

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

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

**SC / CHC / APPEAL / 09 / 2010**

**CHC (Civil) / 112 / 2005 (1)**

**Mrs. N.S. Cader (nee Ratnagoal),**

25/7, Kalinga Mawatha,

Colombo 5.

**PLAINTIFF**

**-Vs-**

**1. Asia Security (Private) Limited,**

21 - 01, West Tower,

World Trade Centre,

Echelon Square,

Colombo 1.

**2. Commercial Bank of Ceylon  
Limited,**

21, Bristol Street,

Colombo 1.

**DEFENDANTS**

**AND NOW BETWEEN**

- 1. Asia Security (Private) Limited,**  
21 - 01, West Tower,  
World Trade Centre,  
Echelon Square,  
Colombo 1.

**1<sup>ST</sup> DEFENDANT –APPELLANT**

- 2. Commercial Bank of Ceylon  
Limited,**  
21, Bristol Street,  
Colombo 01.

**2<sup>ND</sup> DEFENDANT –APPELLANT**

**-Vs-**

**Mrs. N.S. Cader (nee  
Ratnagoal),**  
25/7, Kalinga Mawatha,  
Colombo 5.

**PLAINTIFF – RESPONDENT**

**Before:** S. Thurairaja, PC, J.  
A.H.M.D. Nawaz, J. &  
Achala Wengappuli, J.

**Counsel:** Mrs. Shaheeda Barrie for the 1<sup>st</sup> Defendant – Appellant.  
S.A. Parathalingam, PC with Jaliya Bodinagoda for the 2<sup>nd</sup> Defendant – Appellant.  
Nihal Fernando, PC with Johann Corera for the Plaintiff – Respondent.

**Argued on:** 05.07.2023

**Decided on:** 19.03.2026

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

1. This appeal arises from the judgment of the learned Judge of the Commercial High Court of Colombo, which held that there was no lien or pledge created over certain shares of Hunter & Company Limited (hereinafter “*the Hunters shares*”), held in the name of the Plaintiff – Respondent (*the Plaintiff*), and accordingly awarded the Plaintiff the sale proceeds of Rs.5,584,200.00/- together with further damages of Rs. 10,000,000.00/- against the 1<sup>st</sup> Defendant – Appellant (“*the 1<sup>st</sup> Defendant*”), a licensed stockbroker (“*Asia Securities*”), and the 2<sup>nd</sup> Defendant – Appellant (“*the 2<sup>nd</sup> Defendant*”), a leading commercial bank (“*the Commercial Bank*”), jointly and severally.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants appealed to this Court, contending that the learned Judge fell into a serious error in holding that no lien existed, and that the consequential award of damages was perverse and bad in law.

3. Having carefully considered the evidence and the written and oral submissions placed before us, we are satisfied that this appeal must succeed. For the reasons set out below, we allow the appeal and set aside the Judgment of the Commercial High Court.
4. The Plaintiff is a shareholder in a family Company known as Exporters & Consumers Consortium (Private) Limited (*"the Company"*). The Company sought and obtained a loan facility from the 2<sup>nd</sup> Defendant, the Commercial Bank. As security for this loan, the Plaintiff, who held 372,280 shares of Hunter & Company Limited in her CDS account maintained with the 1<sup>st</sup> Defendant, Asia Securities, pledged those shares to the 2<sup>nd</sup> Defendant. These 372,280 shares were subsequently consolidated at a ratio of 10:1 into 37,228 shares of a face value of Rs. 10 each (the *"Hunters shares"*).
5. As far back as 17 June 1994, barely a year after the Hunters shares were purchased for the Plaintiff by her father, the 1<sup>st</sup> Defendant wrote formally to the 2<sup>nd</sup> Defendant acknowledging the lien created over the said shares. In that letter, the Director Trading of Asia Securities, Mr. Asanga Seneviratne, unequivocally stated:

*"We hereby irrevocably undertake to hold these shares to the order of City Office Branch of the Commercial Bank of Ceylon Ltd. In the event of these shares being sold, we irrevocably undertake to remit the sale proceeds direct to the Manager Commercial Bank City Office, to the Credit Account No. 5219957-01."*
6. Thereafter, for over ten years, the Hunters shares were not traded, remained marked with the electronic notation 'COM' in the internal systems of the 1<sup>st</sup> Defendant to denote the lien held by Commercial Bank, and were treated at all times by both Defendants as shares encumbered by a valid lien.
7. The Company subsequently defaulted on repayment of the loan. By letter dated 10 March 2005, the 2<sup>nd</sup> Defendant directed the 1<sup>st</sup> Defendant to sell the Hunters

shares and remit the proceeds. Acting on this instruction, the 1<sup>st</sup> Defendant sold the Hunters shares on the 11 of March 2005 at a price of Rs.150 per share, realizing a net sum of Rs.5,515,793.55/- sold notes were dispatched to both the Plaintiff and the 2<sup>nd</sup> Defendant.

8. The Plaintiff, upon receiving the sold notes, did not deny the existence of the lien. Instead, she wrote a series of letters demanding to inspect the original lien documents. She also lodged a complaint with the Colombo Stock Exchange ("CSE"). Following a CSE inquiry, the Plaintiff was offered two options; receive the sale proceeds or have the Hunters shares restored to her CDS account. The Plaintiff elected to receive the sales proceeds. She thereafter instituted action in the Commercial High Court claiming the sale proceeds and further damages of Rs. 10,000,000.00/-.
9. The learned Judge of the Commercial High Court held, principally relying on the evidence of the Colombo Stock Exchange witness, Ms. Sureka Sellahewa, that the existence of a valid lien had not been established because no 'slash account' reflecting the pledge in the CDS system had been created. The learned Judge concluded that;

*"...this court is compelled to come to the irresistible conclusion that the Plaintiff has unequivocally established the fact that the above shares are not pledged, and no lien has been created in favour of the 2nd Defendant Bank. Hence the Plaintiff will be entitled to the reliefs claimed in the prayer to the Plaint."*

10. On that single finding, and without any further judicial evaluation or analysis, the learned Judge proceeded to award all damages claimed in the plaint, including the sum of Rs.10,000,000.00/- under the 2<sup>nd</sup> cause of action.
11. The following questions of fact and law arise for determination before this Court;

- (a) *Whether the learned High Court Judge erred in concluding that no lien was created over the Hunters shares in favour of the 2<sup>nd</sup> Defendant – Appellant;*
- (b) *Whether, in the absence of the original pledge document, the existence of the lien can be established by secondary and circumstantial evidence;*
- (c) *Whether the Prevention of Frauds Ordinance or the Mortgage Act posed a legal bar to establishing the lien;*
- (d) *Whether the sale of the Hunters shares in enforcement of the lien was lawfully effected;*
- (e) *Whether the award of Rs. 10,000,000.00/- in damages was justified in law.*

### **Whether a Lien was Created over the Hunters Shares**

12. The central issue in this appeal is one of fact; whether the Plaintiff created a lien over the Hunters shares in favour of the Commercial Bank as security for the Company's loan. The learned Judge of the Commercial High Court answered this question in the negative.

13. The question arises whether the weight of evidence before the High Court overwhelmingly establishes the existence of the lien. I set out my findings on the several strands of evidence below.

### **The Plaintiff's Own Admission**

14. The most compelling piece of evidence is the Plaintiff's own admission made under questioning by the learned Judge of the Commercial High Court. When asked as to when the shares were pledged to the bank, the Plaintiff answered;

*"Q: When were these shares pledged to the bank, approximately when?*

*A: Prior to 1994"*

15. This is a direct, unequivocal admission by the Plaintiff that the shares were pledged. The Plaintiff subsequently attempted to qualify this admission by saying she only came to know of it after the sale. However, this qualification does not in any way negate the admission of the fact of the pledge itself. A party who has made a clear admission of a primary fact cannot thereafter avoid its consequences by adding a gloss that merely speaks to her state of knowledge at the time.

16. It is a settled principle of the law of evidence, as stated in *Karunaratne v. Attorney General*<sup>1</sup>, that there is no rule precluding a court from reaching a finding of fact on the basis of circumstantial evidence alone. Where, as here, a primary finding of fact is supported by a direct admission of the party against whom it is sought, the inquiry is substantially complete. The learned Judge of the Commercial High Court inexplicably overlooked this admission entirely.

### **The Letter of 17 June 1994**

17. Contemporaneously with and shortly after the pledge was created, the 1<sup>st</sup> Defendant wrote the letter of 17 June 1994 to the 2<sup>nd</sup> Defendant. This letter is of the utmost significance. In it, the then Director Trading of Asia Securities gave an *irrevocable* undertaking to hold the Hunters shares to the order of the Commercial Bank's City Office Branch, and to remit any sale proceeds directly to the Commercial Bank. This letter was authored nearly eleven years before the impugned sale, at a time when the Plaintiff's sister whom the Plaintiff alleges concocted the lien had no involvement whatsoever in the affairs of the 1<sup>st</sup> Defendant.

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<sup>1</sup> (2005) 2 Sri.L.R. 233

18. The legal and practical significance of this letter cannot be overstated. First, it constitutes powerful contemporaneous documentary evidence corroborating the creation of the pledge at the relevant time, i.e., 1994. Second, it demonstrates that the 1<sup>st</sup> Defendant, as a licensed stockbroker, had clear and formal notice of the lien and assumed obligations toward the 2<sup>nd</sup> Defendant in relation to the Hunters shares from that date forward. Further, the irrevocable nature of the undertaking mirrors the essential character of a pledge, a disposition of security which the pledgor cannot unilaterally undo once made.

### **The Dormancy of the Hunters Shares for Over a Decade**

19. From June 1994 until February 2005 a period of over ten years the Hunters shares were not traded, transferred, or otherwise dealt with. This is entirely consistent with the shares being encumbered by a lien, which would necessarily restrict the Plaintiff's freedom to dispose of them. It is wholly inconsistent with the Plaintiff's case that no lien existed. If there were no encumbrance, one would expect some transaction in the shares over a decade-long period, particularly given the Plaintiff's evidence that the shares were otherwise actively managed.

### **The Electronic Records of Asia Securities and the 'COM' Notation**

20. The back-office electronic records of the 1<sup>st</sup> Defendant, covering the period from 26 November 1993 to 13 May 2005, consistently bore the notation 'COM' against the Hunters shares in the Plaintiff's account. The Investment Advisor of Asia Securities, Ms. Diluka Nilangani Rodrigo, gave uncontradicted evidence explaining that such a notation is applied exclusively to accounts where the relevant shares are subject to a lien in favour of a named financial institution in this case, Commercial Bank of Ceylon. This practice is consistent, systematic, and institutional in character.

21. In the modern era of electronic commerce and dematerialized securities, it would be irrational and commercially unreasonable to disregard the electronic records of a licensed stockbroker which were created and maintained in the ordinary course

of business over a period of more than a decade. These records constitute cogent secondary evidence of the lien.

### **The Non-Transfer of the Hunters Shares in August 2004**

22. In August 2004, the Plaintiff requested that all shares in her CDS account with Asia Securities be transferred to another stockbroker, Lanka Orix Securities (Pvt) Ltd. All her other shares were duly transferred. The Hunters shares alone were not transferred, and were struck off the transfer request form. The reason was the lien. The Plaintiff received CDS account statements quarterly and, on her own evidence, the December 2004 statement reflected that the Hunters shares remained in the account of the 1<sup>st</sup> Defendant. The Plaintiff did not query, challenge, or protest this non-transfer at any point prior to the sale in March 2005.

23. The conduct of the Plaintiff in this regard is wholly at odds with her case that no lien existed. A person who did not know of any encumbrance on her shares would be expected to vigorously challenge their non-transfer. The Plaintiff's silence is eloquent. It confirms that she was aware of the lien and accepted the non-transfer as the natural consequence of it.

### **The Post-Sale Conduct of the Plaintiff**

24. Equally telling is the Plaintiff's conduct after she received the sold notes in March 2005. In a series of letters to both Defendants marked P15, P16, P17, and P19 the Plaintiff did not deny the existence of the lien. She expressly asked to "*sight the original lien documents.*" She stated that she had "*not been able to verify any documents in respect of my shares being pledged.*" She did not assert that no pledge had been made. She asked for proof of it.

25. This is conduct entirely inconsistent with a person who truly believed that no lien had ever been created. As the 1<sup>st</sup> Defendant – Appellant has correctly submitted, the natural response of a person who had never made a pledge would be an outright denial. The Plaintiff's letters speak instead the language of a person who

knows a pledge was made but has identified that the paper evidence cannot be readily produced. It was only in the course of litigation that the Plaintiff reconstituted her position into an outright denial of the pledge.

### **The Allegation of Fraud is Not Established**

26. The Plaintiff advanced the proposition that the lien was a fabrication concocted by her own sister then a Director of the Company in collusion with one of the most reputable commercial banking institutions in Sri Lanka, solely to settle a loan of the Company in which the Plaintiff conveniently denied any interest. This Court is unable to accept this proposition.

27. First, the lien letter of 17 June 1994 was authored at a time when the Plaintiff's sister had no connection to the 1<sup>st</sup> Defendant – Appellant. It cannot have been fabricated by her. Second, an allegation of fraud against a leading institution such as the Commercial Bank of Ceylon is a grave one. It requires cogent and clear proof. No such proof was offered. Third, upon cross-examination, the Plaintiff herself admitted to being a shareholder in the Company the very company for whose loan the shares were pledged directly contradicting her assertion that she had no interest in the matter and making the creation of the pledge for the benefit of a family company entirely plausible.

### **The Absence of the Original Pledge Document Does Not Defeat the Claim**

28. The Plaintiff sought to capitalise on the admitted misplacement of the original written pledge document to argue that the lien was unproven. This Court is unable to accept that submission. The loss or misplacement of a document that evidences a transaction does not extinguish the transaction itself, nor does it render the transaction incapable of proof.

29. Section 61 of the Evidence Ordinance provides that the contents of a document may be proved by either primary or secondary evidence. Section 65 (3) specifically permits secondary evidence to be adduced when the original has been destroyed

or lost, or when it cannot for any reason not arising from the party's own default or neglect be produced within a reasonable time. In the present case, the 1<sup>st</sup> Defendant – Appellant readily acknowledged that the original paper pledge document could not be located. There is no suggestion that this was occasioned by any fault or deliberate concealment on the part of the Defendants. The secondary evidence provisions of the Evidence Ordinance therefore plainly apply.

30. Beyond the statutory gateway provided by the Evidence Ordinance, the circumstantial evidence in this case is so extensive and so consistent that it would establish the existence of the pledge *beyond reasonable doubt* a standard higher than the balance of probabilities applicable in civil proceedings. As this Court observed in *Karunaratne v. Attorney General*<sup>2</sup> even in criminal proceedings, a conviction may properly rest entirely on circumstantial evidence. In civil proceedings, the lien is established with ease on the standard of the balance of probabilities.

### **The Prevention of Frauds Ordinance Does Not Apply**

31. The Plaintiff relied upon Section 18 of the Prevention of Frauds Ordinance ("*PFO*"), which provides that no pledge of movable property shall be enforceable unless made in writing and signed by the pledgor, or unless the property has been actually delivered to the pledgee. The Plaintiff argued that shares are movable property under the Companies Act, and that accordingly a written pledge was mandatory.

32. This argument was conclusively disposed of by this Court predecessor in *Ratwatte v. Goonesekera*<sup>3</sup> where Sharvananda C.J. held that shares, while defined as movable property for purposes of the Companies Ordinance, are so defined only for the purposes of that Ordinance and not for purposes lying outside the domain of company law. His Lordship held that a share is a *chose in action* a

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<sup>2</sup> (2005) 2 Sri.L.R. 233

<sup>3</sup> (1987) 2 Sri.L.R 260

bundle of rights and liabilities and is neither movable nor immovable property in the sense known to Roman-Dutch law. This principle was affirmed and applied by Tilakawardane J. (as she then was) in SC. Appeal No. 40/2010.

33. The further authority of *Mohamed v. Warind*<sup>4</sup> confirms that the assignment or transfer of a chose in action requires no particular formality under the law of Sri Lanka. If no formality is required for an outright transfer of such a property right, there is no principled basis to impose a formality requirement upon its pledge or hypothecation.

34. The Hunters shares, being dematerialised shares traded electronically on the Colombo Stock Exchange and existing only in electronic form in a CDS account, are paradigmatically choses in action. There are no paper share certificates, no possibility of a 'transfer in blank', and no delivery in the physical sense. The PFO, which is concerned with tangible movable property, simply has no application to instruments of this character. We hold that no written instrument was legally required for the creation of a valid pledge over the Hunters shares, and the absence of the written pledge document does not invalidate or defeat the pledge.

### **The Mortgage Act Does Not Apply**

35. The Plaintiff further argued that Section 73 of the Mortgage Act required a specific instrument for the creation of a mortgage or pledge over shares, including deposit of the share certificate and execution of a transfer in blank, and that the lien was therefore invalid for non-compliance.

36. I am compelled to reject this argument. On a plain and proper reading, Section 73 of the Mortgage Act provides one specific mechanism by which a holder of shares may create a mortgage in favour of an approved credit agency by executing an instrument in the prescribed form and making a transfer in blank. That section

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<sup>4</sup> (1919) 21 NLR 225

does not purport to be the exclusive or exhaustive mode of creating any form of security interest over shares. It creates a permissive avenue, not a mandatory and universal requirement.

37. In any event, as with the PFO argument, the provision contemplates physical share certificates capable of being deposited and endorsed in blank. The Hunters shares are entirely dematerialised. There are no certificates to deposit and no blanks to execute. It would be an absurdity of the first order to apply a provision designed for certificated paper shares to electronic, dematerialised securities traded on a modern stock exchange. We therefore hold that Section 73 of the Mortgage Act is inapplicable to the present facts.

### **The Learned High Court Judge Misapplied the CSE Evidence on Slash Accounts**

38. The ratio of the Learned High Court Judge's finding that no lien existed rested heavily on the CSE witness's evidence regarding 'slash accounts.' The Learned Judge concluded that when shares are pledged, they would be reflected in a slash account, and that the absence of such an account indicated no pledge existed.

39. This conclusion was a fundamental misreading of the evidence. Ms. Sureka Sellahewa herself, when cross-examined, explained that a slash account arises specifically where a financial intermediary extends margin or credit to a client to finance the purchase of shares, and in that scenario the shares are placed in an account in the name of the financial intermediary with the client's name in a 'slash' position. It is a mechanism for recording margin-financed share purchases.

40. In the present case, the Hunters shares were not purchased on margin or credit. They were purchased by the Plaintiff's father in 1993 with his own funds. The lien was subsequently created over those pre-existing shares as security for a separate borrowing. There was therefore no reason for a slash account to have been created,

and its absence proves nothing whatsoever about whether a lien existed. The Learned Judge transposed a mechanism applicable to margin finance onto an entirely different commercial transaction, resulting in a legally and factually erroneous conclusion.

41. In this regard, I observe that Ms. Sellahewa also confirmed on cross-examination that there were no CSE or CDS rules pertaining specifically to the recording of pledges on an ordinary CDS account. The Learned High Court Judge's reliance on the slash account evidence as a decisive indicator of the absence of a pledge was therefore wholly misconceived and constitutes a fundamental error warranting appellate intervention.

### **The Sale of the Hunters Shares was Lawfully Effected**

42. Having found that a valid lien was created over the Hunters shares in favour of the 2<sup>nd</sup> Defendant – Appellant as far back as 1994, the consequential conclusion is clear. When the Company defaulted on the loan secured by the pledge, the 2<sup>nd</sup> Defendant – Appellant was entitled to direct the enforcement of its security. The 1<sup>st</sup> Defendant – Appellant, as pledgeholder and stockbroker, acted in strict conformity with the irrevocable undertaking it had given in 1994 by proceeding to sell the shares upon the written direction of the 2<sup>nd</sup> Defendant – Appellant.

43. The sale was effected at Rs. 150 per share on 11 March 2005. The Portfolio Valuation Report of the 1<sup>st</sup> Defendant – Appellant as at 9 February 2005 had valued the shares at Rs. 152 per share. The sale price of Rs. 150 per share, representing a minor market fluctuation of Rs. 2 over the intervening month, was fair and consistent with the prevailing market value at the time of sale.

44. The sale having been effected in valid enforcement of a lawful security interest upon default, the Plaintiff has no cause of action against either Defendant. The appeal must accordingly succeed on this primary ground.

### **The Award of Damages was in any event Perverse and Bad in Law**

45. In the event that this court has not fallen into an error in our findings and I am satisfied it has not, I address the question of damages awarded by the Learned High Court Judge. We find that the award of Rs. 10,000,000.00 under the 2<sup>nd</sup> cause of action cannot be sustained on any basis.

### **Estoppel arising from the Plaintiff's election at the CSE Inquiry**

46. Following the CSE inquiry, the Plaintiff was expressly offered a choice: receive the sale proceeds, or have the Hunters shares reinstated to her CDS account. The Plaintiff chose the former. In reliance on this unequivocal representation, the 1<sup>st</sup> Defendant – Appellant retained the sale proceeds and did not repurchase the shares. This Court holds that the Plaintiff is estopped by her conduct from now claiming additional damages based on the hypothetical retention of the shares and their subsequent appreciation in value. As stated in *Peoples Bank v. Kulasekara*<sup>5</sup>, estoppel requires a representation acted upon by the representee to its detriment. Those elements are amply satisfied here.

### **The Two Causes of Action are Mutually Inconsistent**

47. The Plaintiff simultaneously claimed the sale proceeds (1<sup>st</sup> cause of action) and damages representing the loss of the shares' subsequent market appreciation (2<sup>nd</sup> cause of action). These two claims are logically and legally inconsistent. The award of damages is premised on restoring the Plaintiff to the position she would have occupied had the sale not occurred i.e., a position in which she still held the shares. But the 1<sup>st</sup> cause of action accepts the sale and claims its proceeds. A plaintiff cannot at the same time accept the proceeds of a sale and claim she was deprived of the asset sold. To permit both claims to succeed would unjustly enrich the Plaintiff.

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<sup>5</sup> (1986) 1 CALR 118 CA

## The Loss Calculation was Unsubstantiated

48. The Plaintiff's computation of the 2<sup>nd</sup> cause of action damages was based on the Interim Report of Hunter & Company Limited for the nine-month period ended 31 December 2005. This report concerned a period some nine months after the sale date of 11 March 2005. It does not establish that the shares were sold at below-market value on the date of sale. On the contrary, the contemporaneous market valuation of Rs. 152 per share as at 9 February 2005 amply supports the sale price of Rs. 150 per share achieved one month later.

49. It is a well-settled principle that special damages must be specifically pleaded and precisely proved: *McGregor on Damages* (18<sup>th</sup> ed.) and *Chitty on Contracts* (27<sup>th</sup> ed.) The Plaintiff's damages computation relied upon a speculative and self-serving selection of share prices from months after the sale, without any evidence that the Plaintiff would have sold the shares at those prices or at all. Indeed, the Plaintiff herself gave evidence that she had no intention of selling the shares. In these circumstances, damages calculated on the basis of a hypothetical sale at post-sale prices are legally impermissible.

## No Judicial Evaluation by the High Court

50. The Learned High Court Judge awarded the full sum of Rs. 10,000,000.00 claimed under the 2<sup>nd</sup> cause of action without any judicial evaluation, analysis, or reasoning. The judgment simply states that the Plaintiff is entitled to all reliefs claimed in the prayer, and nothing more. This is fundamentally incompatible with the judicial function. As held in *Basnayake v. Peters and Others*<sup>6</sup>, a judge must evaluate and consider the totality of the evidence and provide reasoned justification for any award of damages. The blanket adoption of the Plaintiff's claims without scrutiny is itself a ground on which the award cannot stand.

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<sup>6</sup> (2005) 3 Sri.L.R.

## **Failure to Mitigate**

51. The Plaintiff's refusal at the CSE inquiry to accept the reinstatement of the Hunters shares to her CDS account, which was offered as an alternative remedy and which, had it been accepted, would have restored her to precisely the position she claims to have been deprived of constitutes a manifest failure to mitigate. A plaintiff who declines an available remedy that would have eliminated or substantially reduced her loss cannot thereafter claim the full measure of that loss from a defendant.

52. For all of the foregoing reasons, this Court is firmly satisfied that;

- a) A valid lien was created over the Hunters shares by the Plaintiff in favour of the 2<sup>nd</sup> Defendant-Appellant, Commercial Bank of Ceylon, prior to June 1994, as security for a loan advanced to the Plaintiff's family company, Exporters & Consumers Consortium (Private) Limited;
- b) The absence of the original written pledge document does not, in law or in fact, defeat the existence of the pledge, which is amply established by the totality of the circumstantial evidence including the Plaintiff's own admission, the letter of June 1994, the decade-long dormancy of the shares, the electronic records of the 1<sup>st</sup> Defendant – Appellant, the non-transfer of shares in 2004, and the post-sale conduct of the Plaintiff;
- c) Neither the Prevention of Frauds Ordinance nor the Mortgage Act imposes a requirement for written formality in the creation of a pledge over dematerialized shares, which are choses in action and do not fall within the categories of movable property contemplated by those statutes;

- d)** The Learned Judge of the Commercial High Court fundamentally misapplied the evidence of the CSE witness by conflating the mechanism of a 'slash account' applicable to margin-financed share purchases with the creation of a lien over pre-existing, privately-owned shares;
- e)** The sale of the Hunters shares on 11 March 2005 was effected in lawful enforcement of the pledge upon default of the Company in the repayment of its loan, and the Plaintiff accordingly has no cause of action against either Defendant – Appellant;
- f)** In any event, the award of Rs. 10,000,000.00 under the 2<sup>nd</sup> cause of action was perverse, unsupported by evidence, legally inconsistent with the 1<sup>st</sup> cause of action, and arrived at without judicial evaluation, and cannot be sustained.

53. Therefore, I proceed to hold;

- i.** The Appeal of the 1<sup>st</sup> Defendant – Appellant and the 2<sup>nd</sup> Defendant – Appellant is hereby allowed.
- ii.** The Judgment of the Learned Judge of the Commercial High Court is hereby set aside in its entirety.
- iii.** The Plaintiff's action is dismissed.
- iv.** The 1<sup>st</sup> Defendant – Appellant is directed to remit the sale proceeds of Rs. 5,515,793.55 held in terms of the interim order of the Commercial High Court to the 2<sup>nd</sup> Defendant – Appellant, to be applied toward settlement of the outstanding loan of Exporters & Consumers Consortium (Private) Limited, and any balance remaining thereafter to be paid to the Plaintiff.

- v. The Plaintiff-Respondent shall pay the costs of this appeal to both Defendant-Appellants, such costs to be taxed if not agreed.

**Judge of the Supreme Court**

**S. Thurairaja, PC, J.**

I agree

**Judge of the Supreme Court**

**Achala Wengappuli, J.**

I agree

**Judge of the Supreme Court**