**MOHINUDEEN AND ANOTHER**

**v.**

**LANKA BANKUWA, YORK STREET, COLOMBO 01**

SUPREME COURT
AMERASINGHE, J.
ISMAIL, J. AND
YAPA, J.
SC APPEAL (CHC) NO. 23/2000
SC (HC) LA NO. 17/2000
H.C. CIVIL CASE NO. 5/99(1)
16TH MARCH, 2001

*Civil Procedure Code - Section 147 - Discretion of the court to try issues of law first - Mixed question of fact and law.*

The plaintiff Bank, incorporated under the Bank of Ceylon Ordinance (Cap.302) instituted action against the defendants for the recovery of a sum of Rs. 19,811,503.92, on the basis that they being directors of a company called Mohinudeen Ltd. had guaranteed the repayment of a loan (overdraft facility) granted to the said company. At the trial, parties raised 26 issues. On the motion of the defendants two of the said issues were tried as preliminary issues of law.

(a) Issue No. 14 (read with paragraph 7(a) of the answer): whether the plaintiff had *locus standi* to institute legal proceedings in that no legal person had been incorporated (in terms of the Bank of Ceylon Ordinance) under the name of "Lanka Bankuwa"

(b) Issue No. 16 (read with paragraph 7(c) of the answer): whether the plaint discloses a cause of action against the defendant in that there is no plea to say that the payment has been demanded in writing which is a condition precedent to the payment by the guarantors. The High Court determined issue No. 14 in favour of the plaintiff and decided to answer issue No. 16 at the end of the trial with the other issues.

**Held :**

1. In view of section 9 of the 1972 Constitution which declared that the language of legislation was Sinhala, the Bank of Ceylon (Amendment) Law No. 10 of 1974 (Sinhala) which referred to the Bank as "Lanka Bankuwa" and Article 23(1) of the 1978 Constitution which provided *inter alia*, that all laws shall be in Sinhala and Tamil and Article 23(4) which provided *inter alia*, that all laws in force immediately prior to

the commencement of the Constitution shall be published in the Gazette in Sinhala and Tamil as expeditiously as possible, the plaintiff Bank has the *locus standi* to file the action using its Sinhala name "Lanka Bankuwa." Further, the use of the name "Lanka Bankuwa" did not mislead the defendants. Hence there is no merit in the 1st preliminary objection.

2. In view of the averments in paragraphs 11 and 13 of the plaint that the plaintiff Bank had demanded full payment from the defendants on various occasions, the second preliminary issue ceased to be an issue of law only which goes to the root of the case. The question as to whether a demand was made in writing or not could be determined only after evidence has been presented.

*Per* Hector Yapa, J.

"..... section 147 of the Civil Procedure Code gives a wide discretion to the trial judge, so that even if he has decided earlier to try an issue as a preliminary issue of law, it is open to him to decide such an issue later, if he is of the view that it cannot be decided without taking evidence."

**Cases referred to :**

1. *L.B. Finance Ltd. v. Manchanayake* (2000) 2 Sri L.R. 142 (C.A.)

2. *Muthukrishna v. Gomes* (1994) 3 Sri L.R. 01

3. *Pure Beverages Ltd. v. Shanil Fernando* (1997) 3 Sri L.R. 202 (C.A.)

**APPEAL** from the judgement of the High Court.

*Romesh de Silva, P.C.* with *Palitha Kumarasinghe* for appellants.

*N.S.A. Gunatillake, P.C.* with *N. Mahendra* for respondent.

*Cur. adv. vult.*

May 15, 2001

**HECTOR YAPA, J.**

The plaintiff, a banking corporation duly incorporated under the Bank of Ceylon Ordinance (Cap. 302) instituted action against the 1st and 2nd defendants for the recovery of a sum of Rs. 19,811,503.92 together with interest thereon, on the basis that the aforesaid defendants who are the directors of a company called M.M. Mohinudeen Limited had guaranteed the repayment

of a loan (overdraft facility) granted to the said company. At the commencement of the trial issues 1 - 13 were raised on behalf of the plaintiff and issues 14 - 26 on behalf of the defendants. Thereafter the defendants moved that the following issues, namely, issue No. 14 and issue No. 16 be tried as preliminary issues of law. The said issues are as follows:-

Issue No. 14 : For the reasons set out in paragraph 7 (a) of the answer, can the plaintiff have and maintain this action as presently constituted?

In paragraph 7(a) of the answer, defendants pleaded that the plaintiff has no *locus standi* to institute proceedings in that no legal person has been incorporated under the name "Lanka Bankuwa."

Issue No. 16 : Can the plaintiff have and maintain this action, for the reasons set out in paragraph 7(c) of the answer?

In paragraph 7(c) of the answer the defendants pleaded that in any event, the plaint does not disclose a cause of action against the defendants in that there is no plea to say that the payment has been demanded in writing which is a condition precedent to the payment by the guarantors under the purported guarantee and/or an essential ingredient of the alleged cause of action against these defendants.

After considering the submissions of Counsel for the plaintiff and the defendants, on 21.07.2000, the learned High Court Judge made the following order in regard to the said preliminary issues. With regard to issue No. 14, the High Court Judge observed that use of the name "Lanka Bankuwa" had not led to any doubt or misconception in the mind of any person in Sri Lanka that the "Bank of Ceylon" is also known in Sinhala as "Lanka Bankuwa" and the translation of a name is permissible and cited as an example the name, Mt. Lavinia in English which is called "Galkissa" in Sinhala. He further observed that no one

is misled by the use of the Sinhala name Lanka Bankuwa and especially the defendants who would have received bank statements and other documents from the Bank of Ceylon on the letter-heads giving the name of the Bank in Sinhala as "Lanka Bankuwa." Hence, the learned High Court Judge held that this objection taken by the defendants is without merit and answered the issue No. 14 in favour of the plaintiff. With regard to the issue No. 16 the High Court Judge decided to answer it at the end of the trial together with the other issues, since according to paragraph 11 of the plaint the plaintiff bank has demanded from the defendants that the money be paid back even though there is no specific mention as to the manner of demand.

The defendants have now preferred an appeal to this Court from the said order of the learned High Court Judge made in respect of the two issues referred to above. When the application for special leave was supported on 20.11.2000, this Court having considered the submissions made on behalf of the defendants-appellants, granted leave to appeal with respect to the following questions:-

i. Did the learned Judge of the High Court err in holding that the Bank of Ceylon had *locus standi* to file this action because no one is misled by the use of the Sinhala name Lanka Bankuwa and especially the defendant who would have received his bank statements and other documents from the Bank of Ceylon on letter heads from the Bank of Ceylon giving the name of the Bank of Ceylon in Sinhala as Lanka Bankuwa?

ii. Did the learned Judge of the High Court err in deciding to hear the question as to whether there had been compliance with the agreement with regard to the manner and nature of the demand, at the end of the trial, after deciding to take up the matter as a preliminary issue?

At the hearing before us learned President's Counsel for the defendants-appellants submitted that an institution called the Bank of Ceylon was created by the Bank of Ceylon Ordinance. That Sections 2 and 3 of the said Ordinance provided that a bank to be called the Bank of Ceylon is hereby established (Section 2) and the bank shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name. (Section 3) Learned Counsel further submitted that Sections 2 and 3 of the Bank of Ceylon Ordinance, No. 53 of 1938, has not been amended or replaced with a Sinhala translation and therefore, the incorporated name Bank of Ceylon has not been changed to any other name or to its literal translation in Sinhala. Thus the institution established by the said Ordinance continues to be the Bank of Ceylon and no other. Hence learned Counsel argued that the legislature has not permitted any translation, abbreviation or any other convenient name instead of the corporate name for the purpose of litigation and therefore all actions by the Bank of Ceylon should be in its corporate name i. e. Bank of Ceylon and no other name. Accordingly learned Counsel contended that any proceedings instituted under the name of "Lanka Bankuwa" a name other than the corporate name given in the enactment is bad in law.

There is no doubt that the legislature by the Bank of Ceylon Ordinance has created a body corporate called the "Bank of Ceylon" which is empowered to carry on the business of banking with the right to sue and be sued in its corporate name. Therefore, when the plaint is filed in Sinhala on behalf of the institution called the Bank of Ceylon, it would be fair and logical to use the name "Lanka Bankuwa" the term used in Sinhala by the Bank of Ceylon itself. Besides, the Bank of Ceylon over the years has continued to use the term "Lanka Bankuwa" in their dealings with the public and today the term "Lanka Bankuwa" is synonymous with the term Bank of Ceylon. Hence it would appear that the learned High Court Judge has correctly held that the Bank of Ceylon has the *locus standi* to file actions using the Sinhala name of the Bank of Ceylon namely the Lanka

Bankuwa. Besides, the appellants would have received their bank statements and other documents from the Bank of Ceylon on the letter heads giving the name of the Bank of Ceylon in Sinhala as Lanka Bankuwa and therefore there is no question of the appellants or any one else for that matter being misled that the reference was not to the Bank of Ceylon.

Further as submitted by learned President's Counsel for the plaintiff-respondent the language of legislation under the 1972 Constitution was Sinhala and there had to be a Tamil translation of every law so enacted or made (Vide Section 9). Hence the Sinhala statute of the Bank of Ceylon (Amendment) Law, No. 10 of 1974, has referred to the Bank of Ceylon as Lanka Bankuwa. The said amendment law while repealing several sections of the Bank of Ceylon Ordinance has substituted new sections in their place. The Sinhala version of the said amendment Law, No. 10 of 1974 refers to the Bank of Ceylon as the Lanka Bankuwa which is a clear indication that the legislature has recognized that the corporate name of the Bank of Ceylon in Sinhala would be the Lanka Bankuwa. It is also relevant to note that Article 23 of the present 1978 Constitution has made the following provisions regard to the language of legislation.

23. (1) All laws and subordinate legislation shall be enacted or made, and published, in Sinhala and Tamil, together with a translation thereof in English:

Provided that Parliament shall, at the stage of enactment of any law determine which text shall prevail in the event of any inconsistency between the texts.

Provided further that in respect of all other written laws and the text in which such written laws was enacted or adopted or made, shall prevail in the event of any inconsistency between such texts :

(2) All Orders, Proclamations, rules, by-laws, regulations and notifications made or issued under any written law other than by a Provincial Council or a local authority, and the Gazette shall be published in Sinhala and Tamil together with a translation thereof in English.

(3) All Orders, Proclamations, rules, by-laws, regulations and notifications made or issued under any written law by any Provincial Council or local authority, and all documents, including circulars and forms issued by such body or any public institution shall be published in the Language used in the administration in the respective areas in which they function, together with a translation thereof in English.

(4) All laws and subordinate legislation in force immediately prior to the commencement of the Constitution, shall be published in the Gazette in the Sinhala and Tamil Language as expeditiously as possible.

Section 10 of the 1972 Constitution also contained similar provisions. Having regard to these provisions contained in the 1972 and 1978 Constitutions, the Bank of Ceylon (Amendment) Law, No. 10 of 1974 enacted in Sinhala should be given due weight, since it was provided in the 1972 Constitution that the law published in Sinhala shall be deemed to be the law which supersedes the corresponding law in English. (Vide Section 10(3)). Further as referred to above Sinhala was the language of legislation under the 1972 Constitution. The 1978 Constitution provided that all laws be enacted and published in Sinhala and Tamil, together with a translation in English and in the event of any inconsistency between such texts, the text in which such written laws was enacted shall prevail. Therefore even though the Bank of Ceylon Ordinance has not been translated into Sinhala or Tamil, it is clear that in view of the Bank of Ceylon (Amendment) Law, No. 10 of 1974 enacted in Sinhala, the Lanka Bankuwa referred to in that law was none other than the Bank of Ceylon. Under these circumstances there can be no doubt that the Bank of Ceylon has the *locus standi*

to file this action using its Sinhala name Lanka Bankuwa. Besides it should be re-iterated that the defendants-appellants have not been misled to think that the Lanka Bankuwa is not the Bank of Ceylon. Hence, I see no merit in this objection raised by the learned Counsel for defendants-appellants and accordingly it should fail.

The other question to be considered here is whether the learned High Court Judge was correct in deciding to consider the issue No. 16 at the end of the trial, after having decided earlier to take it as a preliminary issue. According to learned Counsel for the defendants-appellants a demand in writing was an essential ingredient of the cause of action and the failure of the respondent bank to plead in the plaint such a demand in writing was fatal. In support of this proposition he cited the case of *L.B. Finance Ltd. Vs. Manchanayake*[1] where the Court of Appeal held that there ought to be an averment in the plaint that the demand was made (consequent to such termination) and that such demand was not honoured. Therefore Counsel argued that since the plaintiff-respondent has not pleaded in the plaint that payment had been demanded in writing, it was incumbent on the part of the High Court Judge to have decided the issue No. 16 as a preliminary issue of law. Hence Counsel submitted that the learned High Court Judge has erred in holding that the said issue could be considered at the end of the trial.

In this case, one cannot overlook the fact that the High Court Judge decided to postpone the determination of the said issue at the end of the trial with other issues for a good reason, namely, that in paragraph 11 of the plaint, it has been pleaded that the plaintiff bank has demanded from the defendants that the money be paid back even though the manner of such demand has not been specifically mentioned. It is the demand that is material and the writing may be one form in which such a demand can be made and that is a matter of evidence as to whether such a demand was made orally or in writing. In the case of *L.B. Finance Ltd. Vs. Manchanayake* (*supra*) which

was cited by learned Counsel for the defendants-appellants, the plaintiff had not pleaded the demand at all and accordingly the Court held that the plaintiff's action was bad in law. In the present case, however, it has been clearly stated in the plaint that the demand had been made by the plaintiff-respondent. Further it is to be observed that in paragraph 13 of the plaint, it has been pleaded that "in terms of the guarantee bond dated 14.02.1985, despite the plaintiff bank having demanded full payment from the defendants on various occasions, they have failed and defaulted in payment." When paragraph 13 of the plaint stated that the plaintiff bank "in terms of the guarantee bond" demanded payment from the defendants, it is more likely that such demand was made in writing. Anyway, the averments contained in paragraphs 11 and 13 of the plaint, is indicative of the fact that the plaintiff bank had demanded payment from the defendants. Whether it was in writing or not is a matter of evidence and it is clearly a question of fact to be decided at the end of the trial. On this matter as to how the demand was made, it would appear that the parties are at variance.

In relation to this question it is worth considering the provisions contained in section 147 of the Civil Procedure Code. This section provides as follows:-

> "When issues both of law and of fact arise in the same action, and the court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

It would appear from this section that a discretion has been vested in the Court to try the issues of law first, if the Court is of the opinion that the case may be disposed of on the issues of law only. In the case of *Muthukrishna Vs. Gomes*[2] it was held that under section 147 of the Civil Procedure Code for a case to be disposed of on a preliminary issue, it should be a pure question of law which goes to the root of the case. In that

case it was observed by Wijeyaratne, J. that "Judges of original courts should, as far as practicable, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case."

In the case of *Pure Beverages Ltd. Vs. Shanil Fernando*[3] it was held that if an issue of law arises in relation to a fact or factual position in regard to which parties are at variance. that issue cannot and ought not to be tried first as a preliminary issue of law. In that case Gunawardena, J. made the following observation. "It also needs to be stressed that in a trial of an action the question as to how or in what manner the issues have to be dealt with or tried is primarily a matter best left to the discretion of the trial Judge, and a Court exercising appellate or revisionary powers ought to be slow to interfere with that discretion except perhaps, in a case where it is patent or obvious that the discretion has been exercised by the trial Judge not according to reason but according to caprice."

In the present case the question as to whether a demand was made in writing or not could be determined only after the evidence has been presented. Further it is a question of fact in regard to which the parties appear to be at variance. Hence it would cause serious prejudice to the plaintiff bank if the said issue No. 16 is tried as a preliminary issue without permitting evidence to be led on the matter. As observed above section 147 of the Civil Procedure Code gives a wide discretion to the trial Judge, so that even if he has decided earlier to try an issue as a preliminary issue of law, it is open to him to decide such an issue later, if he is of the view that it cannot be decided without taking evidence. Having regard to the circumstances of this case, undoubtedly serious prejudice would have been caused to the plaintiff bank if the said issue No. 16, was tried as a preliminary issue of law without permitting evidence to be led on the matter. Besides it is now clear that the said issue is not purely an issue of law. Thus the learned High Court Judge was correct in deciding to answer the said issue at the end of the trial.

For the aforesaid reasons, the two questions of law are answered in the negative. Accordingly the appeal is dismissed with costs fixed at Rs. 5,000/=.

**AMERASINGHE, J.** - I agree.

**ISMAIL, J.** - I agree.

*Appeal dismissed.*