VANATHAWILLUWA VINEYARD LTD
v
COMMERCIAL BANK OF CEYLON

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE,J.
MARSOOF, PC, J.
SC CHC 31/1999
HC CIVIL 27/1996 (1)
DC COLOMBO 12808 / MR
NOVEMBER 10, 2005
FEBRUARY 7, 2006
APRIL 25, 2006
MAY 8, 2006
SEPTEMBER 25, 2006
NOVEMBER 7, 2006
DECEMBER 5, 2006
JANUARY 16, 2007
FEBRUARY 28, 2007
MARCH 22, 2007

Commercial Transaction – Financing of Exports – Contracts of sale of goods on documents against payment (D/P) – Collection arrangement – Right of remitting Bank discounting Bills to have recourse to exporter? – Bankers duty of care and duty to follow instructions? – Estoppel by representation? – Applicability of Uniform Rules of Collection (URC).

VWV Ltd shipped two consignments of gherkins to a buyer in Holland (K) on two merchant vessels. The bills of lading issued by the vessels were made to the order of Commercial Bank (CB). For procuring payment VWV Ltd drew on the buyer K two bills of exchange payable to the order of CB at 'sight'. The Bills of lading were endorsed by CB with the words deliver to the order of Giro Van De Bank. On the instructions of VWV Ltd, CB discounted the two bills of exchange and credited the VWV Ltd account with the equivalent of the value of the said bills of exchange in SL Rupees. The CB debited the account of VWV Ltd with the rupee value of the bill of exchange, on the basis that the said bills of exchange have been dishonoured. VWV Ltd instituted action to recover the rupee equivalent of the value of the two bills of exchange that were debited by CB with interest. The Commercial High Court held with the CB.

The plaintiff-appellant VWV Ltd contended that the action filed by the plaintiff should be viewed as a case involving financing exports in the context of contracts of sale of goods on D/P terms involving a 'collection agreement', and the defendant-respondent CB contended that this transaction should be disposed of by applying the legal principles relating to discounting of bills of exchange. It was also contended by VWV Ltd that Giro Van De Bank was not a Bank in the commercial sense, and the CB has acted negligently and without due care and diligence in carrying out its duty/function of a remitting Bank.

Held:

(1) The Commercial High Court has held that the payment for the said two exports were on D/P terms and in the absence of any cross appeal by CB, the appeal has to be dealt on the basis that the transactions in question were on D/P terms.

(2) There is a privity of contract between the exporter and the remitting Bank and also between the remitting Bank and the collecting bank but not between the seller and the collecting Bank, unless the seller contemplates that a sub agent will be implied and authorize the remitting Bank to create privity of contract between himself and the collecting bank.

The relations between the seller and the remitting bank and between the remitting bank and the collecting bank will normally be governed by the Uniform Rules of Collections (URC). These Rules have introduced privity of contract between the seller and the collecting bank because they provide for the rights and liabilities of the parties to collections to be established contractually. The question as to the objectives of the remitting bank vis-a-vis the exporter, and the liability of the remitting bank for the wrongful acts and omission of the collecting bank have to be considered in the light of the provisions of URC 1978.

It is the duty of the remitting bank to keep track of the bills sent for negotiations to the collecting bank and to give instructions in regard to the handling of the documents. In the event that the bills of exchange are dishonoured by non-acceptance or non payment, it is the duty of the collecting bank to return all the documents including the bills of lading to the remitting bank from which the collection order was received.

(3) The CB has failed to discharge its responsibilities as a remitting bank in terms of the URC Rules. The remitting bank cannot take refuge in the instructions given by the customer, if it had failed to act in good faith and with reasonable care or acted in reckless disregard of the procedure set out in the URC Rules.

This case has to be dealt with as one involving a collection arrangement, the fact that the bills of exchange were discounted by CB does not change the character of a documentary collection.

(4) A bill of lading represents the goods to which they relate, so that the transfer of the bill of lading of itself constitutes a transfer of the goods themselves. It is not like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer. The Maxim *'memo dat quod non habet'* does not apply to a bill of lading in favour of the shipper even against a *bona fide* purchaser for value.

Under a collection arrangement the bill of lading is held as security for payment of the price and should only be released against payment.

Per Saleem Marsoof P.C. J

"It is clear from Article 20 of URC 1978 that the remitting bank should act in collaboration with the collecting bank and must give timely and appropriate instructions to the latter regarding the handling of the documents, it is also contemplated that if no contrary instructions are received from the remitting bank, the documents should be returned to the bank from which the collection order was received".

Held further

Per Saleem Marsoof P.C. J

"In order to succeed with a defence based on estoppel, the person raising the plea should establish that by reason of the representations he was led to believe that the said representation was true and acted thereon to his prejudice, it is obvious that the state of mind and the conduct of the person who raises the plea of estoppel is of great relevance, and which the plea is raised by a party that does not lead any evidence in support of it, the plea cannot succeed".

(5) The trial Court was in error in holding that VWV Ltd was estopped from denying that Giro Do Van de bank was a bank by reasons of the instructions given.

APPEAL from the Commercial High Court - Colombo.

Cases referred to:

(1) *Harlow & James Ltd* v *American Express Bank Ltd* – 1990 – 2 Lloyds Report 343 at 349

(2) *Minories Finance Ltd* v *Afribank Nigara Ltd* – 1995 – 1 Lloyds Report 134 at 139

(3) *Scholar* v *National Westminster Bank Ltd* 139 – 1920 2 QB 719

(4) *Commercial Banking Co. of Sydney Ltd* v *Jalsard (Pvt.) Ltd* 1974 – AL 279

(5) *Redomons* v *Allied Irish Bank PLC* – 1987 – 2 KTLR 264 at 266

(6) *Honourable Society of the Middle Temple* v *Lloyds Bank* – 1999 – 1 All ER (common) 193

(7) *Linklaters (afir)* v *HSBC Bank Ltd* – 2003 – EWAC 1113 (common), 2003 All ER (D) 345 (May)

(8) *Calico Printers Association Ltd.* v *Barclays Bank* 1931 – 145 LT 51

(9) *Boastone & Firminger Ltd* v *Nasima Enterprises (Nyma) Ltd* – 1996 – CLC 1902 at 1908

(10) *RE Johns Ltd* v *Waring & Gillow Ltd* 1926 – AL 670

(11) *Sze Hai Tong Bank* v *Rambler Ceyde Co Ltd* – 1959 – AL 576 at 586

(12) *The Honda* – 1994 – 2 Lloyes Rep 541 at 553

(12a) Gurney v Behrend – 1854 3 E&B 622 at 633.

(13) *The Prinz Adalbert* – 1917 – AL 586

(14) *H. M. Procurator – General* – v *Mc Spencer Controller of Mitsui & Company Ltd* –1945 Al 124

(15) *Maclaine* v *Catty* – 1921 1 AL 376 381 (H.L)

(16) *Hirdaramani Ltd* v *De Silva* – 55 NLR 294

K. Kanag Iswaran PC with *Dr. Harsha Cabral* PC and *Ms. Dilrukshi Boteju* for plaintiff-appellant.

Romesh de Silva PC with *Hiran de Alwis* and *Shanaka Cooray* for defendant-respondent.

February 27, 2008

SALEEM MARSOOF, PC. J.

This is an appeal from the decision of the Commercial High Court dated 12th July 1999 dismissing the action filed by the plaintiff-appellant Vanathawilluwa Vineyard Ltd., against the defendant-respondent Commercial Bank of Ceylon Ltd., with costs. Vanathawilluwa Vineyard Ltd., hereinafter referred to as the 'VWV Ltd.' is a company incorporated in Sri Lanka, engaged in the export of Gherkins-in-Brine to USA, Europe and Australia. It is claimed that VWV Ltd. enjoyed 60% of the market share in exports to Belgium and 50% of the market share in exports to Holland. The Commercial Bank of Ceylon Ltd., hereinafter referred to as the 'Commercial Bank,' is a bank incorporated in Sri Lanka of which VWV Ltd. is a customer.

The facts material to this appeal may be briefly stated as follows: On 4th July 1990 and 14th August 1990 VWV Ltd., shipped two consignments of gherkins to a buyer in Holland named Hans Van Kilsdonk on two merchant vessels 'MV CGM Rimbaurd' and 'MV

Rubelend' respectively. The bills of lading issued by the said merchant vessels were made to the order of the Commercial Bank, the port of discharge being Antwerp. The name and address of Hans Van Kilsdonk also appear in the two bills of lading in the column meant for the address of notification. It is common ground that for procuring payment for the aforesaid consignments of gherkins, VWV Ltd. drew on the buyer Hans Van Kilsdonk two bills of exchange respectively for Netherlands Guilders 46,800.00 (P4) and 40,800.00 (P5) payable to the order of the Commercial Bank 'at sight'. Admittedly, the bills of lading were endorsed by the Commercial Bank with the words "Deliver to the order of Giro Van De Bank'. It is the position of the Commercial Bank that the said endorsements were made as instructed by VWV Ltd. in the covering letters marked 'P6' and 'P7' signed by the Director of VWV Ltd., with which the said bills of lading and bills of exchange were submitted to the Commercial Bank for negotiation. In view of the importance of these letters, which were substantially similar, the undated letter marked 'P6' that related to the first of the two shipments, is quoted below in full –

"Vanathawilluwa Vineyard Ltd.,
441/1A, Razeendale Gardens,
Colombo 4.

The Manager,
Commercial Bank of Ceylon Ltd.,
Wellawatte Branch,
Colombo 6.

Dear Sir,

HO LICENCE NO. CL/1890/04772

We forward herewith final documents for negotiation by your Outward Bills Dept., Bristol St., Colombo 1. Kindly set off 5% of the Fob Value (US$. 1,627.50) as broker's fee as shown in our abovementioned licence and remit same by T/T to the under mentioned, and arrange for the balance proceeds to be credited to our A/C 5820 (Wellawatte Branch):-

MICHAEL L. JONES,
A / C 232 096799
Security Pacific National Bank
NEWBURRY PARK OFFICE 0232
NORTH REINO ROAD,
NWBURRY PARK,
CALIFORNIA 913220, U.S.A.

Please courier the original documents to the under mentioned Bank and debit charges to our account:–

GIRO VAN DE BANK, KAMER VAN KOOPHANDEL
ODRDRECHT NR. 55988
HOLLAND.

Thanking you,

Yours faithfully,

VANATHAWILLUWA VINEYARD LTD.,

Sgd / Ms. V. Viswakula,
Director."

On the instruction of VWV Ltd. the Commercial Bank discounted the two bills of exchange and credited the account of VWV Ltd. with the equivalent of the value of the said bills of exchange in Sri Lanka Rupees. The dispute that gave rise to this action and appeal arose from the subsequent decision of the Commercial Bank to debit the account of VWV Ltd. with the rupee value of the bills of exchange, on the basis that the said bills of exchange have been dishonoured.

VWV Ltd., instituted this action on 23rd November 1992 to recover the rupee equivalent of the value of the two bills of exchange that were admittedly debited by the Commercial Bank but also the further amount charged by the bank as interest totaling to Rs. 2,377,759.72 and Rs. 1,433,286.01 respectively, together with interest at 28 % from 1st November 1992. This action was filed on the basis that 'Giro Van De Bank was not a bank in the commercial sense and that the

Commercial Bank had acted negligently and without due care and diligence in carrying out its duty and function of a remitting bank VWV Ltd. alleged that the Commercial Bank had released the bills of lading and the other shipping documents to the said buyer wrongfully, unlawfully, negligently, without due care and without collecting payment thereon, and was therefore not entitled to debit the account of VWV Ltd.

At the trial which commenced in the District Court of Colombo, twenty issues were settled on 2nd November 1995, and by reason of the transfer of jurisdiction to the Commercial High Court in terms of the High Court of the Provinces (Special Provisions) Act, No.10 of 1996, the trial was thereafter continued in the Commercial High Court on the same issues. It is unnecessary for the purpose of this appeal to set out in full all the issues on which the case went to trial, as the main thrust of the case of VWV Ltd. is embodies in issue No.10 raised on its behalf, and which is quoted below–

"10. Has the defendant-bank having discounted the said Bills 'P4' and 'P5' acted negligently and without due care and diligence in carrying out its duties and functions as a remitting bank?"

The position of the Commercial Bank was simply that the bills of lading and the bills of exchange were sent to the Giro Van De Bank in compliance with specific instructions received from VWV Ltd. in 'P6' and 'P7', and that in these circumstances, it cannot be liable for any loss that may have been sustained by VWV Ltd. The defence of the Commercial Bank is crystallized in issues 14, 15 and 16 which are quoted below–

"14. At all time material to this action, was the defendant entitled to and / or obliged to follow instructions given by the plaintiff.

15. (a) At all times material to this action did the defendant act as the agent of the plaintiff on whose behalf the Bills referred to in the plaint were sent for collection.

(b) If issue 15(a) is answered in the affirmative is the defendant not liable for the loss and damage, if any, caused thereby.

16. (a) By letters marked "P6" and "P7" did the plaintiff give specific instructions to the defendant to send the said Bills and documents by courier to the address sated therein.

(b) If so, did the defendant comply with the said specific instructions?

(c) If issues 16 (a) and (b) are answered in the affirmative can the plaintiff have and maintain this action."

The other substantial defence taken up on behalf of the Commercial Bank relating to estoppel was formulated as issue No. 18, and will be considered later in this judgement. Issue No. 19 raised on behalf of the Commercial Bank related to the question of prescription, but the issue was answered against the Commercial Bank by the learned trial Judge, and the Commercial Bank has not appealed. At the trial before the Commercial High Court, Sachyarachchige Don Cyril Jiasena Perera, a banking expert, Verena Nirmalee Viswakula, the Director of VWV Ltd. and Nimal Perera, Director of Aitken Spence Shipping Ltd. gave evidence on behalf of VWV Ltd. The latter was only a formal witness called to prove certain documents marked subject to proof.

The Pivotal Issue

The submissions of counsel throughout the argument of this appeal focused on one pivotal issue, namely whether the action filed by VWV Ltd. should be viewed, as suggested by President's Counsel for the said company, as a case involving the financing of exports in the context of contracts of sale of goods on 'Documents against Payment' (D/P) terms involving a 'collection arrangement', or should be treated, as contended by learned President's Counsel for the Commercial Bank, as one that can simply be disposed of by applying the legal principles relating to discounting of bills of exchange.

Learned President's Counsel for VWV Ltd., submitted that the appeal should be considered in the broader context of transactions based on 'documentary bills' which necessarily involve some collection arrangement. He has quoted extensively from Schmitthoff's *Export Trade* (10th Edition) and relies heavily on the following passage from page 145–

> "The most frequent payment methods in which banks are involved are a collection arrangement or payment under a letter of credit. In a collection arrangement the bank receives its instructions from the seller. The exchange of the documents of title representing the goods and the payment of the price is normally effected at the place at which the buyer carries on business. Conversely, in the case of a letter of credit the instructions to the bank usually emanate from the buyer. The exchange of the documents and the price is normally effected at the seller's place of business. A considerable amount of business is transacted under letters of credit under which the banker, on the instructions of the buyer, promises to accept, honour or negotiate bills of exchange drawn by the seller. Both these methods, the collection arrangement and the letter of credit, enable the interposed bank or banks to use the documents of title as a collateral security."

In regard to the 'collection arrangement' on which this action is alleged by VWV Ltd. to be based, learned President's Counsel for VWV Ltd. submits that it is usual for the exporter to ask his bank to arrange for collection of the price by presenting the bill of exchange for acceptance and / or payment, and that the bank will carry out this task through it's own branch office abroad or a correspondent bank in the buyer's country. He further submits that banking practice relating to collection arrangements is contained in the Uniform Rules for Collection, and that at the relevant time it was the 1978 version of these Rules that were in force. He submits that the provisions of these Rules will have to be carefully examined and applied.

As against these submissions, learned President's Counsel for the Commercial Bank contends that even if the transactions were considered to be in the broader perspective as contended on behalf of VWV Ltd., some significance must be given to the issuance of the bills of exchange and the role played by the bills in the context of the transaction. He submits that the bills of exchange in fact relates to the method of payment, and is autonomous from the underlying sale of goods transaction. He quotes from Ross Cranston's book, *Principles of Banking* Law (2nd Edition) in which under the head 'The Underlying Transaction' at page 381, it is observed that –

> "If the bank, having bought a trade bill and still holding it, seeks payment from the buyer or acceptor on its maturity, can it be defeated by any claim which the buyer had in relation to the underlying contract - failure of consideration, late or defective performance and so on? In general, the bank, as holder in due course of the bill, holds the bill free from any defect of title of prior parties, as well as mere personal defences available to prior parties among themselves. So whatever claims the immediate parties to the bill - the buyer and supplier - might be able to raise in proceedings between themselves, the bank would not be troubled by them."

Learned President's Counsel submits that in the instant case, the bills of exchange were included as a part of the transaction so that if the buyer does not pay on the bills drawn on him, the exporter as drawer of the bills is obliged to make payment to the bank. Accordingly, if the drawee fails to honour the bill, the exporter as drawer is liable *qua* surety to the discounting bank. He submits that the remitting bank that discounts any bills of exchange has the ultimate right of recourse to the exporter.

I have no doubt in my mind that while the aspect of discounting of the bills of exchange is relevant, this case should be dealt with in the broader perspective of the financing of an international trade transaction.

D/P terms and URC

A question of fundamental importance that arises in this connection is whether the sale of gherkins to the buyer in Holland was on 'Documents against Payment' (D/P) terms. The trial court had formulated the issue as follows-

"2 (a) was payment for the said two exports on D/P terms?"

It is the case of VWV Ltd., that the two consignments of gherkins were sold on 'Documents against Payment' (D/P) terms and that the handling of documents relating to these transactions was governed by the Uniform Rules for Collections, 1978 Revision (ICC Publication No. 322). The Uniform Rules for Collections (URC) apply if incorporated into the contracts by the parties, whether expressly or by course of dealings or simply by the international custom and practice of

bankers. See *Harlow & Jones Ltd.* v *American Express Bank Ltd.*(1) at 349, per Gatehouse J; *Minories finance Ltd.* v *Afribank Nigeria Ltd.*(2) at 139, per Longmore J. Fortunately, it is not necessary to go into the question of the applicability of URC 1978 to the collection in this case, as 'the Commercial Bank has in paragraph 13(c) of its answer admitted that URC is applicable, and in fact, both learned President's Counsel appearing for VWV Ltd. and the Commercial Bank have relied extensively on the provisions of URC 1978, which they have agreed apply to the case.

However, the Commercial Bank did not admit the position that the transactions were on 'Documents against Payment terms'. At the trial, the testimony of Verena Nirmalee Viswakula, who was a Director of VWV Ltd., to the effect that the sale was on Document against Payment (D/P) terms, was not challenged in cross-examination. In fact, Sachyarachchige Don Cyril Jiasena Perera, who was called on behalf of VWV Ltd. as a banking expert, testified that when a bill of exchange is used as a financing document and is drawn for payment on sight, it signifies payment on D/P terms. The learned Commercial High Court Judge has in his judgement dated 12th July 1999 answered issue No. 2 (a) in the affirmative, and in the absence of any cross-appeal by the Commercial Bank, this court has to deal with this appeal on the basis that the transactions in question were on D/P terms.

The Duty of Care v *the Duty to follow Instructions*

Two well-known duties of bankers and agents that are generally complementary to each other, come into loggerheads in the intriguing circumstances of this case. VWV Ltd. contends that having discounted the bills of exchange marked 'P4' and 'P5', the Commercial Bank acted negligently and without due care and diligence in carrying out its functions as a remitting bank in forwarding the documents for collection to Giro Van De Bank, which was in fact not a 'Bank' in the commercial sense. The Commercial Bank with equal force argues that in sending the documents for collection to Giro Van De Bank, it simply acted in accordance with the instructions of VWV Ltd contained in the letters marked 'P6' and 'P7'.

In this case, it is common ground that VWV Ltd has given express and clear instructions to the Commercial Bank to forward the

documents to Giro Van De Bank for collection. Learned President's Counsel for the Commercial Bank has submitted that as the agent of VWV Ltd. and as the remitting bank, the Commercial Bank was obliged to obey the specific instructions of VWV Ltd. While learned President's Counsel for VWV Ltd. strenuously argued that the Commercial Bank, as the remitting bank, was bound to exercise a high degree of care and was under a duty to verify whether the "bank" nominated by VWV Ltd., in fact existed, and to satisfy itself of its standing and ability to function as the 'collecting bank', learned President's Counsel for the Commercial Bank submitted the contrary.

Before going into the legal issues, it may be useful to consider the evidence placed before the trial judge in regard to the conduct of the parties. The main witness called to testify on behalf of VWV Ltd. in this connection was Verena Nirmalee Viswakula, the Director of VWV Ltd., who testified in detail about the transactions in question. It appears from the testimony of this witness that instructions relating to the first shipment of gherkins were given to the Commercial Bank by the undated letter 'P6' in consequence of which the Bank discounted the bill of exchange marked 'P4' and the account of VWV Ltd., was credited with a sum of Rs. 1,381,614.00 on 9th July 1990. Thereafter, on account of the second shipment regarding which the instructions were given by a letter dated 16th August 1990 marked 'P7', the bill of exchange marked 'P5' was also discounted by the Bank and a further sum of Rs.880,275.25 was credited to the account of the said company. The aforesaid amounts were credited to the account of VWV Ltd. after discounting the 'on sight' bills of exchange marked 'P4' and 'P5' drawn on Hans Van Kilsdonk, the buyer of the gherkins in Holland and made payable "to the order of Commercial Bank of Ceylon Ltd." The account of VWV Ltd. was credited with the rupee values of the said bills of exchange less brokers fees, and the witness expected that the bills of exchange will be dispatched to Giro Van De Bank along with the bills of lading for collection.

The witness testified that she was perturbed when there was no intimation of payment on the bills of exchange and that around 16th or 17th August 1990 she got to know from the Manager - Exports of the Commercial Bank that no payment has been received on account of the first shipment. She thereafter requested the Manager - Exports to follow up with the Giro Van De Bank, and she produced in evidence

a copy of the letter dated 17th August 1990 (P10) by which the Manager - Exports of the Commercial Bank drew the attention of the Manager of the Giro Van De Bank regarding the payment due on the first shipment. In fact the said letter refers to "a tele-inquiry of 29/7/1990 for fate thereof." This clearly shows that even on 17th August 1990, the Commercial Bank was under the impression that the Giro Van De Bank was a bank in the commercial sense. Thereafter, she got to know from the shipping agent, Aitken Spence Shipping Ltd., that the cargo on the first shipment had been delivered on 23rd August 1990. When she communicated this information to the Commercial Bank and asked the Bank to find out how the gherkins were delivered without payment, she was informed by the Manager - Marketing of the Commercial Bank, for the first time, that there was no bank by the name Giro Van De Bank and that consequently the buyer had been able take delivery of the gherkins without payment.

When the account of VWV Ltd. was thereafter debited the witness addressed a letter dated 19th October 1990 (P13) to the Commercial Bank in which significantly she states as follows –

> "We negotiated our documents with you as our Bankers (Buyer's Bank) under a complete fiduciary relationship to obtain payment on further negotiating the 'title to the goods'.
>
> In the circumstances, kindly refrain from debiting our account until you revert the 'title to the goods' negotiated through you.
>
> Please expedite the returning of the documents within another week as the goods are of perishable nature and necessary action has to be taken to recall the goods as soon as possible."

The only response she received from the Commercial Bank was the letter dated 24th October 1990 (P14) by which she was called upon to settle the sums of Rupees 1,381,536.00 on account of the first shipment and Rs. 881,198.25 on account of the second shipment and further informed that the company account would be debited with these amounts if she fails to settle. She further testified that the company account was thereafter debited with the aforesaid amounts wrongfully and unlawfully.

Witness Viswakula could not produce the original bills of lading and testified marking in evidence photo-copies thereof she had obtained from the respective shipping agents and produced in

evidence without objection. The witness took pains to point out that the endorsements of the Commercial Bank on the reverse of the said bills of lading marked 'P2' and 'P3' had been made using a rubber stamp where the words "Pay / Deliver to the Order of" appear to be stamped, below which the words "Giro Van De Bank" have been inserted in the hand writing of the Authorized Signatory above his signature. The witness emphasized that the world "Pay" has been scored off in ink at the time when the signature was placed, which significantly may have facilitated the taking of delivery of the cargo without making payment.

She also produced copies of the letters dated 8th February 1991 addressed by the Commercial Bank to Aitken Spence Shipping Ltd ('P18'), agents for Nedloyd Lines owning 'MV CGM Rimbaurd' and to Freudenberg Shipping Agencies Ltd ('P19'), agents for Happag-Lloyd owning 'MV Rubeland' claiming damages for the wrongful delivery of the gherkins without due endorsement of the relevant bills of lading by Giro Van De Bank. She also produced copies of the responses received from the owners of the said vessels, namely, the letter dated 19th March 1991 ('P20') from Happag-Lloyd and the letter dated 16th April 1991 ('P21') from Nedloyd Lines. It is admitted by the owners of the vessels in these letters that the gherkins were delivered to the buyer, Hans Van Kilsdonk, without due endorsement on the bills of lading by Giro Van De Bank. As justification for the said action of the carriers, it is expressly stated in both letters that there is no bank in existence with the name 'Giro Van De Bank.' Additionally, it is stated in the letter of Hapag-Lloyd ('P20') that the words 'Giro Van De Bank' in Dutch meant "account of the bank" and consequently the endorsement was taken as "an order to deliver the goods to the holder of the bill of lading for the account of the Bank (i.e. the Commercial Bank of Ceylon Limited)". The witness testified that the originals of the bills of lading, which had ben submitted by VWV Ltd with 'P6' and 'P7' to the Commercial Bank for negotiation, were at no time returned to that company. She claimed that in these circumstances, the Commercial Bank had not properly discharged its duties as the remitting bank and that the debiting of the account of VWV Ltd. without returning the original bills of lading was wrongful and unlawful. Under cross-examination she admitted that the said bills of lading had been sent to Giro Van De Bank in accordance with her instructions given in 'P6' and 'P7'.

The other witness called on behalf of VWV Ltd. was Sachyarachchige Don Cyril Jiasena Perera, who admitted under cross-examination that he only has "a hazy idea" about the facts of the case, and was justifiably treated by the trial judge as "an expert with regard to banking practice only." The gist of his testimony was that Giro Van De Bank was a money transfer system and was not a commercial bank listed in the Bankers' Almanac. According to him, if there was any doubt in the mind of a remitting banker regarding the existence or standing of an entity such as the Giro Van De Bank named as a collecting bank, he should have the matter verified, and if necessary, negotiate the documents through his own correspondent bank. He expressed the opinion that in the event of a dishonour of a discounted bill of exchange, the discounting bank has recourse to the drawer of the bill only after returning the original shipping documents including the bill of lading. However, it is noteworthy that under cross-examination he admitted that in the event of dishounour of the bill, the remitting bank is entitled to debit the customer's account for the value of the discounted bill, after giving notice of dishonour to the drawee.

It is significant that the Commercial Bank, which was in the best position to explain the circumstances in which the bills in question were dishonoured, chose to close its case without leading any evidence. However, it appears that VWV Ltd. and the Commercial Bank had believed that Giro Van De Bank was a bank which would collect the proceeds of the bills of exchange as is customary in this kind of international commerical transaction, although it was admittedly not listed in the Bankers' Almanac.

Learned Counsel for the Commercial Bank submitted that both as agent for the exporter as well as the remitting bank, the Commercial Bank was under a duty to comply with the instructions of the principal, and was not under any duty to advise the principal or to warn against any commercial or other risks. He invited the attention of court to decisions such as *Schioler* v *National Westminster Bank Ltd.*(3) *Commercial Banking Co. of Sydney Ltd.* v Jalsard Pty. Ltd(4) *Redmons* v *Allied Irish Banks PLC* (5) at 266, per Saville J. *Honourable Society of the Middle Temple* v *Lloyds Bank PLC* (6) and *Linklaters (a fir)* v *HSBC Bank Plc* (7). Learned President's Counsel further submitted that since speed is of the essence in transactions

involving international trade, the bank is obliged to follow the instructions of the customer without undue delay. He relied heavily on the following *dicta* of Lord Diplock in *Commercial Banking Co. of Sydney Ltd.* v *Jalsard Pty. Ltd.* (supra) at 286 in a case dealing with the dealings of a bank with a letter of credit-

> "Delay in deciding may in itself result in a breach of his contractual obligations to the buyer or to the seller. This is the reason for the rule that where the banker's instructions from his customer are ambiguous or unclear he commits no breach of his contract with the buyer if he has construed them in a reasonable sense, even though upon the closer consideration which can be given to questions of construction in an action in a court of law, it is possible to say that some other meaning is to be preferred."

Learned President's Counsel for the Commercial Bank contends that as far as the instant case is concerned there was absolutely no ambiguity in regard to the instructions that were given by the exporter to the Bank, and the instructions have been faithfully carried out by the Commercial Bank, and further submits that since the exporter had selected the Giro Van De Bank as the collecting bank, the Commercial Bank cannot be held responsible for any act or omission of the Giro Van De Bank.

In this context it may be relevant to observe that there is privity of contract between the exporter and the remitting bank, and also between the remitting bank and the collecting bank, but not between the seller and the collecting bank, unless the seller contemplates that a sub-agent will be implied and authorizes the remitting bank to create privity of contract between himself and the collection bank. See *Calico Printers' Association Ltd.* v *Barclays Bank Ltd.*(8) However, relations between the seller and the remitting bank, and between the remitting bank and the collecting bank, will usually be governed by the Uniform Rules for Collections (URC) and it is possible that as suggested by Rix J in *Bostone & Firminger Ltd.* v *Nasima Enterprises (Nigeria) Ltd* (9) at 1908, these Rules have introduced privity of contract between the seller and the collecting bank because they provide for the rights and liabilities of the parties to collections to be established contractually. Therefore, the question as to the obligations of the remitting bank *vis-a-vis* the exporter, and the liability of the remitting bank for the

wrongful acts or omissions of the collecting bank have to be considered in the light of the provisions of URC 1978 which is admittedly applicable to this case.

Uniform Rules for Collection

The Uniform Rules for Collection embodies banking practice relating to documentary collections codified by the International Chamber of Commerce. Although the Uniform Rules are revised from time to time, it has been agreed by President's Counsel for both parties in this case that the version that is applicable is the 1978 Revision of the Uniform Rules for Collection. The provisions of these Rules apply to all 'collections' which term is defined as "the handling by banks, on instructions received, of documents ..... in order to (a) obtain acceptance and/or, as the case may be, payment, or (b) deliver commercial documents against acceptance and/or, as the case may be, against payment, or (c) deliver documents on other terms and conditions."

It is expressly stated in these Rules that the term 'documents' would include financial documents such as bills of exchange and commercial documents such as invoices, shipping documents and documents of title such as bills of lading. In the context of the question that arises in this case as to the liability of the Commercial Bank as the remitting bank, it is instructive to quote, Article 3 of the Uniform Rules for Collection in full-

> "For the purpose of giving effect to the instructions of the principal, the remitting bank will utilise as the collecting bank-
>
> (1) the collecting bank nominated by the principal, or,
>
> (ii) in the absence of such nomination, any bank, of its own or another bank's choice, in the country of payment or acceptance, as the case may be.
>
> The documents and the collection order may be sent to the collecting bank directly or through another bank as intermediary.
>
> *Banks utilising the services of other banks for the purpose of giving effect to the instructions of the principal do so for the account of and at the risk of the latter.*

The principal shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws or usages." (Italics added)

Learned President's Counsel for the Commercial Bank has argued that since in terms of 'P6' and 'P7' the Commercial Bank acted on the clear instructions of VWV Ltd. in sending the relevant bills and other documents to Giro Van De Bank for negotiation, the services of Giro Van De Bank were utilised "for the account of and that risk of" the principal, VWV Ltd.

I cannot agree with this submission as it is in my view fundamental to Article 3 that the collecting bank should be a "bank" in the commercial sense. Giro Van De Bank does not appear in the Bankers' Almanac and no evidence has been placed before the original court as regards its existence or standing as a banker. In this context, it is necessary to refer to Article 1 of the URC 1978, which requires all banks governed by the Rules to "act in good faith and exercise reasonable care". It is evident from the correspondence produced in evidence marked 'P16', 'P18', 'P19', 'P20' and 'P21' that the Commercial Bank believed 'Giro Van de Bank' to be a commercial bank capable of functioning as a collecting bank, and had on that basis even presented a claim against the carriers for delivery of the goods without due endorsement by Giro Van de Bank, only to be informed by the carrier that 'Giro Van de Bank' was not a bank but was in Dutch the equivalent of a "blank endorsement" which enabled the buyer Hans Van Kilsdonk to collect the gherkins by presenting the bills of lading to the carrier.

An important feature of the URC 1978 is that they contain certain minimum standards for the conduct of business by remitting, collecting and other banks to whcih the Rules apply. For instance, Article 6 of the Rules expressly lays down that-

"Goods should not be dispatched direct to the address of a bank or consigned to a bank without prior agreement on the part of that bank. In the event of goods being dispatched direct to the address of a bank or consignd to a bank for delivery to a drawee against payment or acceptance or upon other terms without prior agreement on the part of that bank, the bank has no obligation to take delivery of the goods, which remain at the risk and responsibility of the party dispatching the goods."

The various articles of URC 1978 also contain the procedure for making the documentary collection. For example, Article 10 expressly provides that "the collection order should state whether the commercial documents are to be released to the drawee against acceptance (D/A) or against payment (D/P)." It further provides that in the absence of such statement, "the commercial documents will be released only against payment." Article 14 provides that "amounts collected (less charges and / or disbursements and / or expenses where applicable) must be made available without delay to the bank from which the collection order was received in accordance with the instructions contained in the collection order." Article 17 requires that the collection order should give specific instructions regarding protest (or other legal process in lieu thereof), in the event of non-acceptance or non-payment. There was no evidence placed before the original court that prior to dispatching the relevant bills of lading, which are documents of title to goods, to Giro Van De Bank, the Commercial Bank had entered into any "prior agreement" with the Giro Van De Bank as contemplated by Rule 6, nor has the Commercial Bank produced any evidence regarding the collection order dispatched by the Commercial Bank to the Giro Van De Bank. In the absence of any evidence in this regard, it has to be inferred that the Commercial Bank had not only acted in total disregard of the provisions of the URC 1978, but had acted recklessly in violation of its obligations to act in good faith and to exercise reasonable care in discharging its obligations as a remitting bank.

It is necessary at this stage to refer to Article 20 of the URC 1978, which requires collecting banks "to advise fate" of bills sent for collection. The Article provides the following guidelines to be followed in the event of a dishonour-

"..... the presenting bank should endeavour to ascertain the reasons for such non-payment or non-acceptance and advise accordingly the bank from which the collection order was received.

On receipt of such advice remitting bank must, within a reasonable time, give appropriate instructions as to the further handling of the documents. *If such instructions are not received by the presenting bank within 90 days from its advice of non-payment or non-acceptance, the documents may be returned to the bank from which the collection order was received."* (Italics added)

It is very clear from the above quoted Article that it is a durty of the remitting bank to keep track of the bills sent for negotiation to the collecting bank and to give appropriate instructions in regard to the handling of the documents. It is evident that the Commercial Bank failed to discharge its responsibilities as a remitting bank in terms of this article. Furthermore, it is significant that this Article provides that in the event that the bills of exchange are dishonoured by non-acceptance or non-payment it is the duty of the collecting bank to return all the documents including the bills of lading to the remitting bank from which the collection order was received. It appears from the evidence in this case that instead of returning the bills of lading to the remitting bank and through it to the exporter VWV Ltd., the buyer in Holland Hans Van Kilsdonk was permitted to take delivery of the gherkins without making any payment on the bills of exchange. It is this kind of misadventure that responsible banks involved in documentary collection are expected to avoid through compliance with the accepted banking practice that has been codified by the ICC as the Uniform Rules. I am unable to agree that a remitting bank could take refuge in the instructions given by a customer if it had failed to act in good faith and with reasonable care or acted in reckless disregard of the procedures set out in these Rules.

The Right of Recourse on a Discounted Bill of Exchange

In my view this case has to be dealt with as one involving a 'collection arrangement' in which financial documents in the form of bills of exchange marked 'P4' and 'P5' accompanied by commercial documents including the bills of lading marked 'P2' and 'P3' were submitted to the Commercial Bank with the covering letters marked 'P6' and 'P7' for negotiation. The fact that the bills of exchange were discounted by the Commercial Bank does not change the character of a 'documentary collection'.

However, learned President's Counsel for the Commercial Bank has stressed the importance of the principles relating to the right of recourse of a discounting banker against the exporter in the event the discounted bill of exchange is eventually dishonoured. Learned President's Counsel contends that the issuance of the bills of exchange is a significant factor, and empahsises the autonomous nature of the bill of exchange from the underlying sale of goods transaction. He submits that as observed by Ross Cranston in

Principles of Banking Law (2nd Edition) at page 381 "the bank, *as holder in due course* of the bill, holds the bill free from any defect of title of prior parties, as well as mere personal defences available to prior parties among themselves". He submits that this proposition is further fortified by Holden, *Law and Practice of Banking* (5th Edition) where at page 316 (Volume 1) it is stated that-

> "The legal effect of the negotiation of the bill is that the negotiating bank becomes the holder in due course of the bill, and also holds the shipping documents by way of security."

He submits that therefore any claims that the buyer and supplier might be able to raise in proceedings between themselves are irrelevant when recourse is had against the seller on the discounted bill.

I find it difficult to agree with the submission that the Commercial Bank is a holder in due course of the bills of exchange marked 'P4' and 'P5'. This is because the Commercial Bank was named as the original payee of these bills. In *R. E. Johns Ltd.* v *Waring & Gillow Ltd.*(10) it has been held by the House of Lords that the original payee of a bill of exchange does not fall within the expression 'a holder in due course'. The reasoning of the House of Lords was that in terms of section 29 (1) of the Bills of Exchange Act of 1882, 'a holder in due course' is a person to whom a bill has been "negotiated". Therefore, although generally a discounting bank may become 'a holder in due course' of the bill that is discounted, this does not occur when the banker is also the payee.

Nevertheless, I am impressed by the submission of the learned President's Counsel for Commercial Bank that in the instant case, the bills of exchange were included as a part of the transaction so that if the buyer does not pay on the bills drawn on him, the exporter as drawer of the bills is obliged to make payment to the bank. Accordingly, if the drawee fails to honour the bill, the exporter as drawer is liable *qua* surety to the discounting bank. In support of this proposition he relies on the following passage from Cranston's, *Principles of Banking Law* (2nd Edition) page 379-380 under the heading 'Trade Bills':-

> "Now assume the Bill is first negotiated to the supplier's bank. The bank discounts the bill i.e., it buys the bill at less than its face

value, to reflect the fact that it is out of its money till the bill matures. The supplier is, of course, paid immediately, which is the very object of the exercise. The Bank claims against the buyer on maturity of the bill. It collects the bill on its own account. In the event of non-payment, the bank will have recourse against the supplier, its customer. The bank, having discounted the bill has clearly given value."

Learned President's Counsel submits that in these circumstances, if the bill is dishonoured, the negotiating bank will necessarily look to its own customer as drawer to re-imburse it in respect of the amount of the bill, together with interest and charges, and that therefore the debiting of the customer account by the Commercial Bank was perfectly lawful.

However, in this case there is absolutely no evidence in regard to the question whether the bills of exchange marked 'P4' and 'P5' were forwarded along with the relevant bills of lading marked 'P2' and 'P3' and other relevant documents to Giro Van De Bank. It is significant that at the trial no admission was recorded, nor any evidence lead with respect to the alleged dishonour of the two bills of exchange marked 'P4' and 'P5'. Indeed there is no admission or evidence even in regard to the question whether the bills of exchange in question were ever presented to the buyer Hans Van Kilsdonk for acceptance / payment. It is trite law that a remitting bank has no right of recourse against the drawer of a discounted bill of echange unless and until the bill has been duly presented for acceptance / payment and has been in fact dishonoured. In the absence of any evidence to show that the bills of exchange in question were in fact dishonoured. In the absence of any evidence to show that the bills of exchange in question were in fact presented to the drawee Hans Van Kilsdonk, I hold that the Commercial Bank had no right of recourse against VWV Ltd. nor any right to debit its account with the value of the bills of exchange.

Duty of Discounting Bank to return Bills of Lading

In regard to the 'collection arrangement' on which this action is alleged by VWV Ltd. to be based, learned President's Counsel has referred us to Schmitthoff's *Export Trade* (10th Edition) page 155 wherein it is stated as follows-

> "The seller often attaches to a bill of exchange which he has drawn on the buyer the bill of lading to the goods sold. Such a bill of exchange is known as a *documentary bill.* The purpose of issuing a documentary bill is mainly to ensure that the buyer shall not receive the bill of lading and with it, the right of disposal of the goods, *unless he has first accepted or paid the attached bill of exchange according to the arrangement between the parties.* If the buyer fails to honour the bill of exchange, he has to return the bill of lading, and, if he wrongfully retains the latter, the law presumes that the property in the goods sold has not passed to him." (italics added)

It is settled law that a bill of lading represents the goods to which they relate, so that the transfer of the bill of lading (in proper form and manner) of itself constitutes a transfer of the goods themselves. An order bill of lading entitles the holder to call for delivery of the goods. Where the goods are surrendered to a person other than the holder of the bill of lading, the shipowner so delivering is exposed to risk of liability to the holder: *Sze Hai Tong Bank* v *Rambler Cycle Co Ltd* [11] at 586. Leggatt LJ *in The Houda* [12] stated at 553-

> "Under a bill of lading contract a ship owner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession."

A bill of lading differs from a bill of exchange and other negotiable instruments in one important respect highlighted in the following *dicta* from the old decision *Gurney* v *Behrend* [12a] at 633-

> "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bona fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and, in this instance the

transfer of the symbol does not appear more than a transfer of what is represented".

It follows that the maxim *nemo dat quod non habet* does apply in relation to a bill of lading in favour of the shipper even against a *bona fide* transferree for value. Under a collection arrangement, the bill of lading is held as security for payment of the price, and should only be released against payment. An instructive decision in this connection is *the Prinz Adalbert* (13) in which referring to a transaction of a similar nature with the immaterial difference that the financial document involved was a draft and not a bill of echange, Lord Sumner made the following observation at 589 and 590 of the judgement-

> "When a shipper takes his draft, not as yet accepted, but accompained by a bill of lading, endorsed in this way, and discounts it with a Banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting Banker surrenders the bill of lading to security for its payment. If, in turn, the discounting Banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the endorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorizes and directs the Banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done."

The same principle is illustrated by the more recent decision in *H. M. Procurator-General* v *M. C. Spencer, Controller of Mitsui & Company Limited.*(14) In this case, a Japanese Company carrying on business in Japan, had branches in London and Hamburg. The business in Germany was later incorporated there, but the whole of the shares in the German company were owned by the Japanese

company and their trustees, and, in addition, the German Company was controlled and staffed by, and was entirely dependent on, the Japanese company, being really a purchasing and selling house of that company. A contract, made before the outbreak of war in 1939, for the sale of goods by the Japanese company to the German company stipulated, *inter alia*, Hamburg as the destination, the price per ton, c.i.f. Hamburg, and that payment was to be by a three months sight draft against a letter of credit on a Bank. An irrrevocable letter of credit was duly issued by the Hamburg branch of the Bank to the Japanese company, authorizing them to draw on the London branch of the Bank at three months for account of the German company for the price of the goods. The letter contained instructions that the bills of lading, drawn in triplicate, were to be made out to the order of the Bank, and the invoices and insurance, in triplicate, in the Bank's name or in that of the shipper and bank endorsed. Two sets of documents were to be sent to the Bank at Hamburg, and one set, with drafts on London attached, was to be delivered to the Bank in London against acceptance of the drafts. The goods were shipped in Japan on the M. V. Glenroy, a British vessel, and bills of lading issued, invoices prepared and insurance taken out on 31st July 1939, in accordance with those instructions. On 7th August 1939, the Japanese company drew a bill in accordance with the credit, negotiated it through the Japanses branch of the Bank, which delivered three sets of the documents as arranged. The set sent to London was received on 13th September 1939, and owing to the outbreak of war the draft was not accepted nor the documents taken up. On September 13, 1939, the German company cancelled the contract unconditionally. Meanwhile the Glenroy had been diverted to Liverpool, where she arrived on 17th October 1939, and there, on 2nd November, the goods were seized as prize. A claim was made by the Crown that the goods were enemy property or contraband of war and as such liable to condemnation. Lord Porter at page 134 of the judgement of the Privy Council referred to section 19 (2) and (3) of the Sale of Goods Act, 1893 which correspond to section 20 (2) and 20 (3) of the Sale of Goods Ordinance and observed that-

> "..... where the seller draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of

exchange, *the buyer is bound to return the bill of lading if he does not honour the bill of exchange,* and if he wrongfully retains the bill of lading the property in the goods does not pass to him," (Italics added)

P. S. Atiyah, The Sale of Goods (10th Edition) at page 430 extracts from the above decisions, the following principle-

> "Even if the seller draws a bill of exchange on the buyer and discounts it with a Bank before it has been accepted by the buyer, the property will still not pass. Although the seller may obtain payment in this way he remains under a secondary liability as drawer of the bill of exchange and so property remains in him as security for this contingency. Indeed, even when the seller has received the full price in advance there may be special circumstances which give him some interest in retaining the property and it may be held that the transfer of the documents remains necessary to pass property."

As already noted, it is clear from Article 20 of URC 1978 that the remitting bank should act in collaboration with the collecting bank and must give timely and appropriate instructions to the latter regarding the handling of the documents. It is also contemplated by the said Article that if no contrary instructions are received from the remitting bank, the documents should be returned to the bank from which the collection order was received. As Schmitthoff in *Export Trade* (10th Edition) observes at page 164 -

> "If the collecting bank releases the documents to the buyer contrary to instructions, for example, by not insisting on payment or the acceptance of a time bill, the bank is liable in damages to the seller for breach of contract and for conversion of the documents."

It is trite law that in the absence of any agreement to the contrary, the remitting bank would be liable to the exporter for the acts of the collecting bank, its agent. See *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (15th Edition) paragraph 1128. These principles fortify the position taken up by VWV Ltd. that a discounting bank can have recourse to the seller as drawer, only after returning the original shipping documents.

The Question of Estoppel

The other question that arises in this appeal is one of estoppel, and learned President's Counsel for VWV Ltd. has sought to impugn the decision of the trial judge on this point. At the trial, the question of estoppel by representation was raised by the Commercial Bank in issues 18 (a) to (g) which are quoted below:-

" (a) Did the Defendant send the said Bills and documents to the address pleaded in paragraph 9 of the plaint in compliance with specific instructions from the plaintiff?

(b) By the documents marked 'P6' and 'P7' and / or in the circumstances pleaded in paragraph 12 (a) to 12 (h) or any one or more of them, did the plaintiff represent to the defendant that 'Giro Van De Bank' is a Bank?

(c) Did the plaintiff give the said instructions and make the said representation in order to cause the defendant to send the said Bills and documents to the said address?

(d) Did the defendant and its officers believe the said representation to be true?

(e) Did the defendant and its officers act on the said representation and cause the said Bills and documents to be sent by courier to the said address?

(f) If any one or more of the above issues marked 18 (a) to 18 (e) are answered in favour of the defendant, is the plaintiff estopped from denying that the 'Giro Van De Bank' referred to in 'P6' and 'P7' and the plaint is a Bank?

(g) If issue 18 (f) is answered in the affirmative, can the plaintiff have and maintain this action?"

The learned trial Judge has answered issues 18 (a), (b), (c) and (f) in the affirmative while noting that there is insufficient evidence to answering issues 18 (d) and (e). However, he has answered issue 18 (g) in the affirmative and arrived at the conclusion that VWV Ltd. cannot have and maintain the action as it is estopped from denying that the 'Giro Van De Bank' is a Bank.

In *The Law relating to Estoppel by Representation,* (4th Edition), paragraph 1.2.2, Spencer Bower explains the concept of estoppel by representation of fact as follows:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment,* the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (Italics added)

It is clear from this definition that in order to succeed with a defence based on estoppel, the person raising the plea should establish that by reason of the representation he was led to believe that the said representation was true and acted thereon to his prejudice. As Lord Birkenhead put it in the case of *Maclaine* v *Catty* (15), the essence of the doctrine may be illustrated as follows: where 'A' has by his acts or conduct justified 'B' in believing that a certain state of facts exists, and 'B' has acted upon on such belief to his prejudice, 'A' is not permitted to affirm against 'B' that a different state of facts existed at the same time.

It is obvious that the state of mind and the conduct of the person who raises the plea of estoppel is of great relevance. Where, as in this case, the plea is raised by a party that does not lead any evidence in support of it, the plea cannot succeed. This is very clear from the decision of the Supreme Court in *Hirdaramani Ltd.* v *De Silva* (16) in which Gratiaen, J. observed at 297 that he cannot see how 'estoppel' can be applied to the facts of that case in the absence of evidence to support the view that the plaintiff was misled into the belief that the defendant company would continue making certain payments that had been made to the plaintiff by the owner of a business that the defendant company had subsequently taken over. The learned trial

judge was clearly in error in holding that VWV Ltd. was estopped from denying that 'Giro Van De Bank was a Bank by reason of the instructions contained in 'P6' and 'P7'.

Conclusions

For the foregoing reasons, the appeal is allowed, the judgment of the Commercial High Court dated 12th July 1999 is set aside and judgment is entered in favour of the plaintiff-appellant Vanathawilluwa Vineyard Ltd. as prayed for in prayer (a) (i) and (ii) of the plaint. In all the circumstances of this case I am inclined to award the plaintiff-appellant nominal costs in a sum of Rs.10,000 both as costs of suit in terms of prayer (b) of the plaint and as costs of this appeal.

JAYASINGHE, J. - I agree.

TILAKAWARDANE, J. - I agree.

Appeal allowed.