

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

Allianz Insurance Lanka Ltd,  
No. 675, Dr. Danister de Silva  
Mawatha (Baseline Road),  
Colombo 09.

Janashakthi Insurance PLC of  
No. 46, Muttiah Road, Colombo 02.  
And presently of No. 55/72,  
Muttiah Road, Colombo 02.

Plaintiff-Appellant

**SC/CHC/APPEAL/10/2017**

**HC (CIVIL) 217/09/MR**

Vs.

A. Masakorala,  
'Dharshani Guest House',  
Habarana Road, Polonnaruwa,  
carrying on business as a sole  
proprietor under the name and style  
of 'Dharshani Constructions' at  
No. 42, Pothgul Road, Polonnaruwa.

Defendant-Respondent

Before: Mahinda Samayawardhena, J.

Sampath B. Abayakoon, J.

Sampath K. B. Wijeratne, J.

Counsel: Nihal Fernando, P.C., with Rajindra Jayasinghe and Sanjit  
Dias for the Plaintiff-Appellant.

Defendant-Respondent is absent and unrepresented.

Argued on: 30.01.2026

Written submissions:

By the Plaintiff-Appellant on 13.02.2026.

Decided on: 26.03.2026

**Samayawardhena, J.**

The Appellant's case, in brief, is as follows. The Appellant issued Advance Payment Bond P2 in favour of the Sri Lanka Red Cross on behalf of the Respondent for a sum of Rs. 27,916,720, based on the Counter Indemnity P3 by which the Respondent agreed to indemnify the Appellant in the event the Appellant paid any moneys to the Sri Lanka Red Cross on the said Bond. Upon demand, the Appellant paid a sum of Rs. 7,641,494 to the Sri Lanka Red Cross. However, the Respondent failed to reimburse that sum.

The Appellant instituted this action in the Commercial High Court against the Respondent seeking to recover Rs. 5,000,000 out of the said sum of Rs. 7,641,494. The action was filed as a hypothecary action following the procedure laid down in the Mortgage Act, No. 6 of 1949. The Mortgage Bond was marked P4. In the plaint, the Appellant stated that it limited its claim to Rs. 5,000,000 as the maximum recoverable value under the Mortgage Bond was Rs. 5,000,000.

After trial, by judgment dated 31.10.2016, the Commercial High Court dismissed the Appellant's action on the basis that the Mortgage Bond was incurably bad in law and therefore unenforceable. Hence this appeal.

Notices issued on the Respondent were returned undelivered with the endorsement that he had left the address. Accordingly, the Court did not have the advantage of hearing learned Counsel for the Respondent.

At the hearing, learned Counsel for the Appellant candidly conceded that the Mortgage Bond was incurably bad and unenforceable. However, his contention was that, only after determining the Appellant's entitlement

to a money decree, could the Court decide whether such decree could be enforced by the sale of the mortgaged property. He submitted that the Commercial High Court erred in law in failing to appreciate the distinction between a money decree and a hypothecary decree, and that the Court ought to have entered judgment as prayed for in paragraph (a) of the prayer to the plaint, thereby granting a money decree for Rs. 5,000,000.

While I accept this argument in theory, I must state that cases are decided not only on legal theory but also on the particular facts of each case. On the facts of the present case, it cannot be overlooked that the Appellant's claim of Rs. 5,000,000 is inextricably linked to the Mortgage Bond.

Be that as it may, the Appellant had previously instituted action bearing No. HC/CIVIL/216/2009/MR in the same court against the same Respondent to recover a sum of Rs. 3,700,000 out of the aforesaid Rs. 7,641,494 paid to the Sri Lanka Red Cross. That action was also filed on the same date as the present action. After trial, the Commercial High Court entered judgment in favour of the Appellant.

The pivotal argument of learned Counsel for the Appellant is that the cause of action for the money decree in the present case is based on the Counter Indemnity marked P3 and not on the Mortgage Bond marked P4, and therefore there was no prohibition on the Court granting the monetary claim. If that position is correct, the Appellant ought to have claimed the entire sum of Rs. 7,641,494 in the previous action, since the claim in that action was also founded on the same Counter Indemnity, albeit supported by different Mortgage Bonds as security.

In paragraph 18 of the plaint in the previous action, the Appellant stated that "*The Plaintiff reserves the right to file separate actions against the Defendant, if necessary, to enforce the other securities provided by the Defendant to secure the repayment of moneys due to the Plaintiff.*" The "other securities" referred to therein cannot, by any stretch, include the

Counter Indemnity. The “other securities” referred to therein was the Mortgage Bond P4, which has been unsuccessfully sued upon in the present action.

Section 34 of the Civil Procedure Code enacts that every action shall include the whole claim, and that if a plaintiff omits to do so, except with the leave of the court obtained before the hearing, he shall not afterwards sue in respect of the portion so omitted. It further provides that, for the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action. Although the Appellant stated in the plaint that it reserved the right to institute separate actions to enforce other securities, it did not obtain the leave of court to do so prior to the hearing, as required by section 34(2) of the Civil Procedure Code. Hence there is a bar for the Appellant to maintain this action.

Section 34 of the Civil Procedure Code is of fundamental importance. It is designed to prevent multiplicity of actions, vexatious litigation, and abuse of the process of court. In the present case, the Appellant, being an insurance company, has sought to split a single cause of action founded on a Counter Indemnity into multiple actions against the same Respondent. Such a course cannot be countenanced.

For completeness, I must also refer to section 7 of the Mortgage Act, which provides as follows:

*“Notwithstanding anything in section 34 of the Civil Procedure Code, a claim to enforce payment of the moneys due upon a mortgage may be joined to a claim in a hypothecary action, or a separate action may be brought in respect of each such remedy.”*

As I have explained in *Ramachandran and Others v. HNB and Others* [2024/25] BLR 128 at 142–145, what may be joined in a hypothecary action is “a claim to enforce payment of the moneys due upon a mortgage”, and not a monetary claim arising under a Counter Indemnity.

In these circumstances, the Appellant cannot succeed in this appeal.

Accordingly, the appeal is dismissed. No costs.

Judge of the Supreme Court

Sampath B. Abayakoon, J.

I agree.

Judge of the Supreme Court

Sampath K. B. Wijeratne, J.

I agree.

Judge of the Supreme Court