trees were to take place. The starting point in deciding this question is P2 which only provided the parties a basis to negotiate the terms and conditions. That is clearly borne out by the two conditions in P2 which I have referred to in paragraph 16. The response of the Plaintiffs by way of P3 and P4 was nothing but conditional, and hence, P3 and P4 did not amount to any kind of acceptance of the terms in P2.
- (34) P6 drew the parties closer to an agreement but required a formal acceptance of the terms and recording of such terms in a formal written agreement. Acceptance of P6 on the part of the Plaintiffs was however not forthcoming and instead what followed was D5 which amounted to a re-calibration of almost the entire arrangement that the parties had negotiated by then.
- (35) Thus, to my mind, the correspondence between the parties do not show that there was consensus on the principle terms. During cross examination, the 3rd Plaintiff admitted that:
- (a) Negotiations were subject to a contract being entered into, the execution of a formal contract was therefore in the contemplation of the parties and that agreement reached during negotiations will not be binding on the parties until a formal contract was entered into and that until negotiations culminated in a written agreement there was no agreement;
 - (b) At a meeting that followed D5, the Defendant had agreed to some of the conditions proposed in D5 and had disagreed to some. While the 3rd Plaintiff did not elaborate on what was agreed or disagreed, he admitted that at that point of time, the parties were not agreed as to the contents of the agreement;

- (c) D5 amounted to a counter proposal and that as at 25th June 2002, there was no finality of the agreement;
 - (d) There was an ad hoc arrangement while negotiations were going on but a formal agreement was never entered into.
- (36) Although the Plaintiff claimed that he had enough documents to say the Defendant was due to enter into an agreement with the Plaintiffs, the correspondence and the evidence that was before the High Court does not bear out that the parties had reached consensus. Thus, I am in agreement with the conclusion reached by the High Court that the Plaintiffs have failed to establish that the parties had reached consensus and there was in place a legally enforceable agreement between the parties.

Conclusion

- (37) In the above circumstances, I am of the view that the conclusion reached by the High Court is in accordance with the law and the facts. I therefore affirm the judgment of the High Court and dismiss this appeal without costs.

JUDGE OF THE SUPREME COURT

Dr. Sobhitha Rajakaruna, J

I agree

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J

I agree

JUDGE OF THE SUPREME COURT