

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

In the matter of an appeal made in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996.

SC / CHC / APPEAL / 19 / 2013

HC / Civil / 552 / 2009 / MR

Kaluarachchige Ananda Nimal

Chandra De Silva,

25/6A, Rodney Place,

Colombo 08.

PLAINTIFF

-Vs-

Grace Advertising (Private) Limited,

83, Gregory's Road,

Colombo 07.

DEFENDANT

AND NOW BETWEEN

Kaluarachchige Ananda Nimal

Chandra De Silva,

25/6A, Rodney Place,

Colombo 08.

PLAINTIFF – APPELLANT

-Vs-

Grace Advertising (Private) Limited,

83, Gregory's Road,

Colombo 07.

DEFENDANT – RESPONDENT

Before: S. Thurairaja, PC, J.

A.H.M.D. Nawaz, J. &

Kumudini Wickremasinghe, J.

Counsel: Dr. Sunil Coorey with Nilanga Perera for the Plaintiff – Appellant

Dulani Peiris for the Defendant – Respondent

Argued on: 02.09.2024

Decided on: 17.03.2026

A.H.M.D. Nawaz, J.

1. The property over which this appeal has arisen, as is apparent on the facts, stands tall and high as a three-storey apartment in Cooray Mawatha, Rajagiriya.
2. The seller of the property — the Plaintiff – Appellant (the Plaintiff) alleges the purchase price to be Rs.35 million, while the buyer of the property — the Defendant – Respondent (the Defendant) proclaims it to be a sum of Rs.20 million as is reflected on the face of the deed of transfer bearing no. 987 and dated 26 August 2008.
3. The rival narratives surrounding this storeyed high-rise property strike a familiar and oft-encountered chord in our quotidian disputes. The vendor seeks to establish that the real consideration agreed upon between the parties was Rs.35 million, notwithstanding the lower figure of Rs.20 million consensually recited in the instrument of transfer. The Plaintiff stated that at the insistence of the Defendant, the lower amount was stipulated to reduce stamp duty.
4. Such contests are neither novel nor uncommon. At least at the threshold, it would appear that the law does not foreclose this exercise of going behind what is stated as the price. By reason of *proviso (1)* to Section 92 of the Evidence Ordinance, a party is not per se precluded from leading evidence *aliunde* to controvert the consideration stated in a deed. Put differently, a vendor may, in law, seek to challenge the purchase price specified in the instrument. E.R.S.R. Coomaraswamy invokes the *proviso (1)* to section 92 to support this leading of evidence.
5. E.R.S.R. Coomaraswamy in his “*The Law of Evidence*” (Volume II, Book I) states the following proposition under the heading “*want or failure of consideration*”;

“It can always be shown that a contract was entered into without consideration, or the consideration, if any, has failed. This applies even where the instrument contains an averment that the

deed was for consideration. If, therefore, in a deed of sale of land, there is the usual consideration and receipt clause in the operative part of the deed, it is still open to the vendor to show that in fact no consideration was paid or that the consideration was in fact different from that which was recited in the deed”.

6. The learned author further goes onto state that;

*“The Privy Council has held that the statements of the notary in the attestation clause of a deed of sale are admissible evidence and may well be important evidence regarding consideration, but are not conclusive” — see **Munasinghe v. Vidanage**¹.*

7. The Supreme Court has also held that the fact that the deed was for no consideration can be shown even where a notary in his attestation says that the parties in his presence stated that the consideration had been paid — **Penderlan v. Penderlan**². Commenting on this case, Coomaraswamy holds that;

*“This is the correct view, since the presumption on which a notary's acts are considered to have been properly done is the maxim, omnia praesumuntur rite esse acta, which applies to official acts, and under Section 114, this is a rebuttable presumption”.*³

8. In this aforesaid case of **Penderlan v. Penderlan** (supra) Basnayake, J stated as follows;

“It has been argued that the Section 92 of the Evidence Ordinance precluded the admission of the evidence which the Plaintiff has

¹ (1966) 69 N.L.R 97-PC

² (1948) 50 N.L.R. 513; 37 CLW 35

³ See Coomaraswamy *“The Law of Evidence”* (Volume II, Book I) pp 203 - 204

given as to the true nature of the transaction and we have been referred by the learned counsel to a number of decided cases in support of his submissions. Those cases have no application to the present case. There is nothing in the presumption of Section 92 that precludes the reception in evidence of the fact that no consideration was received by the vendor although the notary in his attestation says that they received a consideration prior to the execution of the deed”.

9. There are cases in Sri Lanka where the Supreme Court held that the consideration mentioned in the deed or recitals as to receipt of payment could be superseded by extrinsic evidence — see ***Kiri Banda v. Marikar***⁴; ***Nadaraja v. Ramalingam***⁵; ***Molagoda v. Molagoda***⁶; ***Begaswatte v. Ukku Banda***⁷; ***Dingiri Naide v. Kirimenike***⁸. This is also called the principle of equitable modification.
10. In Indian Courts across the Palk Strait, there has been much discussion on the attempt to get around the prohibition in Section 92 — see ***Ramratan v. Ramtapeswar***⁹ ; ***State Bank of India v. Premco Saw Mill, Ahmedabad***¹⁰; ***Baldeo Singh v. Dwarika Singh***¹¹; ***Mahalakshmi Amma v. Krishna Holla***¹².
11. Certain jurists, including Sarkar and Shailendra Kumar Awasthi, as well as the celebrated judge-jurists Sir John Woodroffe and Amir Ali, advance an additional and analytically distinct basis for permitting the adduction of evidence to establish a consideration different from that recited in the deed, or even its absence. The proposition they advance is a simple one. They contend that consideration in a contract of sale, namely the price, does not constitute a term of the contract itself.

⁴ 20 N.L.R 123

⁵ 21 N.L.R 38

⁶ 45 N.L.R 481

⁷ 43 N.L.R 281

⁸ 57 N.L.R 559

⁹ (1969) *Jab LJ* 164, 166; 1968 *MPLJ* 802.

¹⁰ AIR 1984 *Guj* 93; (1983) 2 *Civ LJ* 465; (1983-2) 24 *Guj LR* 1322 (DB).

¹¹ AIR 1978 *Pat* 97; 1978 *Pat LJR* 255 (DB).

¹² AIR 1938 *Mad* 320.

On that footing, the leading of evidence *dehors* the instrument to establish the true consideration does not amount to a variation of contractual terms, but merely an elucidation of a collateral fact bearing on enforceability.

12. The question whether the contractual terminology “*consideration*” would constitute a term of a contract has been interpellated by ***Sarkar and Shailendra Kumar Awasthi on Oral and Documentary Evidence***¹³ in the following tenor;

“A contract is nothing but the promise to do or forbear to do something. Anything which is enlarging or limiting or conditioning that promise to do something is a term of a contract. Consideration cannot be said to be a term of contract”.

13. The above statement that consideration cannot be said to be a term of a contract is another way of justifying the adduction of evidence of what the real consideration should have been, as the Plaintiff in this case has attempted to do in this case, and it would also mean that such adduction of *parol* evidence would not be offensive to Section 92 of the Evidence Ordinance, **if consideration is not considered a term of the contract**. The prohibition in Section 92 is only against *contradicting, varying, adding to, or subtracting from the terms* of a document. If consideration (*price*) is not a term of the contract of sale, the question of the mischief prohibited in Section 92 does not arise.

14. Woodroffe and Syed Amir Ali in their tome “***Law of Evidence***”¹⁴ states the legal position thus;

“Consideration of a contract is not a term of the contract, though it is interwoven with it. It is open to the party contesting it to show that there was no consideration or that the consideration was different from the one that is described in the contract and such

¹³2nd edition Chapter 8 at page 394

¹⁴See 21st Edition Part II titled “Of the Exclusion of Oral by Documentary Evidence” in Vol 3

*evidence is not barred either by Section 91 or by Section 92 of the Indian Evidence Act – see the cases cited by the learned authors such as **Daryaosingh Bhagwansingh Chhatri v. Krishnarao Visnupati Kukde**¹⁵; **Mushtaq Ahmad v. Md Shafi**¹⁶; **Alokmay Banerjee v. Chatturanan Ghosh**¹⁷".*

15. The proposition that consideration is not a term of the contract admits of little controversy. While consideration is essential to render an agreement into a contract and clothe it with legal enforceability, it remains conceptually distinct from the contractual terms themselves, a distinction that assumes particular significance when questions arise as to the admissibility of evidence touching upon the stated consideration in a deed. *Parol* evidence is thus admissible to show a different consideration and it will not amount to *contradicting, varying, adding to, or subtracting* from the terms of the deed.
16. It is in this legal background that such an attempt on the part of the vendor (the Plaintiff in this case) to prove that the agreed amount of sale was a sum of Rs.35 million and not Rs.20 million must be viewed.
17. I delved into this aspect of the matter just by way of both doctrinal and precedential underpinnings behind Section 92 and its *proviso (1)*, inasmuch as litigation not only in Sri Lanka but also in other jurisdictions has focused on the question whether a party to a litigation can show the sale price to be larger than what is reflected on the sale deed.
18. From the foregoing discussion on the legal ability of a vendor to lead evidence *aliunde* to establish the true consideration notwithstanding the figure recited in the deed, I will summarize the bases on which courts in this jurisdiction and across the Palk Strait have permitted such an exercise. Jurists such as Sarkar, Woodroffe

¹⁵ AIR 1939 Nag 91

¹⁶ AIR 1983 J&K 44

¹⁷ (1980) 1 Cal HN 117. c

and Amir Ali articulate the doctrinal foundation for this approach by positing that the admission of *parol* evidence is justified where the consideration so recited does not constitute a contractual term, but merely a statement or recital collateral to it. Evidence *aliunde* as to the actual purchase price could be led, as long as such adduction of evidence is outside the prohibition contained in Section 92 against *contradicting, varying, adding to, or subtracting from its terms.*

19. As some of the cases have held, another way of justifying the reception is by letting that evidence in through the *proviso (1) to Section 92* which refers to want or failure of consideration. The first *proviso* to Section 92 permits proof of any fact which invalidates a document — for example, absence of passing of consideration as set out in the document or as amounting to want or failure of consideration which is expressly stated in the *proviso.*

Has the Plaintiff established by evidence *aliunde* that the consideration for his sale is a sum of Rs.35 million?

20. Let me turn now to the quintessential question before this court. Has the Plaintiff adduced sufficient evidence to establish whether the consideration for the sale was for Rs.35 million? As I stated before, the Defendant buyer has asserted the purchase price to be Rs.20 million and he has consistently run a case that all his subsequent payments have been in satisfaction of meeting the cost of facilitating the additional work. He testified that he has already settled the payment of Rs 20 million and he has no further dues to pay the Plaintiff as part of purchase price.

21. The learned Commercial High Court judge by his judgment dated 14 November 2012 dismissed the plaint of the Plaintiff holding that his three causes of action had to fail on account of his failure to prove that the payments in excess of Rs.20 million made by the Defendant did not go towards the purchase price but rather towards meeting the cost of additional work done to the premises before the Defendant moved in.

22. That brings me to the three causes of action that the Plaintiff – Appellant instituted against the Defendant – Respondent.

1. Rs.3,200,000/- as the balance purchase price of land.
2. Rs.2,224,833.38/- allegedly due for extra work, utility bills and watchmen charges etc.
3. Rs.5,424,833.38/- based on unjust enrichment.

23. As could be observed, the third cause of action was based on unjust enrichment which amounted to the alleged non-payment of the monies due on the first and second causes of action. The Plaintiff assailed the dismissal of his plaint by the Commercial High Court on the basis that there was a misappreciation of the facts surrounding the transactions that had taken place subsequent to the execution of the deed of transfer bearing no.987 and dated 26 August 2008.

24. The Plaintiff advanced the contention that while the agreed consideration for the property was Rs.35 million, only Rs.31.8 million had been paid by the Defendant, leaving a shortfall of Rs.3.2 million in the purchase price and a further Rs. 2.2 million for additional work is outstanding towards the provision of utilities such as repairing the water and drainage systems, installing pantry cupboards and provision of high voltage electricity.

25. On the contrary, the Defendant Company has contended that it had no further obligations beyond the payment of Rs.20 million as the purchase price and a sum of Rs.11.8 million that was paid over and above Rs.20 million was for the purpose of meeting the costs spent on extra work done on the premises.

26. The bone of contention between the two parties could then be distilled in a nutshell.

1. Is the purchase price Rs.20 million or Rs.35 million?
2. What is the purpose for which the Defendant buyer paid an additional sum of Rs.11.8 million? Is it towards the liquidation of the purchase price of

Rs.35 million as the Plaintiff alleged or is it for the additional work on the premises as the Defendant asserted?

27. If I may once again advert to the conclusion of the Commercial High Court judge, the pith and substance of his factual conclusion is that the purchase price was Rs.20 million and all other payments that the Defendant made namely Rs.11.8 million went towards additional work.

28. This court is confronted with the impugment of this factual finding and the court will bear in mind the useful observations of H.N.G.Fernando, J in the case of *Mahawithana v. Commissioner of Inland Revenue*.¹⁸ The appellate court would interfere with the inferences drawn by the court *a quo* only on the following grounds;

a) The inference of the court below had been drawn on a consideration of inadmissible evidence, or after excluding admissible and relevant evidence,

b) If the inference was a conclusion of fact drawn but unsupported by legal evidence, or if the conclusion drawn from relevant facts was not rationally possible, and was perverse and should therefore be set aside.

29. The question would then be how the conclusions drawn by the Commercial High Court judge namely that the purchase price was only Rs.20 million and all excessive payments made towards utilities were indeed supported by **relevant and admissible evidence**.

30. I must state that there has been competing evidence both oral and documentary from both the Plaintiff and the Defendant and it is quite critical to highlight at

¹⁸ 64 N.L.R 217

this stage that the documentary evidence led in this case provides cogent testimony for the assessment of the rival contentions. One has to bear in mind that Sir James Fitzjames Stephen the architect of the Indian Evidence Act and our own in his wisdom bifurcated evidence into oral and documentary evidence and neither suffers from inferiority over the other.

31. If oral evidence proffered by a witness is contradicted by his own documentary evidence, it is a factor to be considered as raising the improbability of his case. For instance, I find a material contradiction in the Plaintiff's testimony. In an effort to demonstrate that the payments reflected in the correspondence between them were credited against the balance purchase price — rather than the extra work, the Plaintiff relied heavily upon a letter dated 10 July 2009 (this letter was marked as **P4**), which the Defendant denied having received. I must say that it was this letter marked **P4** dated 10 July 2009 that the Plaintiff alleged for the first time that the sale had taken place for a sum of Rs.35 million. None of the prior communications between them ever specify a sum of Rs.35 million as the purchase price.
32. The document **P4** itemized the cheques that were paid by the Defendant as having been paid for the purchase price. However, in a letter marked **V8** written one month prior to **P4**, the Plaintiff had said to the Defendant that some cheques had been received for additional work. There was no mention of the cheques coming in for liquidation of purchase price. In other words, the letter posterior in point of time (**P4**) contradicted the anterior letter (**V8**) which was contemporaneous with receipt of payments. The posterior letter **P4** itemized the cheques as if they were made for the purchase price, whilst in the anterior letter **V8**, the Plaintiff had indicated them as payments for extra work.
33. It is evident that the Plaintiff was blowing hot and cold on a material point. When the Plaintiff was confronted with this contradiction *per se* in cross-examination, he conceded that these payments related to the extra work done to the premises and they had nothing to do with the full settlement of the purchase price.

34. I am reminded of the maxim *Allegans contraria non est audiendus* – He who alleges contradictory things is not to be heard. The maxim and its import have been widely applied in Sri Lanka for assessment of evidence – see *Kadija Umma v. Meera Lebbe*¹⁹. A person who anticipates a benefit under a transaction must not claim any right inconsistent with the tenor and background of a deed, which is left to courts to be objectively determined. This is the doctrine of approbation and reprobation which finds recognition in a slew of cases – see *Kanadasamy v. Gnanasekeram*²⁰; *Ranasinghe v. Premadharm*²¹; *Manage Sardajeewa v. Manage Sumana Nandaseeli et al*²²; *Agampodige Nirosha Shyamalee Puspha Kumari and Others v. Horathal Pedige Selena and Others*.²³

35. This elementary rule of logic expresses the trite saying of Lord Kenyon that a man shall not be permitted to blow hot and cold with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to prompting of his private interests – see *Wood v. Dwarrris*²⁴ and *Andrews v. Elliott*²⁵.

36. I would state that the Plaintiff's evidence on this crucial point is unreliable and contradictory. This clearly raises the improbability of his story that the Defendant had been paying in money towards the reduction of the purchase price.

37. **P4** was dispatched at a later point of time and, for the first time, asserted that the purchase price stood at Rs.35 million. That document was strenuously challenged at the trial, the Defendant having denied its receipt. More importantly, **P4** stands in direct contradiction to the Plaintiff's earlier correspondence, particularly **V8**, wherein the Plaintiff expressly acknowledged that sums paid over and above Rs.20 million were towards additional works relating to the provision of basic utilities.

¹⁹ 11 N.L.R 75 at 83

²⁰ SC / Appeal / 60 / 82 - SC minutes of 16.06.1983

²¹ (1985) 1 Sri LR 63

²² C.A. Case No. 722 / 1999 decided on 06.05.2019

²³ C.A. Case No. 555 / 1999 (F) C.A minutes of 06.05.2019

²⁴ 1 Exch. 493

²⁵ 5 E&B 502

The Plaintiff's own admissions at the trial reaffirmed this position. In the face of this contemporaneous acknowledgment, the belated assertion contained in **P4** cannot be reconciled with the Plaintiff's prior stance. The inevitable conclusion is that the Plaintiff has departed from the truth on a matter that goes to the very root of his transaction with the Defendant.

38. The volte face embodied in **P4**, when juxtaposed with the Plaintiff's own contemporaneous correspondence particularly **V8** and his admissions at the trial, admits of no innocent or inadvertent explanation. I therefore find that the Plaintiff has uttered a deliberate falsehood on a material and foundational aspect of his case.

39. In *Karunanayake v. Karunasiri Perera*²⁶, the court held that where a witness is found to have uttered a falsehood on a material point, that circumstance constitutes an additional factor operating in favour of the opposing party and may be treated as corroborative of the latter's version of events. In reaching that conclusion, Atukorale, J. relied on the principle enunciated in *R v. Lucas*²⁷, namely that a deliberate lie, if established, may in appropriate circumstances afford assurance to the truth of the opposing case. Although the *Lucas* principle has its genesis in the criminal law, it applies with equal force to civil proceedings where credibility is equally crucial to the resolution of the dispute.

40. Applying that principle to the present case, I treat the Plaintiff's testimony as affording corroboration of the Defendant's account of the transaction namely his payment of Rs.11.8 million over and above Rs.20 million was nothing but money given for extra work done on the premises.

41. There are further items of evidence which militate against the Plaintiff's case. As I have already observed, in none of the correspondence exchanged between the parties prior to **P4** dated 10 July 2009 is there any reference whatsoever to a purchase price of Rs.35 million. Equally, there is no suggestion anywhere in that

²⁶ (1986) 02 Sri.L.R. 27

²⁷ (1981) 2 All E.R 1008

correspondence of an outstanding balance of the purchase price being due and payable as such. Throughout the long exchange of letters between the parties, the Plaintiff as the vendor never once asserted that the Defendant was in default of an obligation to pay any balance consideration. The communications between them remained active for nearly a year. The deed of transfer was executed in 2008, and correspondence passed between March 2009 and August 2009. During this period, several tranches of money were remitted by the Defendant to the Plaintiff. Yet, at no point were those payments characterized by the Plaintiff as part payment of an alleged true consideration of Rs.35 million. This prolonged and consistent silence on a matter of such critical importance is wholly irreconcilable with the Plaintiff's later assertion and further undermines the credibility of his claim.

Section 114 illustration (g) inference

42. This silence which I would call evidentiary silence is not without legal consequence. Section 114 illustration (g) of the Evidence Ordinance authorizes the court to draw a presumption that evidence which could and ought to have been produced, but is withheld, would, if produced, be unfavourable to the party withholding it. If the Plaintiff's present assertion of a purchase price of Rs.35 million were correct, it would be reasonable to expect that such a claim would have surfaced in the contemporaneous correspondence exchanged at the very time when payments were being made. Instead, each tranche of money remitted by the Defendant was, at the time of receipt, treated by the Plaintiff as being towards expenses incurred in relation to the installation or completion of the basic utilities of the apartment. It was only subsequently, and for the first time in **P4**, that the Plaintiff sought to recharacterize those same payments as part payments of an alleged higher consideration. In these circumstances, the Plaintiff's failure to assert his present claim when the occasion naturally called for it, coupled with his contemporaneous treatment of the payments for a different purpose, permits the Court to draw an adverse presumption under Section 114 illustration (g), which weighs against the credibility of his case.

The payment of Rs.4.5 million classified by the Plaintiff as “full and final settlement”.

43. The parties eventually reached a consensus on 23 March 2009. It was agreed that the Defendant would pay a sum of Rs.4.5 million to meet the costs attendant upon the deficiencies relating to the inadequate provision of electricity and water to the premises. The evidence establishes that this arrangement was intended to facilitate the provision of essential utilities such as water and electricity and to bring the matter to a conclusion between the parties.
44. The Defendant reduced the terms of the aforesaid agreement to writing by dispatching a letter dated 23 March 2009, confirming the agreed sum of Rs.4.5 million and forwarding payment of Rs.2 million by way of four cheques as part performance thereof.
45. The Defendant proposed a structured payment plan for the remaining amount, undertaking to pay Rs. 2 million in two equal installments on specified dates, while he also sought therein a waiver of Rs.500,000 (five hundred thousand) by way of an amicable settlement.
46. I am fortified in my view that all these payments were made for additional work and not as part payments for the purchase price, because I find an admission on the part of the seller in a letter, he wrote to Vishwajith Saparamadu (the Defendant) on 3 June 2009. In this letter marked as V8, Nimal De Silva (the Plaintiff vendor) had characterized two cheque payments made by Vishwajith Saparamadu as if those payments were made for additional work. I cannot lose sight of the fact that since the settlement which both these parties reached on 23 March 2009, there had been a clutch of letters that exchanged between the two of them and the letter I have referred to above stands conspicuously in that clutch containing the unambiguous admission the incoming payments were meant for additional work undertaken by the vendor of the premises i.e, the Plaintiff.

47. By no stretch of imagination can the Plaintiff resile from this admission which is admissible against him by virtue of Section 21 of the Evidence Ordinance.
48. None of the correspondences from the date of the verbal agreement that was reached between the parties on 23 March 2009 ever indicates unambiguously that the payments were being made as part of the purchase price.
49. There is also an unmistakable failure I observe in the conduct of the vendor. When the vendee (the Defendant) sought a waiver of Rs.500,000 in his letter dated 23 March 2009, there was no agreement the Plaintiff indicated to this proposal - i.e., it could be said that the buyer was seeking an amicable alteration of the payable amount from Rs.4.5 million to Rs. 4 million. Even though the Plaintiff did not agree to this suggestion but insisted on the full payment of Rs.4.5 million he further went on to assure the Defendant in his response dated 25 March 2009 that a full and final settlement would become a reality only in the event of Rs.500,000 being paid. In other words, the Plaintiff insisted on a strict payment of Rs.4.5 million as the full and final settlement of any outstanding dues between the two of them. He also assured handing over of the keys to the apartment only upon the full payment of Rs.4.5 million. In the event the payment of Rs.4.5 million was made, the Defendant would have made a total payment of 12.8 million. It is upon this payment that the Plaintiff promised a full and final settlement of the transactional dues between the two parties. There is evidence which unmistakably establishes that when the Defendant made a payment of Rs.3.5 million out of the agreed upon sum of Rs.4.5 million, that constituted a total payment of Rs. 11.8 million.
50. Upon this payment of Rs. 11.8 million, the Plaintiff handed over the premises by symbolic delivery of the key to the Defendant. This took place on 4 June 2009 which signified the full and final settlement as declared by the Plaintiff in his letter dated 25 March 2009. In other words, though the Plaintiff agreed to settle the account between him and the Defendant at a sum of Rs. 12.8 million, eventually he settled down to a sum of Rs. 11.8 million. As I said before, this

implied the full and final settlement which was symbolically signified by the handing over of the keys.

51. If the total incoming payments that had been made so far added up to a sum of Rs.11.8 million, which the Plaintiff classified as part of the purchase price, it would be illogical for him to allege in his plaint that the Defendant owed him a further Rs.3.2 million on the purchase price. His letter dated 25 March 2009 speaks of a **full and final settlement** and the Plaintiff's case is premised on the basis that payments made so far by the Defendant were part payment of the purchase price. If on his own admission the incoming payments should stop at Rs.11.8 million which cap was reached on 3 June 2009, there would be no outstanding amounts due to the Plaintiff because he handed over the keys upon the complete payment of Rs.11.8 million and if all that had been paid was part of the purchase price, on his own admission he made it final at Rs.11.8 million.

52. Therefore, there cannot be an action founded on a further Rs.3.2 million allegedly owed by the Defendant. On this analogy there is nothing more that the Plaintiff could claim as purchase price. The story of a purchase price at Rs.35 million thus falls like a pack of cards.

53. Objectively interpreting the Plaintiff's letter dated 25 March 2009, I conclude that the payments that were made over and above Rs.20 million should be accepted as having been made for the additional work and not for the purchase price.

54. This would demonstrate that the claim of the Plaintiff that the sale was effected for a sum of Rs.35 million has not been proved on a balance of probability. Therefore, the version proffered by the Defendant namely all his subsequent payments that totalled a sum of Rs.11.8 million went towards the extra work that were done on the premises and not towards the liquidation of the purchase price should be accepted.

55. The Plaintiff has not controverted the sale price of Rs.20 million that was reflected on the deed of transfer. Though legally he could bring evidence that would override

the sum of Rs.20 million reflected on the deed, there was no admissible evidence before the court to conclude otherwise. The learned Judge of the Commercial High Court was quite right in rejecting the version of the Plaintiff and dismissing the action filed by the Plaintiff.

56. It must be remembered that the sale price of Rs.20 million was settled on the date of the execution of the deed. It was settled by an initial payment of Rs.15 million being paid by two cheques and the remaining sum of Rs.5 million was paid by way of a promissory note.

57. There is no dispute that the cheques and the promissory note were honored by the vendee — the Defendant in the case. It is undeniable that cheques and promissory notes are choses in action which are often described as equivalent to cash. In the case of *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei G.m.b.H*²⁸ Lord Wilberforce was of the view that;

*“A seller may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instruments of cash”.*²⁹

58. Further in the case of *Fielding & Platt Ltd v. Selim Najjar*³⁰ Lord Denning stated the following;

“We have repeatedly said in this court that a Bill of Exchange or a Promissory Note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary”.

59. The fact that these bills of exchange were equivalent to cash payable on demand in the case of a cheque or at a fixed or determinable future time in the case of a promissory note was established by these instruments being encashed on

²⁸ [1917] 1 WLR 721

²⁹ Ibid

³⁰ [1969] 2 All E.R 150 at p 152; [1969] 1 WLR 357; [1969] EWCA Civ J0117-1

presentment and if indeed the purchase price as alleged by the Plaintiff was a sum of Rs.35 million, the Plaintiff could have insisted at the time of the execution of the deed a promissory note for a sum of Rs.20 million.

60. When the Plaintiff was posed a question as to why he did not demand a promissory note for Rs.20 million, he was quite content to state that he trusted the Defendant. This answer begs the question. If the Plaintiff could repose trust in the bills of exchange that were being handed over to him by the Defendant and the Defendant was a person who could inspire trust in him, it defies logic as to why he could not trust him enough for a promissory note worth Rs.20 million. This evidence leaves much to be desired.

61. All in all, the Defendant's case has to be upheld and as for the case of the Plaintiff, the words of Lord Brandon in *Rhesa Shipping Co SA v. Edmunds*³¹ are apposite;

“This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden”.

62. Thus, I proceed to affirm the judgment of the learned Commercial High Court Judge dated 14 November 2012 and dismiss the appeal of the Plaintiff – Appellant.

Judge of the Supreme Court

³¹ (1985) 1 WLR 948

S. Thuraija, PC, J.

Judge of the Supreme Court

I agree

Kumudini Wickremasinghe, J.

Judge of the Supreme Court

I agree