

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

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter L VIII of the Civil Procedure Code.

J. D. Corporation (Private) Limited
No. 37, W. A. D. Ramanayake Mawatha
Colombo 02

PLAINTIFF

S.C. CHC Appeal No: 35/2012

H.C. Civil No: 198/2006 (1)

Vs.

Lafarge Mahaweli Cement (Private) Limited
No. 69, New Kelani Bridge Road
Orugodawatte
Colombo 14

DEFENDANT

AND NOW BETWEEN

J. D. Corporation (Private) Limited
No. 37, W. A. D. Ramanayake Mawatha
Colombo 02

PLAINTIFF~APPELLANT

Vs.

Lafarge Mahaweli Cement (Private)
Limited
No. 69, New Kelani Bridge Road
Orugodawatte
Colombo 14

DEFENDANT-RESPONDENT

BEFORE: Buwaneka Aluwihare, PC, J,
L. T. B. Dehideniya, J &
E. A. G. R. Amarasekara, J

COUNSEL: Gamini Perera with Wijitha Salpitikorala instructed by
Saumya Hettiarachchi for the Plaintiff-Appellant.

Anura Meddegoda, PC with Ms. Nadeesha Kannangara
instructed by Varners for the Defendant-Respondent.

ARGUED ON: 09.05.2022

WRITTEN SUBMISSIONS; 05.08.2022 Defendant Respondent
10.11.2022 Plaintiff-Appellant

DECIDED ON: 13.01.2023

JUDGEMENT

Aluwihare, PC, J.

- (1) **The Plaintiff-Appellant** (hereinafter referred to as the “Plaintiff”) instituted this action in the Provincial High court of the Western Province (Exercising Original Civil Jurisdiction) Holden in Colombo (hereinafter referred to as the “Commercial High Court”) against the Defendant-Respondent (hereinafter referred to as the “Defendant”) on 12th September 2006 seeking a Judgement and Decree against the Defendant in a sum of Rupees 75 million with legal interest thereon till date of Decree, and thereafter legal interest on the aggregate amount of Decree till payment in full.
- (2) The Defendant by their Answer filed on 08th December 2006 sought a dismissal of the Plaintiff’s action. After the conclusion of the trial, the learned Judge of the High Court by Judgement dated 09th March 2012, decided in favour of the Defendant and dismissed the action. Being aggrieved by this Judgement, the Plaintiff has preferred this appeal seeking to set aside the Judgement of the learned High Court Judge.

Factual background

- (3) The Plaintiff in their Plaintiff have averred that; the Plaintiff is a Company mainly engaged in the business of purchasing bulk cement in Sri Lanka, bagging it into branded 50kg bags and supplying it to customers. The Defendant is a Company engaged in importing cement into Sri Lanka in bulk. A third Company called

Zeeniya Traders (Pvt) Ltd has at all times material to this action, acted as the agent of the Defendant Company, for the purpose of, *inter alia*, selling and/or entering into a contract on behalf of the Defendant Company for the sale of such Cement.

- (4) On or about 07th of October 2005 the Defendant Company agreed and/or undertook through its agent Zeeniya Traders (Pvt) Ltd to supply in bulk a quantity of 40,000 metric tons of Ordinary Portland Cement from the month of October 2005 to November 2006, at a rate of Rs. 8,100/- per Metric ton less a confidential discount of 20%. For arranging the above contract, the agent, Zeeniya Traders (Pvt) Ltd was paid an additional sum of Rs. 15 Million upfront by the Plaintiff Company calculated at Rs. 375/- per Metric Ton of Cement. The Plaintiff duly paid the said sum of Rs. 15 million to Zeeniya Traders (Pvt) Ltd.
- (5) The Defendant acting on the said agreement, supplied to the Plaintiff 18,500 Metric Tons of Ordinary Portland Cement in bulk up to 29th of May 2006 in respect of which the Defendant received full payment due from the Plaintiff. Thereafter, by a letter dated 30th May 2006, marked “**P22**”, the Defendant informed the Plaintiff that no further bulk cement will be supplied to the Plaintiff, thus the Plaintiff claims, since 30th May 2006, the Defendant has wrongfully failed or neglected to supply the balance quantity of 21,500 Metric tons of the said Bulk Cement thus causing damage and loss to the Plaintiff.
- (6) Owing to the failure of the Defendant in honouring their contract, the Plaintiff alleges to have suffered loss and damage to its business reputation, financial loss, a loss of Rs. 8,064,750/- being the balance sum of the advance payment of Rs. 15 million paid by the Plaintiff to Zeeniya Traders (Pvt) Ltd, in respect of which the Defendant has not supplied the balance quantity of the said bulk cement, as

well as having been wrongfully deprived of the income which the Plaintiff would have otherwise earned.

- (7) The Defendant in their answer has stated as follows; The Defendant supplied cement to the Plaintiff Company solely at the request of the Chairman of Sri Lanka Cement Corporation, and that **there was no contract or agreement** between the Plaintiff and the Defendant stipulating the rate or quantity of cement to be supplied. Zeeniya Traders (Pvt) Ltd was not a party to these transactions and that the Defendant did not know of any agreement that existed between the Plaintiff Company and Zeeniya Traders (Pvt) Ltd. At any rate, Zeeniya Traders (Pvt) Ltd has no authority to enter into a contract on behalf of the Defendant Company as an agent for the Defendant.
- (8) The Defendant also claims that the supply of cement by the Defendant to the Plaintiff was later stopped at the request of the said Chairman of Sri Lanka Cement Corporation. The Defendant alleged that since **no contract exists** between the Plaintiff and the Defendant, **there is no cause of action** for the Plaintiff to sue the Defendant. Accordingly, the Defendant sought for a dismissal of the Plaintiff's action.
- (9) On behalf of the Plaintiff Company, witness Janath Sri Vidanage, the Managing Director of the Plaintiff Company, testified. According to the evidence [Affidavit] of the witness, when the witness first approached the Defendant Company with an offer of purchasing cement, a price of Rs. 8,100/- per Metric Ton of cement was quoted, which was the usual price at which Lafarge Cement sold to its customers. When the Witness thereafter inquired from one Nithyanandan, the Supply Chain Manager of the Defendant Company, as to how a previous purchaser had obtained a 20% discount on this price, Nithyanandan had informed that any discount was at the sole discretion of Rex Hatherly, the

Managing Director of the Defendant Company. Thereafter, Sri Vidanage and Dilshan Rajapakse who was another Director of the Plaintiff Company had met with one Mohamed Maharoof, who was a former Chairman of the Defendant Company, with the aim of approaching Rex Hatherly. During this meeting between Sri Vidanage, Dilshan Rajapakse and Mohamed Maharoof, Maharoof had informed that Zeeniya Traders (Pvt) Ltd of which his wife. Zareena Zainab Maharoof is the Chairperson and his sister Zainab Zeenia Maharoof Osman is a director, and he himself is a shareholder, is the main agent for the Defendant Company in selling imported Cement. Maharoof had also informed at this meeting that he would be able to arrange for the purchase of bulk cement at the discounted price. Thereafter Maharoof had informed the Directors of the Plaintiff Company that he could arrange with the Defendant Company to issue 20,000 Metric Tons of bulk cement with a discount of 20% on the normal selling price of Rs. 8,100/- per ton, provided that the Plaintiff Company make an upfront payment of Rs. 6 million to Zeeniya Traders (Pvt) Ltd.

(10) According to the evidence [affidavit] of the witness Sri Vidanage, on 22nd of March 2005 Sri Vidanage and Dilshan Rajapakse had met with Maharoof and Rex Hatherly, to discuss this arrangement. At the said meeting Rex Hatherly had agreed and guaranteed the supply of 20,000 Metric tons of bulk cement with a special discount of 20% on the normal price of Rs. 8,100/- per ton. It was stated in this meeting that as a condition of this arrangement Rs. 6 million had to be paid by the Plaintiff Company to Zeeniya Traders (Pvt) Ltd, calculated at Rs. 300/- per Metric ton for the quantity of 20,000 Metric tons, which was termed a “quantity booking charge”. The Plaintiff Company had thereafter made this payment of Rs. 6 million to Zeeniya Traders (Pvt) Ltd. Upon this payment being made Rex Hatherly had written to the Plaintiff Company a letter dated 11th May 2005, marked “P7” which stated,

“I can Confirm we will be able to supply Bulk Cement to you at Rs. 8,100/- per metric ton less of course our agreed confidential discount.

Please ensure that you operate on a strict “cash and carry” basis at all times. Therefore, to start the sequence of deliveries, please remit to us the funds sufficient to cover your first delivery.”

The letter “**P7**” has not been marked subject to proof (vide page 2 of proceedings of 28.09.2007)

- (11) Thereafter, according to Sri Vidanage, the Defendant had supplied 20,000 Metric tons of Cement to the Plaintiff as agreed from 11th May 2005 to 02nd of November 2005.
- (12) According to the evidence [affidavit] of Sri Vidanage, it is in this backdrop that the purported contract between the Plaintiff and the Defendant which forms the subject of the present action was entered into. According to his evidence, Sri Vidanage and Dilshan Rajapakse had once again met with Rex Hatherly and Maharoof for the purchase of 40,000 Metric tons of Cement. They had been informed that this time, Rs. 15 million be paid to Zeeniya Traders (Pvt) Ltd upfront, calculated at Rs. 375/- per Metric ton to **secure the supply of 40,000 Metric tons of Cement** by the Defendant Company to the Plaintiff Company for a price of Rs. 6,500/- per metric ton to be supplied from October 2005 to November 2006. Sri Vidanage and Dilshan Rajapakse had accepted these terms and had paid the said Rs. 15 million to Zeeniya Traders (Pvt) Ltd. The copies of the receipts issued by Zeeniya Traders (Pvt) Ltd were tendered in evidence marked “**P11**”, “**P12**”, “**P13**” and “**P14**”. Thereafter the Defendant Company had issued a total of 18,500 Metric tons of cement to the Plaintiff up until the 29th of May 2006 in pursuance of this agreement. Memos issued by the Defendant Company to the Plaintiff Company in respect of this supply of cement were marked as “**P15(1)**” to “**P15(72)**”. Sri Vidanage stated that the Plaintiff Company had made a total payment of Rs. 120,250,000/- in respect of the said quantity of 18,500 Metric tons of cement supplied by the Defendant, and payment receipts issued by the Defendant Company to the Plaintiff verifying this payment were marked as “**P16(1)**” to “**P16(58)**”.

(13) According to the evidence of Sri Vidanage and Nithyananda, the Supply Chain Manager of the Defendant Company, by a letter dated 09th March 2006 addressed to Zareena Zainab Maharoof, Director, Zeeniya Traders (Pvt) Ltd, marked “*P17(a)*” purported to have been signed by the Supply Chain Manager Nithyananda, had confirmed the existence of this agreement between the Plaintiff and the Defendant. The letter states as follows,

“Balance Confirmation of Bulk Cement Contracted on behalf of J. D. Corporation (Pvt) Ltd

“This is to confirm, as at 07th March 2006 we have supplied 14250 Mt to J.D. Corporation out of 40,000MT of bulk cement contracted through your company as our agent.”

(14) According to the evidence of Sri Vidanage, the Defendant Company thereafter by letter dated 30th May 2006, signed by Rex Harthely [“*P22*”] had informed the Plaintiff that no further cement would be supplied to the Plaintiff.

(15) Witness Tharanga Priyawansha, an accountant attached to the Plaintiff Company gave evidence to the effect that the loss suffered by the Plaintiff owing to the failure of the Defendant Company to supply the outstanding quantity of 18,500 Metric tons of cement was Rs. 22,897,500/-. He also gave evidence that on many occasions he had personally seen Nithyanandan, the Supply Chain Manager, place his signature on numerous documents, and that he identifies the signature placed on [P17(a) 1] as being that of Nithyanandan.

(16) Koggala Wellala Bandula, who was the Chairman of the Sri Lanka Cement Corporation and a director of the Defendant Company during 2004 to 2005 also had given evidence on behalf of the Plaintiff. The Witness in his evidence stated that during his time as a director in the Defendant Company he was familiar

with the signature of Nithyanandan and that he identifies the signature appearing in “**P17**” marked as **P17(a)(1)** as being that of Nithyanandan. Two other witnesses were also called to give evidence by the Plaintiff.

- (17) On behalf of the Defendant, Nithyanandan, who was the Supply Chain Manager of the Defendant Company during the said period, gave evidence. Nithyanandan in his evidence [affidavit] denied having written the letter marked **P17**. He stated that he has never had any written communication with any director or staff member of Zeeniya Traders (Pvt) Ltd during his employment in the Defendant Company. He claimed that the font used in the letter “**P17**” varies from what is usually used by the Defendant Company, that his signature appears somewhat distorted and that his name is spelt wrong in the said letter. He also stated that he had no authority to officially enter into any agreement or approve any contract on behalf of the Defendant Company.
- (18) Sandaya Darshini Siriwardena, the Finance Manager of the Defendant Company was the other witness who gave evidence on behalf of the Defendant. Mrs. Siriwardena in her evidence stated that the Defendant Company started supplying cement to the Plaintiff Company on the request of M/s Sri Lanka Cement Corporation and that Zeeniya Traders (Pvt) Ltd was not a party to this transaction. Her evidence was to the effect that Zeeniya Traders (Pvt) Ltd has no authority to enter into contracts on behalf of the Defendant Company. The Witness also referred to the fact that the letter “**P17(a)**” does not have a reference number on the face of the letter whereas other letters originating from the Defendant Company do. The Witness, by referring to the series of documents marked “**P15(1)**” to “**P15(72)**” stated that the Defendant Company had supplied cement to the Plaintiff Company between 07th of November 2005 to 29th May 2006. Mrs. Siriwardena also stated that Nithyanandan, the Supply Chain

Manager of the Defendant Company has no authority to enter into contracts on behalf of the Defendant Company.

The Issues

(19) Accordingly, two main issues arise for determination in this appeal. The first is whether Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in the purported contract between the Plaintiff and the Defendant for 40,000 Metric tons of Cement. The second is whether a legally enforceable contract exists for the sale of 40,000 Metric tons of cement by the Defendant to the Plaintiff. Each of these issues will be dealt with, in sequence.

(20) On 02.03.2007, when recording the issues and admissions of the parties the following admissions were recorded by the Judge,

- “1. The Defendant is a duly Incorporated Company in Sri Lanka
- 2. The Defendant Company was engaged in importing ordinary Portland cement in bulk
- 3. Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant Company”

(Vide page 1 of proceedings of 02.03.2007)

(21) The Defendant in their Written Submission in the Commercial High Court as well as in their Submissions before this court has stated that the third admission, namely; Zeeniya Traders acted as agent of the Defendant, was recorded erroneously by the Learned High Court Judge. In support of this contention, they refer to paragraph 4 of the Answer whereby the Defendant has denied the averments contained in paragraph 3 of the Plaintiff.

(22) On a perusal of the Answer of the Defendant it does not appear that the Defendant has admitted that Zeeniya Traders (Pvt) Ltd acted as their agent. Additionally, in the issues and admissions of this action, the first issue raised by the Plaintiff is as follows,

“1. At all times material to this action did Zeeniya Traders (Pvt) Ltd act as an agent for the Defendant Company for the purpose of selling and/or entering into contracts on behalf of the Defendant Company?”

(23) By raising this issue, the Plaintiff has taken upon themselves the burden of proving that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in relation to the agreement in question. Nevertheless, the Defendants' submission that this admission was erroneously recorded by the Judge cannot be justified as no attempt had been made to rectify it. This court, however, would proceed on the premise that the admission No.3 is a general admission and in view of the issue No.1 raised by the Plaintiff, that it was incumbent upon the Plaintiff to prove that Zeeniya Traders (Pvt) Ltd did in fact act as the agent of the Defendant Company in relation to the transaction in question.

(24) The submission of the Defendant was that there exists no contract of agency between Zeeniya Traders (Pvt) Ltd and the Defendant Company and, therefore, Zeeniya Traders (Pvt) Ltd has no authority to bind the Defendant Company. The Learned High Court Judge has also based her decision on the premise that Zeeniya Traders (Pvt) Ltd did not have authority to bind the Defendant and therefore no agreement for the sale of cement exists between the Plaintiff and the Defendant.

(25) On the subject of agency reference may be had to “**Bowstead and Reynolds on Agency**” (18th Ed, London Sweet and Maxwell 2006) by F. M. B. Reynolds, QC which details the different means by which agency could arise, [at page 37],

“(1) *The relationship of principal and agent may be constituted-*

- (a) by agreement, whether contractual or not, between principal and agent, which may be express, or implied **from the conduct or situation of the parties.**
- (b) retrospectively, by subsequent ratification by the principal of acts done on his behalf.

(2) A person may be liable under the doctrine of apparent authority in respect of another who is not his agent at all; or may be estopped as against a third party from denying the existence of an agency relationship”

(26) “**Bowstead and Reynolds on Agency**” discusses the doctrine of apparent authority; [page 335]

“Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.”

(27) In the leading case of *Freeman & Lockyer v, Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480, Diplock LJ stated,

“An ‘apparent’ or ‘ostensible’ authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created, the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an

estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent **had actual authority to enter into the contract.**"

(28) In *Colombo Shipping Co., Ltd v. Chirayu Clothing (Pvt) Ltd. (Case No. 2)* [1999] 1 Sri L.R. 213 De Silva J. has referred to the doctrine of apparent or ostensible authority,

"In any event the 1st defendant-petitioner has described itself as the agent of the defendant on the "Cargo Receipts P4A, P4B and P4C". It has therefore held itself out as the agent of the 2nd defendant who has ostensible or apparent authority.

In *Hely-Hutchinson v. Brayhead Ltd. and another* apparent authority of an agent is thus explained by Denning, L.J. :

"Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the Board of Directors appoint one of their members to be a managing director they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director."

Furthermore, in the instant case the 1st defendant-petitioner has represented itself to be the agent of the 2nd defendant through F4A, P4B and P4C and the plaintiff-respondent has acted on such representation. Therefore the 1st defendant-petitioner is estopped from claiming that it is an agent for a limited purpose."

(29) It may be noted that a contract of agency is not necessary for the creation of agency in all instances. A party may be estopped from denying the existence of a contract of agency with an agent if such party has made a representation to a contractor that the agent in fact has authority to contract on his behalf, and the contractor acting upon that representation enters into an agreement with the said agent. It is true that the Plaintiff has led no evidence as to the existence of

any written contract of agency between the Defendant Company and Zeeniya Traders (Pvt) Ltd. However, the issue to be determined in the present action is whether the Defendant Company either represented Zeeniya Traders (Pvt) Ltd as being its' agent or knowingly allowed Zeeniya Traders (Pvt) Ltd to represent themselves as being the agent of the Defendant Company for the purpose of entering into a contract for the sale of 40,000 Metric tons of cement. The issue is whether under the doctrine of apparent authority, Zeeniya Traders (Pvt) Ltd has acted as agent of the Defendant in relation to this contract.

- (30) According to the evidence of Janath Sri Vidanage, Maharoof had initially represented Zeeniya Traders (Pvt) Ltd as being the main agent for the Defendant Company in selling imported cement. According to his evidence, on 22nd of March 2005, when directors of the Plaintiff Company had met with Maharoof and Rex Hatherly, the Managing Director of the Defendant Company at the time, Rex Hatherly had agreed to supply 20,000 Metric tons of Cement to the Plaintiff company, with a 20% discount given on the normal price of Rs. 8,100/- per ton, provided Rs. 6 million was paid up front to Zeeniya Traders (Pvt) Ltd as a “quantity booking charge”. After this payment of Rs. 6 million was made by the Plaintiff Company to Zeeniya Traders (Pvt) Ltd, Rex Hatherly had authorized the supply of 20,000 Metric tons of Cement from the Defendant Company to the Plaintiff Company at the agreed price per ton. The Plaintiff has led in evidence the document marked “**P7(a)**”, which has not been marked subject to proof, as corroboration of this claim.

- (31) According to the evidence of Sri Vidanage, thereafter the Directors of the Plaintiff Company had met with Maharoof of Zeeniya Traders and Rex Hatherly once again to discuss the purchase of 40,000 Metric tons of cement, which is the subject-matter of this action. In the said meeting the Directors of the Plaintiff Company had been informed to make an upfront payment of Rs. 15 million to

secure the supply of 40,000 Metric tons of cement by the Defendant. The receipts issued by Zeeniya Traders (Pvt) Ltd in respect of the said payments were also marked in evidence as “P11”, “P12”, “P13” and “P14”.

- (32) It must be noted that the evidence given by Sri Vidanage, stands uncontradicted. Additionally, the Defence during cross-examination has not assailed the part of his evidence which detailed out the meetings that were had between the Directors of the Plaintiff Company and Rex Hatherly, the Managing Director of the Defendant Company.
- (33) The receipts [invoices] issued by Zeeniya Traders (Pvt) Ltd to the Plaintiff Company [P11 to P14] also corroborate Sri Vidanage’s evidence. These receipts, state in its description,

“Being Advance Payment for supply of OPC bulk. Through “LAFARGE”
Mahaweli Marine Cement (Pvt) Ltd.”

The signatures appearing on these receipts marked “P11” to “P14” has been proved by the Plaintiff by calling Mr. Weerasekara Arachchilage Balasuriya, who was a sub-police inspector of the Criminal Investigation Unit as a Witness.

- (34) These documents marked “P7” as well as “P11” to “P14” gives credence to the testimony of Sri Vidanage of having had prior dealings with the Defendant Company and having met Rex Hatherly, the Managing Director of the Defendant Company in an attempt to secure the supply of 40,000 Metric tons of cement.
- (35) The submission by the Defendant is that Zeeniya Traders (Pvt) Ltd is merely agents of the Defendant in the commercial sense who sell bagged cement on their own behalf and not on the behalf of the principal. The Defendant’s claim

is that Zeeniya Traders (Pvt) Ltd never had authority to enter into contracts on behalf of the Defendant Company in respect of bulk cement.

(36) “**Bowstead and Reynolds on Agency**” by **F. M. B. Reynolds, QC** at page 25 describes the relationship that the Defendant alleges to have existed between Zeeniya Traders (Pvt) Ltd and the Defendant,

“Distributors, concessionaires, and franchisees. A supplier of the goods of a manufacturer, whether on a retail or wholesale basis, who has some form of concession as a regular stockist, distributor or franchisee is often described as “agent”, “selling agent”, “main agent” and the like, for the manufacturer of the goods which he supplies. Although it is possible that he is an agent in the common law sense, it is nowadays much more likely that he actually buys from the manufacturer and resells to his own customer.”

(37) The Defendant has also claimed in their submissions that Zeeniya Traders (Pvt) Ltd was only supplying bagged cement to purchasers and they did not in fact sell bulk cement. It may be true that in the ordinary course of business Zeeniya Traders (Pvt) Ltd functioned as a distributor for the Defendant Company who resells cement purchased by the Defendant Company to third parties after bagging the cement. However, the present transaction concerns the sale of bulk cement, as evidenced by the documents marked “**P11**” to “**P14**”. If as the Defendant claims, Zeeniya Traders (Pvt) Ltd is not ordinarily in the business of selling bulk cement to purchasers, the fact that the transaction in question relates to bulk cement also gives credence to the claim that Zeeniya Traders (Pvt) Ltd was in fact entering into a contract on behalf of the Defendant for the sale of bulk cement in the present instance.

(38) The claim that Zeeniya Traders (Pvt) Ltd was merely a distributor of the Defendant Company with respect to the contract in dispute is not reconcilable with the evidence presented during the trial. There is no documentary evidence

to suggest that Zeeniya Traders (Pvt) Ltd bought cement from the Defendant Company and resold it to the Plaintiff Company. On the contrary, the Defendant Company has admitted to having supplied 18,500 Metric tons of Cement to the Plaintiff Company directly. The Defendant Company has also admitted having been paid by the Plaintiff Company directly in respect of the said supply of cement. According to the memos issued to the Plaintiff Company by the Defendant company marked “**P15(1)**” to “**P15(72)**”, 18,500 Metric tons of cement have been supplied by the Defendant Company to the Plaintiff Company during the period between 07th of November 2005 to 29th May 2006. These dates coincide with the period for which supply of bulk cement in receipts **P11**, **P12**, **P13** and **P14** issued by Zeeniya Traders (Pvt) Ltd relates to. Both Witnesses who gave evidence for the Defendant Company have admitted to having made these supplies to the Plaintiff Company and having received payments for the same from the Plaintiff Company.

- (39) All these facts indicate that it was in fact the Defendant who supplied cement to the Plaintiff directly, without any involvement of Zeeniya Traders (Pvt) Ltd in the supply of cement and payment for the same. Such an arrangement is inconsistent with the claim that the Defendant has made that Zeeniya Traders (Pvt) Ltd was merely a distributor of the Defendant in the given transaction. No goods have passed through Zeeniya Traders (Pvt) Ltd. Except for the payment of Rs. 15 million that has been made upfront by the Plaintiff, no money has passed through Zeeniya Traders (Pvt) Ltd in relation to the supply of cement between the Plaintiff and the Defendant. Accordingly, the evidence suggests that Zeeniya Traders (Pvt) Ltd has acted as the agent through which the Plaintiff Company has contracted with the Defendant Company for the supply of cement.
- (40) The letter marked **P17**, which was led in evidence by the Plaintiff also supports the claim that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant for the said contract. The letter “**P17**” which is addressed to Zeeniya Traders (Pvt) Ltd by the defendant, states as follows,

“Balance Confirmation of Bulk Cement Contracted on behalf of J. D. Corporation (Pvt) Ltd

This is to confirm, as at 07th March 2006 we have supplied 14250 Mt to J.D. Corporation out of 40,000MT of bulk cement contracted through your company as our agent.”

(41) This letter appears to have been written by Nithyanandan, who was the Supply Chain Manager of the Defendant Company at the time. In his Evidence [Affidavit] Nithyanandan claimed that his name had been incorrectly spelt in the said letter “**P17**”. However, in cross-examination it was revealed that in the Evidence Affidavit submitted to court by Nithyanandan, his name had been spelt in the same manner as in “**P17**”.

“Q. How have you spelt your name in your Affidavit?

A. Nithyanandan.

Q. So, is that spelling of your name as appearing in the document marked “**P17**” the same as you have spelt in your Affidavit tendered to Court?

A. It is spelt the same. But it is a typing error.

Q. Now you realize in your Affidavit also your name is spelt in the same way as your name has been spelt in the document marked “**P17**”?

A. Yes.”

(vide pages 11 and 12 of Proceedings of 08.12.2009)

(42) In fact, it was also revealed that Nithyanandan’s name had been spelt wrong in multiple other documents emanating from the Defendant Company he had signed.

“Q. When you went through the document marked “**P17**” did you go through “**P15**” documents?

A. I went through.

Q. You would have then realized "**P17**" has the same spelling as the spelling that is contained "**P15**" documents?

A. Yes.

Q. So therefore, you obviously would have known that is no mistake in "**P17**" in spelling of your name?

This is also a mistake done by my Marketing Executive which I overlooked and I signed, but my true spellings are **Nithyanandan**."

(vide pages 15, 16 of proceedings of 08.12.2009)

(43) Nithyananda, also states in his evidence [Affidavit] that his signature that appears on P17 is distorted. The Plaintiff's submission was that the signature of Nithyananda which appears in "**P17**", is identical to that of his signature appearing in the series of memos starting from "**P15(1)**" to "**P15(72)**". Additionally, Sri Vidanage, Tharanga Sarathchandra Priyawansha, as well as Koggala Wellala Bandula, all of whom gave evidence on behalf of the Plaintiff have identified the signature which appears in "**P17**" as belonging to Nithyanandan. All these Witnesses gave evidence to the effect that they had personally seen Nithyanandan place his signature on documents and are therefore familiar with the signature of Nithyanandan.

(44) Nithyanandan in his evidence has also stated that the letter "**P17**" has been written in a different sequence and style to which he usually uses and that the font used in the said letter is different to that which is usually used by the Defendant Company. Referring to the signature of P17 witness had said "My signature too seems to be somewhat distorted" but there is no categorical denial on his part to say that he was not the author of P17, and appears to be an attempt to impress upon the court, that he was not the author of P17.

(45) However, it is to be noted that Mr. Nithyanandan's evidence has at times been contradictory or unreliable. In fact, he has made contradictory claims during re-examination by the Counsel for the Defendant with regards to the document marked "**P17**".

During re-examination Mr. Nithyanandan has stated as follows,

“Q. Shown document “**P17**”, what is the date of that document?

A. 9th March 2006

Q. And that is the document that is a letter addressed to Ms. Maharoof? Who has signed that letter?

A. Nithyanandan

Q. That is yourself?

A. Yes.

...

Q. To whom is this letter addressed?

A. To Director, Zeeniya Traders Pvt Ltd, Colombo: 14,

Q. And who is the addressee in that letter?

A. Ms. Zarina Seinab Maharoof

Q. So she is a director of Zeyniya Traders Pvt Ltd?

A. Yes.

Q. By way of that letter you had conveyed certain information to Ms. Maharoof?

A. Yes.”

(vide pages 8, 9 of proceedings dated 30.04.2010)

However, he has put forward a completely different position later on during re-examination,

“Q. Shown document marked P17,

Witness does the document marked P17, have the reference number?

A. There is no reference number.

Q. Earlier you said to this court that this is the letter address to Ms. Maharoof a director of Zeyniya Traders?

A. Yes

Q. Did you write this letter to Ms. Maharoof?

A. I cannot recollect having written any letter.

Q. Have you written any letters to Ms. Maharoof in the cause of your duties as supply change manager of the defendant company?

A. No.

Q. Have you written to any director of Zeniya Traders in the course of your duties as supply chain manager of the defendant company?

A. Never written any letters.”

(vide pages 13, 14 of proceedings dated 30.04.2010)

(46) Sandaya Darshini Siriwardena, giving evidence on behalf of the Defendant Company also tried to cast doubt on the authenticity of “P17”, by stating that the letter has no reference number whereas other letters originating from the Defendant Company do. However, in cross-examination it was revealed that many other letters originating from the Defendant Company, signed by Mrs. Siriwardena herself bore no reference numbers. (vide pages 9-13 of proceedings dated 17.06.2010). The Learned High Court Judge too had made this observation [page 13 of the judgement]. Accordingly, many attempts made by the Defendant to attack the credibility of the letter “P17” has failed.

(47) On a perusal of the evidence given by Mr. Nithyanandan at trial it can be concluded that his claim that “P17” was not signed by him lacks credibility. On balance, the evidence of three Witnesses called by the Plaintiff who identified the signature placed on “P17” as being Mr. Nithyanandan’s, as well as on a

comparison of the signature placed in “**P17**” with the signature in other documents in the series of documents marked “**P15(1)**” to “**P15(72)**” by the Plaintiff to which Nithyanandan has admittedly placed his signature, gives more credibility to the claim that “**P17**” was in fact signed by Nithyanandan. It is apt to point out that the learned trial judge having analysed the evidence in relation to P17, had concluded that:

“Therefore, the Defendant’s position that Mr. Nithyanandan has not signed and he did not have the authority to do so has been attacked and lacks probity.”

(vide pages 11, 12 of the Judgement1)

(48) The evidence given by the two Witnesses called by the Defendant also supports the claim that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in entering into the contract which forms the subject of this action. Attention is drawn to the following statement by Mr. Nithyanandan during cross-examination.

“Q. And you told court on the other day that at the point of stopping further supply there was a quantity that had been supplied to the plaintiff company?

A. Yes.

Q. In to that contract to supply a further quantity to the plaintiff the Chairman of Sri Lanka Cement Corporation was not a party, because it was something between the plaintiff and the defendant company?

A. Yes, actually it was between JD Corporation and Lafarge. And actual contract was with a Zeeniya and JD Corporation and Lafarge was only supplying.”

(vide pages 3, 4 of proceedings dated 30.04.2010)

(49) Sandya Darshini Siriwardena who gave evidence on behalf of the Defendant Company initially claimed that Zeeniya Traders (Pvt) Ltd merely was a

distributor of the Defendant Company who sold cement on their own right. She has stated this position during her cross-examination.

“Q. M/s Zeeniya Traders (Pvt) Ltd., has been an agent of the Defendant company?

A. Yes.

Q. Agent for what purpose?

A. To distribute our cement.

Q. They take orders on behalf of the Defendant company and distribute cement on behalf of the Defendant company?

A. They had the right to distribute our cement. They sold on their own right.”

(vide page 14 of proceedings dated 29.06.2010)

(50) The above statements are in line with the claim of the Defendant Company that Zeeniya Traders (Pvt) Ltd was merely a distributor of the Cement imported by the Defendant Company. However, later during cross-examination Mrs. Siriwardena stated as follows,

“Q. How do they act as the agent of your company?

A. They sell orders to any persons as they wish.

Q. What do you mean by they sell orders?

A. They sell orders to collect cement.

Q. They sell orders on whose behalf?

A. They are our commercial agents and they sell the orders to whom they want.

Q. On whose behalf? You can understand English?

A. Yes.

Q. On whose behalf do they sell orders?

A. On behalf of the company.

Q. On behalf of the Defendant company. So, they are taking orders on behalf of the Defendant company and selling cement on behalf of the Defendant company?

A. Yes.”

(vide pages 14, 15 of proceedings dated 29.06.2010)

- (51) The above statements by Mrs. Siriwardena cannot be reconciled vis-à-vis the claim that Zeeniya Traders (Pvt) Ltd was an agent in the commercial sense, who merely sold cement in their own right. The statements above make it quite clear that Zeeniya Trader (Pvt) Ltd was entering into contracts on behalf of the Defendant Company, by taking orders on behalf of the Defendant Company. Accordingly, it appears that Zeeniya Traders (Pvt) Ltd did in fact have authority to bind the Defendant Company by entering into contracts on its behalf.
- (52) Therefore, on a balance of probability, the Defendant's claim that Zeeniya Traders (Pvt) Ltd was merely “an agent in the commercial sense” or a distributor who had no authority to enter into contracts on behalf of the Defendant Company cannot stand.
- (53) The evidence of Sri Vidanage, which is materially corroborated by documents marked “P11” to “P14” and the letter marked “P17”, as well as the evidence of Nithyanandan and Darshani Siriwardena who gave evidence on behalf of the Defendant, indicates that Rex Hatherly, the Managing Director of the Defendant Company has either represented Zeeniya Traders (Pvt) Ltd as being the agent of the Defendant Company or knowingly allowed Zeeniya Traders (Pvt) Ltd to represent themselves as the agent of the Defendant Company. Although Zeeniya Traders (Pvt) Ltd may not have had a written contract with the Defendant Company authorizing them to enter into contracts on their behalf, by allowing Zeeniya Traders to be represented as the agents of the Defendant Company, the

Defendant Company has become liable under this contract entered into between the Plaintiff Company and Zeeniya Traders (Pvt) Ltd for the supply of 40,000 metric tons of Cement.

- (54) The Learned High Court Judge has, therefore, erred in fact and in law in holding that Zeeniya Traders (Pvt) Ltd had no authority to enter into contracts on behalf of the Defendant. Although Zeeniya Traders (Pvt) Ltd may act merely as a distributor in the ordinary course of business between Zeeniya Traders (Pvt) Ltd and the Defendant Company, under the present circumstances Zeeniya Traders (Pvt) Ltd has acted as the agent of the Defendant Company when entering into a contract with the Plaintiff for the supply of 40,000 metric tons of bulk cement. The conduct of the Defendant Company, and in particular of. Rex Hatherly, the Managing Director of the Defendant Company has estopped the Defendant Company from denying that any such agency exists.
- (55) Accordingly, I answer the first issue as to whether Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in the purported contract between the Plaintiff and the Defendant for 40,000 metric tons of Cement in the affirmative.
- (56) Moving into the next issue of whether a legally enforceable contract exists for the sale of 40,000 Metric tons of cement by the Defendant to the Plaintiff. With regards to contracts for the sale of goods, **Law of Contracts - Volume I (Stamford Lake Publication 2017)** by Prof. C. G. Weeramantry at page 202 states as follows,

“By section 5 of the Sale of Goods Ordinance a contract for the sale of any goods shall not be enforceable by action unless

 1. the buyer shall accept part of the goods so sold and actually receive the same, or
 2. pay the price or a part thereof, or

3. some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent.

The object of the Statute is to ensure that where there is no contract in writing, there is some overt act to render the bargain binding. Consequently, in the absence of writing, the effect of acceptance of part of the goods or of payment of the price or a part thereof, is to establish the existence of an enforceable contract of sale between the parties.”

- (57) Accordingly, a contract can arise by a written agreement between the buyer and the agent of the seller or alternatively, in the absence of any such written agreement if the buyer has accepted and paid for a part of the goods to be delivered by the seller.
- (58) If the claim that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in entering into the agreement is believed, the receipts issued by Zeeniya Traders (Pvt) Ltd marked “**PI 1**” to “**PI 4**” would be evidence that an agreement for the sale of 40,000 Metric tons of bulk cement by the Defendant to the Plaintiff existed.
- (59) However, quite independent of whether Zeeniya Traders (Pvt) Ltd was the agent of the Defendant, there exists a separate issue of whether a verbal agreement between the Plaintiff and the Defendant to sell 40,000 Metric tons of existed. The absence of any written agreement between the parties directly, does not invalidate the Plaintiff’s claim that such an agreement existed.
- (60) In *Walakdas v Supramaniam chetty* (1917) 20 N.L.R. 23 it was held that even in the absence of a writing embodying the terms of the contract, a buyer who has accepted part of the goods may maintain an action for damages against the seller for non-delivery of the balance. In the present action, the Defendant has admitted to having supplied a quantity of 18,500 Metric tons of cement to the

Plaintiff. This fact established that there was some form of contract for the sale of cement that existed between the Plaintiff and the Defendant. The issue then is to determine whether such contract was for the supply of 40,000 Metric tons as the Plaintiff claims or whether such supply of cement was solely on a request made by the Chairman of Sri Lanka Cement Corporation as claimed by the Defendant.

- (61) According to the evidence of Sri Vidanage, the Managing Director of the Plaintiff Company, on a meeting between two directors of the Plaintiff Company with Rex Hatherly, the Managing Director of the Defendant Company, Rex Hatherly had agreed to supply 40,000 Metric tons of Cement to the Plaintiff Company. It was never suggested in cross examination of the witness that he had not in fact met with Rex Hatherly and such discussion never took place. As stated earlier, this part of the evidence of Sri Vidanage is unchallenged. The only suggestion had been that there had been no documentary proof of the contract entered into between the Plaintiff Company and the Defendant Company. But as stated earlier documentary proof of a contract of such nature is not essential to determine the existence of such a contract.
- (62) The letter marked “P17” is material in this regard. The Defendant, through the evidence of their Witnesses as well as their written submissions has maintained that since Nithyanandan has no authority to enter into contracts on behalf of the Defendant company, “P17” does not create an enforceable contract. It is true that “P17” does not create an enforceable contract. However, the position of the Plaintiff is not that “P17” creates a legally enforceable contract, but rather that “P17” is evidence of a verbal contract for the sale of cement that existed between the Plaintiff and the Defendant. In this regard reference may be had to the cross-examination of Sri Vidanage, the Managing Director of the Plaintiff Company,

“Q. Any agreement or understanding you had, was with M/s Zeenia Traders (Pvt) Ltd., directly?

A. No., P17 confirms contract and they have executed the contract. They have acted upon the contract.”

(vide page 7 of proceedings of 30.11.2007)

(63) The thrust of the Plaintiff’s claim is that the Defendant has accepted and acted upon the contract for the sale of cement that the Plaintiff alleges exists between the Defendant and the Plaintiff. “P17” is an admission by Nithyanandan, the Supply Chain Manager of the existence of the existence of a contract.

(64) Nithyanandan has also admitted to the existence of this contract to supply 40,000 Metric tons of Cement by the Defendant to the Plaintiff on numerous occasions during his cross-examination.

“Q. So Rex Hartherly the M.D. was giving a confidential discount? Is it confidential discount 20%?

A. Yes.

Q. Normal price per Metric ton was Rs. 8100?

A. Yes.

Q. Your company had agreed to supply to the Plaintiff per ton for a price minus 20% confidential discount. And that confidential discount you say was something that had been agreed between your Managing Director Mr. Rex Hartherly and the Plaintiff Company?

A. Yes”

(vide pages 20, 21 of proceedings of 08.12.2009)

“Q. You cannot recall what was the quantity that was agreed to be supplied?

A. Yes.

Q. Now can you recall?

A. Yes.

Q. What is the quantity they have agreed to supply?

A. 40,000 metric tons.

Q. And they have set out that is between this period?

A. Yes.

Q. What is the period? From October 25 to November 2006? That was the time you were also working there?

A. Yes.

Q. The agreement had been the Defendant should be supplied what is the quantity?

A. 40,000 tons.

Q. 40,000 tons of what?

A. Bulk Cement.

Q. Bulk Cement to whom?

A. To J. D Corporation.

Q. But that quantity was not in fact supplied?

A. It was stopped."

(vide page 26 of proceedings of 08.12.2009)

"Q. Did you tell to Court today that the quantity was agreed upon between the parties to supply?

A. I cannot remember. I do not know the agreed quantity.

Q. Did you tell court today? That the quantity was agreed upon to be supplied by the Defendant to the Plaintiff?

A. I would have said.

Q. You told court today that the quantity was agreed upon to be supplied?

A. Yes.

Q. Did you also tell Court today that out of the quantity that was agreed upon only a certain quantity was supplied?

A. Yes.

Q. Did you also tell Court today in your recollection the quantity that was supplied was about 20,000 tons?

A. Yes.

Q. You also tell Court today that there was an agreement for a confidential discount of 20%?

A. Yes.

Q. Did you also tell court that the quantity that was agreed upon to be supplied was 4000 metric tons?

A. Yes.

Q. Did you tell court out of 4000 metric tons that was agreed only 1800 metric tons have been supplied?

A. I said 20000 metric tons.

Q. Less than that?

A. Yes.

Q. Out of 40000 metric tons your company has supplied only 18500 metric tons?

A. Yes.

Q. Therefore, out of the agreed sum 21500 metric tons had to be supplied?

A. Yes.

Q. That is the quantity that the Defendant company had not supplied although they agreed?

A. Yes.”

(vide pages 28, 29 and 30 of proceedings of 08.12.2009)

“Q. Your company had undertaken to supply a quantity of cement?

A. Yes.

Q. That you told Court was bulk cement, and that you had already told the court was a quantity of 40,000 Mt?

A. Yes.

Q. Which full quantity was not supplied?

A. Yes.

Q. So that supply was terminated by letter sent to JD Corporation, which has been produced In this case marked P22?

A. Yes.

Q. And that point of time the entire 40,000 was not supplied?

A. No.

Q. The balance quantity was 21,500mt?

A. Yes.”

(vide pages 3, 4 of proceedings dated 30.04.2010)

(65) These evidence referred to above given by the Witness of the Defendant Company is completely inconsistent with the claim made by the Defendant in their answer that the Defendant Company was merely supplying cement to the Plaintiff on the request Sri Lanka Cement Corporation and that the Defendant was not bound by any stipulated price or to supply any stipulated quantity when supplying cement to the Plaintiff (vide paragraph 06 of the Answer of the Defendant).

(66) In fact, under cross-examination Nithyanandan has stated that “P17” refers to this verbal contract which existed between the Plaintiff and the Defendant Companies.

“Q. That is the agreement which is reflected in the document marked “P17”? That is what is reflected in the document marked “P17” is that agreement of which you have now told Court?

A. 40000 metric tons.

Q. So the document marked "P17" contains what you have in fact told Court?

A. Total quantity.

Q. And the total quantity according to the document marked "P17" is 40000 metric tons?

A. Yes.

Q. It is the bulk cement?

A. Yes.

Q. It is the contract?

A. Yes."

(vide pages 30, 31 of proceedings of 08.12.2009)

(67) The Defendant, on the other hand has not produced any material to support their claim that the supply of Cement to the Plaintiff was done solely on the request made by the Chairman of Sri Lanka Cement Corporation. The document "**P22**" which the Defendant relies on which was written by Rex Hatherly merely states that the supply of cement to the Plaintiff was stopped at the instructions of the Chairman of Sri Lanka Cement Corporation. Even if this fact is accepted as true, it does not necessarily follow that the supply of cement to the Plaintiff Company was initiated at the request of the Sri Lanka Cement Corporation.

(68) Sandaya Darshani Siriwardena who gave evidence on behalf of the Defendant has stated that supply of cement to the Plaintiff was initiated at the request of the Sri Lanka Cement Corporation. However, Koggala Wellala Bandula , who was the Chairman of Sri Lanka Cement Corporation during 2004 to 2005, the period during which the Defendant Company started supplying cement to the Plaintiff Company, who was called as a Witness by the Plaintiff stated that Sri Lanka

Cement Corporation had given no instructions to the Defendant Company to supply cement to the Plaintiff Company,

“Q. Did you or your corporation instruct the defendant LAFARGE Cement to supply the cement to the plaintiff company J P Corporation?

A. No.”

(vide page 5 of proceedings dated 26.01.2009)

This part of Koggala Wellala Bandula’s evidence had not been assailed under the cross-examination of the witness.

- (69) Additionally, Sri Vidanage, in his evidence has consistently maintained that the claim, the supply of cement to the Plaintiff Company was due to a request made by the Sri Lanka Cement Corporation, was false. During the cross-examination of Sri Vidanage it was suggested to him that the supply of cement was halted due to the Plaintiff Company selling cement openly in the market to third parties, in contravention of an agreement that existed between the Plaintiff Company and the Defendant Company. However, this position is again not supported by any other evidence and in fact, not even mentioned in the Answer filed by the Defendant Company. This position is inconsistent with the position maintained by the Defendant in their answer that there existed no agreement as to the price or the quantity of cement to be supplied between the Plaintiff and the Defendant (vide paragraph 6 of the Answer of the Defendant). Accordingly, the Defendant has failed to provide a consistent explanation as to why cement was admittedly supplied by them to the Plaintiff Company.
- (70) Therefore, it could be concluded that the Defendant has failed to establish their assertion that cement was supplied to the Plaintiff solely on the request made by the Sri Lanka Cement Corporation. On a balance of probability, the Plaintiff has clearly established that cement was supplied to the Plaintiff by the Defendant in

pursuance of a verbal contract that existed between the two parties for the sale of 40,000 Metric tons of cement. The document “**P17**” as well as the evidence of Nithyanandan, the Supply Chain Manager of the Defendant Company at the time, who was called as a Witness by the Defence, gives credence to this claim.

- (71) Accordingly, I answer the second issue as to whether a legally enforceable contract exists for the sale of 40,000 Metric tons of cement by the Defendant to the Plaintiff in the affirmative. It must be noted that independently of the first issue, the Defendant would be liable for a breach of contract on the finding of the second issue alone.
- (72) Since both issues have been found in favour of the Plaintiff, it must be examined whether the Plaintiff has sufficiently proved the quantum of damages that they are entitled to for the breach of contract by the Defendant Company.
- (73) Witness Tharanga Sarathchandra Priyawansha, an accountant attached to the Plaintiff Company in his evidence has quantified the loss of profit which has resulted from the breach of contract by the Defendant as amounting to Rs. 22,897,500/- based on “**P29**” which is a document prepared by the said Witness. In his evidence the witness states that he has calculated the total profit earned through the quantity of 18,500 Metric tons of cement that was supplied by the Defendant Company to the Plaintiff Company as being Rs. 15,734,640.65. The relevant documents, memos and invoices which support this calculation has been marked as “**P25**”, “**P25(1)**” to “**P25(127)**”, “**P26**”, “**P26(1)**” to “**P26(39)**”, “**P27**”, “**P27(1)**” to “**P27(103)**”. Witness Koggalla Wellala Bandula, who was the Chairman of Sri Lanka Cement Corporation from 2004 to 2005, who was called to give evidence by the Plaintiff, has identified the documents “**P26(1)**” to “**P26(19)**” as being purchase orders issued to the Plaintiff Company from the Sri Lanka Cement Corporation. Ponniah Sri Skandarajh, who was an accountant of

Lanka Cement Ltd, who testified on behalf of the Plaintiff, has identified the documents marked “**P25(1)**” to “**P25(64)**” as being purchase orders issued on behalf of Lanka Cement Ltd to the Plaintiff. The Witness has also admitted to having signed the document “**P25**” which details the total income earned by the Plaintiff Company by supplying cement to Lanka Cement Ltd.

(74) The Witness Mr. Tharanga Sarathchandra Priyawansha has calculated the estimated profit that the Plaintiff Company would have earned if the Defendant supplied the remaining 21,500 Metric tons of cement as agreed in the contract, as amounting to Rs. 22,897,500/-. He has based this estimate on the total income earned and expenses incurred by the Plaintiff Company by the sale of 18,500 Metric tons of cement that were supplied by the Defendant Company to the Plaintiff Company. This estimated loss of profit has not been sufficiently challenged during the cross-examination of the Witness. The Counsel for the Defendant during cross-examination has suggested that the loss of profit of Rs. 22,897,500/- calculated by the Witness is a fictitious amount as no damage has actually been caused to the Plaintiff. However, the Witness has maintained that this is the loss of profit that the Plaintiff Company has suffered owing to the breach of contract by the Defendant Company.

(75) In this regard the treatise “The Law of Contracts Volume – II” (Stamford Lake Publications 2017) by Prof. C. G. Weeramantry states at page 888,

“The award of damages is based upon the general principle that a sum of money to be given in reparation of the damage suffered should, as nearly as possible, be the sum which will put the injured party in the position he would have enjoyed had he not sustained the wrong for which the award of damages is made, and that it should include both actual loss and loss of profit.”

(76) Accordingly, the Plaintiff is entitled to claim any loss of profit arising from a breach of contract as damages from the Defendant.

(77) The Plaintiff in their Plaintiff has also quantified a loss of Rs. 8,064,750/- as being the balance sum of advance payment of Rs. 15 million made by the Plaintiff to Zeeniya Traders (Pvt) Ltd in respect of which the Defendant has defaulted to supply cement. However, if this amount is awarded, in addition to the loss of profit from the breach of the contract, that would place the Plaintiff in a better position than which they would have been placed if the contract had been performed by the Defendant. Accordingly, the Plaintiff is not entitled to recover the said amount.

(78) The Plaintiff in their Plaintiff has also claimed loss and damage to its business reputation and goodwill. However, the Plaintiff has failed to sufficiently prove or quantify any such loss resulting from damage to its business reputation and goodwill.

(79) In these circumstances, I hold that the total loss that the Plaintiff is entitled to recover is the loss of profit arising from the breach of contract amounting to Rs. 22,897,500/- and the legal interest thereof.

(80) For the reasons set out above, I make the following orders;
The judgement of the (Commercial) High Court dated 9.03 2012 is hereby set aside.
I hold that the Defendant has acted in breach of the contract entered between the Plaintiff and the Defendant to supply 40,00 metric tons of [bulk] Cement.
The Plaintiff is entitled to the judgment as prayed for, and is entitled to damages in a sum of Rs.22, 897,500/- with legal interest.

The Learned Judge of the (Commercial) High Court is hereby directed to enter decree accordingly,

Appeal Allowed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R AMARASEKERA

I agree

JUDGE OF THE SUPREME COURT