IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against a judgment pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

S C Appeal (CHC) No. 20/2007

HC Colombo (Civil) 137/99

1. Pesumal Bulchand Chandiramani,

2. Jayashree Pesumal Chandiramani,

Both of
No. 18,
Murugan Place,
Colombo 06.

PLAINTIFF - APPELLANTS

-Vs-

1. Chandru Lakshimal Sadhwani,

No 50,
Nelson Place,
Colombo 06.

2. Seylan Bank Ltd,
Ceylinco Seylan Towers,
No. 90,
Galle Road,
Colombo 03.

DEFENDANT - RESPONDENTS

Before: Sisira J. De Abrew J

Vijith K. Malalgoda PC J

P. Padman Surasena J

Counsel:

Faisz Musthapha PC with Keerthi Thilakaratne for the Plaintiff - Appellants

Bimal Rajapakshe with Amrith Rajapakse for the 1st Defendant - Respondent

Romesh de Silva PC with Palitha Kumarasinghe PC and Manjuka Fernandopulle for the 2nd Defendant - Respondent.

Argued on: 2019 - 03 - 05

Decided on: 2019 - 04 - 04

P Padman Surasena J

The Plaintiff - Appellants (hereinafter sometimes referred to as the Plaintiffs) filed the plaint relevant to this case in the High Court of the Western Province against the 1st and 2nd Defendant - Respondents (hereinafter sometimes referred to as the 1st and 2nd Defendants). In the said plaint, the plaintiffs have complained that the 1st and 2nd Defendants acting in collusion, wrongfully and without any authority converted and/or misappropriated and/or deprived the plaintiffs a sum of US $ 161,381.15. The Plaintiffs have further stated that despite several demands, the 2nd Defendant (Seylan Bank Ltd.) has failed and neglected to pay the said sum of money, which it was obliged to pay to the Plaintiffs.

It would be useful at the outset, for the Court to identify, the case presented (as per the plaint) by the Plaintiffs to the High Court.

The following salient features in the case for the Plaintiffs could be highlighted.

1. The Plaintiffs who are husband and wife, along with the 1st Defendant had jointly opened (in the year 1987) an account (a term deposit bearing No. 230-3156-101 at the Bank of Credit and Commerce International (overseas) Ltd, Gloucester Branch, Hong Kong (hereinafter referred to as BCCI).

2. In or around the year 1991 the said BCCI had seized operations worldwide.[1]
3. The Plaintiffs had thereafter claimed a sum of approximately US $ 161,381.15 from the liquidator of the BCCI.
4. The Plaintiffs had provided proof to claim this sum of money from the said BCCI in its liquidation proceedings.[2]
5. Somewhere in November 1998, the Plaintiffs had become aware from independent sources that the said liquidator in Hong Kong has remitted the money so claimed by the plaintiffs to the 2nd Defendant, which is a bank operating in Sri Lanka (Seylan Bank).
6. Thereafter the 2nd Defendant Bank by its letter dated 1999-02-18 had informed the Plaintiffs that the 2nd Defendant had received instructions that proceeds from the deposits placed in BCCI Hong Kong Ltd be utilized towards the reduction of the liabilities of Esquire Garments Industry Ltd with the bank and that the said instructions had been duly carried out.[3]

The Plaintiffs have taken up the position that they did not at any stage give any instructions to the 2nd defendant to utilize the said proceeds towards the reduction of liabilities of Esquire Garments Industry Ltd. [4]

It is the position of the Plaintiffs that the 1st and 2nd Defendants acting in collusion wrongfully and without authority converted and or

[1] Paragraph 7 of the Plaint.
[2] Paragraph 8 of the Plaint.
[3] Paragraph 14 of the Plaint.
[4] Paragraph 15 of the Plaint.

misappropriated and / or deprived the Plaintiffs of the said sum of US $ 161,381.15.[5]

The 2nd Defendant filed its answer stating;

i. that the Colombo branch of the Bank of Credit and Commerce International (Overseas) Ltd, at the request of the Plaintiffs and the 1st Defendant had provided banking facilities to Esquire Garments Industry Ltd, which is a company duly incorporated in Sri Lanka.[6]

ii. that the Plaintiffs and the 1st Defendant had deposited the term deposit receipts pertaining to the account bearing number 230-3156-101 as a security for the repayment of the said banking facilities, with the Colombo branch of the BCCI under lien and assigned all rights over the said term deposit to the said Colombo branch of the BCCI. [7]

iii. that on or about 28th December 1991, as the BCCI had seized operations, the Monetary Board of the Central bank of Sri Lanka under the powers vested in it by virtue of the Emergency (Banking Special Provisions) Regulation No. 02 of 1991 made by His Excellency the President under section 5 of the Public Security Ordinance, had vested all the assets and liabilities of Colombo branch of BCCI with the 2nd Defendant (Seylan Bank) with effect from 1st January 1992.[8]

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[5] Paragraph 16 of the Plaint.
[6] Paragraph 4(a) of the answer filed by the 2nd Defendant.
[7] Paragraph 4(b) of the answer filed by the 2nd Defendant.
[8] Paragraph 5(b) of the answer filed by the 2nd Defendant.

iv. The 2nd Defendant had since then become entitled to the business and assets to the said Colombo branch of BCCI since 1st January 1992.[9]

v. The said Esquire Garment Industry Ltd had defaulted payments pertaining to the banking facilities granted to it by the Colombo branch of the BCCI. [10]

It is the position of the 2nd Defendant that the Plaintiffs and the 1st Defendant, after the collapse of the BCCI, had duly authorized the liquidator of BCCI (in the process of its winding up proceedings conducted in terms of winding up rules of Hong Kong), to pay the dividends due to the Plaintiffs and the 1st Defendant on the said term deposit receipts, to the 2nd Defendant.

The 2nd Defendant further states that the said liquidator in view of the said authority granted to him by the Plaintiffs and the 1st Defendant, had from time to time remitted the relevant dividends to the 2nd Defendant. In essence, it is the position of the 2nd Defendant that it merely recovered the moneys due to it by Esquire Garments Industry Ltd under the above-mentioned lien.

This Court at this stage would like to highlight a special feature in the case presented to the High Court by the Plaintiffs. The plaintiffs for the reasons best known to them had chosen not to refer to the fact of obtaining the said banking facilities from the BCCI or tendering the relevant term deposit receipts of the account bearing No. 230-3156-101 with the Colombo branch of the BCCI as a security for repayment of the relevant

[9] Paragraph 5(c) of the answer filed by the 2nd Defendant.
[10] Paragraph 6 of the answer filed by the 2nd Defendant.

banking facilities. Ironically, the Plaintiffs appear to simulate a mere general situation where the bank (2nd Defendant) despite several demands, has failed and neglected to pay to its account holder (Plaintiffs) the remainder of the funds of their account after the closure of the said account. The Plaintiffs allege that the 2nd Defendant (Seylan Bank Ltd.) wrongfully, without any authority and acting in collusion with the 1st Defendant (the other joint account holder) had converted and or misappropriated the said sum of money, which it was otherwise obliged to pay to the Plaintiffs.

The written authority given by the Plaintiffs and the 1st Defendant to the liquidator to pay the dividends pertaining to the term deposit bearing No. 230-3156-101 has been produced in the trial marked **D 3**. Perusal of the contents of the said document (**D 3**) clearly shows that the Plaintiffs and the 1st Defendant have unequivocally authorized and requested the liquidator to pay to the 2nd Defendant all dividends declared in the relevant liquidation proceedings as payable to them (Plaintiffs and the 1st Defendant).

As has been pointed out by the learned President's Counsel for the 2nd Defendant, remitting this money to the 2nd Defendant is unconditional. Further, the 1st plaintiff who had given evidence on his behalf and his wife's behalf (2nd Plaintiff's behalf) has admitted in his evidence, in no uncertain terms;

i. that the relevant term deposit is a joint account opened together by the plaintiffs and the 1st Defendant.
ii. that the said account was operated jointly by all of them,
iii. that no single account holder could have operated it alone,

iv. that a liquidator was appointed after the BCCI went into liquidation,

v. that it was the liquidator who was in charge of all funds in BCCI,

vi. that in order to deal with the said funds the liquidator wanted him to make a claim,

vii. that all three of the joint account holders namely the plaintiffs and the 1st Defendant signed the form 72 (**D 3**) and gave instructions to the liquidator to remit the money to the 2nd Defendant,

viii. that the 2nd Defendant accordingly had correctly received this money from the liquidator,

ix. that it is that amount of money which is the subject matter of his claim in the instant action,

x. that there is no fault on the part of the liquidator in sending money to the 2nd Respondent,

xi. that the plaintiffs do not have any account with the 2nd Defendant.

Further, as pointed out by the learned President's Counsel for the 2nd Defendant, there is no evidence to prove (other than the letter of demand) that the Plaintiffs had at any time demanded from the 2nd Defendant that the said remitted amount of money be paid to them. The 1st Plaintiff has admitted in his evidence that the first letter he wrote to the 2nd Defendant is the letter produced marked **P 5**.

This Court while observing that the plaintiffs and the 1st Defendant had signed the form 72 (**D 3**) on the 10th December 1993 giving instructions to the liquidator to remit the money to the 2nd Defendant also observes that it was on a date as late as the 31st December 1998 that the Plaintiffs had sent the letter (**P 5**) to the 2nd Defendant. It would be noteworthy that the Plaintiffs either in **P 5** or in the other subsequent communication

(**P 6**) sent by them to the 2nd Respondent, had not made any claim to this sum of money from the 2nd Defendant. The first time the plaintiffs had made a claim, for this money is through the letter of demand dated 27th April 1999 (produced marked **P 9**) sent to the 2nd Defendant by the Attorneys at Law of the Plaintiffs. This appears to be after the 2nd Defendant had informed the Plaintiffs by letter dated 18th February 1999 (produced marked **P 7**) that the said money was utilized by it towards the reduction of the liabilities of Esquire Garments Industry Ltd as per the instructions given by the Plaintiffs. This fact militates against the hypothesis that the Plaintiffs have not given any instructions to the 2nd Defendant to use the relevant remittances received from BCCI towards reducing liabilities of Esquire Garments Industry Ltd.

Learned President's Counsel for the Plaintiffs strenuously argued that the learned High Court Judge should have held that the 2nd Defendant should pay this sum of money to the Plaintiffs. He advanced the above argument based on the answer provided by the High Court to the issue No. 30. The said issue No. 30 and the answer provided to it are as follows.

Issue No. 30;

Is the 2nd Defendant entitled to recover and/ or set off the moneys remitted or paid by the liquidator against the liabilities of the said Esquire Garments Industry Ltd under the lien granted to the 2nd Defendant?

Answer;

not proved.

It would be of some relevance at this stage to note the fact that the High Court has answered the issue No. 13 in the negative. The said issue No. 30 and the answer provided to it are as follows.

Issue No. 13;

Did the 1st and 2nd Defendants wrongfully and unlawfully utilize the said remittances towards the reduction of the liabilities of the Esquire Garments Industry Ltd?

Answer;

No.

It is also relevant at this stage to observe that the parties have recorded the following admissions at the trial.

I. The plaintiffs and the 1st Defendant made the term deposit into the account bearing No. 230-3156-101 at the BCCI as stated in paragraph 4(b) in the amended answer.
II. BCCI seized operations in 1991 as stated in paragraph 5 of the 2nd Defendant's answer.
III. BCCI was subject to liquidation and/ or winding up proceedings, as averred in paragraph 7(a) as amended in the answer of the 2nd Defendant.
IV. The 2nd Defendant recovered the proceeds of dividends for itself and received from the liquidator of the BCCI from time to time in terms of paragraphs 8(a) and (b) of the answer of the 2nd Defendant.

1st Plaintiff in the course of his cross-examination has admitted that none of the Plaintiffs either jointly or severally has had any account with the 2nd

Defendant. He also had admitted that neither of them had any dealings with the Seylan Bank and that the only person, whom they had dealt with, was the liquidator. The Plaintiffs had categorically admitted that they had authorized the liquidator to pay to the 2nd Defendant whatever the monies due to them. The Plaintiffs do not complain against the liquidator alleging that the said liquidator had remitted the said sum of money due to them, to a wrong person namely the 2nd Defendant. In the light of the above facts, this Court is unable to gather any basis as to why the 2nd Defendant should thereafter also have sought instructions from the plaintiffs as to the disbursement of that money. The said sum of money with the said remittance had become part of the 2nd Defendant's funds. This is particularly so in view of the fact that the Plaintiffs and the 1st Defendant have not mentioned anywhere in **D 3** that they authorize the liquidator to remit this money to the 2nd Defendant to be transferred to them or to be used only according to their instructions. Thus, on the balance of probability of the evidence led in this case, this Court is of the view that the learned High Court Judge is correct when he held that the Plaintiffs and the 1st Defendant by the act of signing the form 72 (**D 3**) have authorized the liquidator to pay the dividends to the 2nd Defendant. Thus, this Court is of the opinion that dismissal of the Plaintiffs' action by the learned High Court Judge is justifiable.

This Court holds that the argument advanced by the learned President's Counsel for the Plaintiffs that the learned High Court Judge should have held that the 2nd Defendant should pay this money to the Plaintiffs when he had held that the issue No. 30 has not been proved, has no merit. This

Court concludes that the High Court has correctly decided that the Plaintiffs have failed to prove their case.

In these circumstances, this Court affirms the judgment of the High Court dated 22nd February 2007 and proceeds to dismiss this appeal with costs. Learned Judge of the High Court holden in Colombo is directed to enter the decree accordingly.

JUDGE OF THE SUPREME COURT

Sisira J. De Abrew J

I agree,

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda PC J

I agree,

JUDGE OF THE SUPREME COURT