MOHAMED AZWAR HASSIM
v
SAMPATH BANK LIMITED

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
FERNANDO, J. AND
AMARATUNGA, J.
S.C. (C.H.C.) APPEAL NO. 17/2000
H.C. (CIVIL) 176/96(1)
MARCH 13, 2007

Mortgage Act – Section 85(1) – A credit agency could sell any of the movables in the possession and custody of such agency – Section 85(2) and 85(3) – Restrictions that should be taken into consideration prior to such sale – Section 86 – Notice of demand of payment prior to the exercise of power of sale.

The respondent-Bank filed action in the High Court (Civil) against the appellant for the recovery of a sum of Rs. 3,280,209/80 together with interest until payment in full and a sum of Rs. 445,366/65 together with interest thereon being the amounts claimed to be due to the respondent-Bank from the Appellants respectively on account allegedly of a pledge loan granted to the appellants and an overdrawn balance in the current account of the appellants.

The High Court held in favour of the respondent-Bank and granted the respondent Bank the reliefs prayed for and dismissed the defendant-appellants claim in reconvention.

When this matter was taken up for hearing it was agreed that the appeal would be considered on the following ground:-

> "Was the learned judge of the High Court right in holding that the respondent-Bank was acting in compliance with the provisions of section 85(2) of the Mortgage Act, in not proceeding to sell the pledged goods and seeking an order of Court to sell, without considering the effect of clause 11 of the "Pledge Agreement" which confers on the respondent-Bank the right to sell the pledged property.".

Held:

(1) According to section 85(1) of the Mortgage Act, it is apparent that, a credit agency could sell any of the movables in the possession and custody of such agency. The restrictions that should be taken into consideration, prior to such a sale have been referred to in sections 85(2) and 85(3) of the Act.

(2) On an examination of sections 85(1), 85(2) and 85(3) of the Mortgage Act, it is quite clear that mortgagee, if it is an approved credit agency could sell property which is in its possession, if provision is contained in the instrument of mortgage or in an agreement between the parties, which refers to section 85(2) of the Mortgage Act and empowers the agency to exercise the power of sale.

(3) The basic requirement in terms of section 85 of the Mortgage Act is the availability of the instrument of mortgage or an agreement between the parties with reference to section 85(2) of the Mortgage Act and due notice being given to the mortgagor by way of a notice of demand granting him one month time to make a payment to the relevant credit agency.

(4) It is the duty of the party, who is entitled to claim damages to take all reasonable steps to minimise the loss consequent to breach of contract.

Cases referred to:

(1) *Compania Naveira Maropan S.A.* v *Bowaters Lloyd Pulp and Paper Mills Ltd.* (1955) 2 Q.B. 68 at 98-99.
(2) *British Westinghouse Electric Co.* v *Underground Electric Railways* (1912) A.C. 673).
(3) *Noorbhai and Co.* v *Karuppan Chetty* (1924) 26 NLR 161.
(4) *Wimalasekera* v *Parakrama Sundra Co-operative Agricultural Production and Sales Society Ltd.* (1955) 58 NLR 298.
(5) *Town Council, Chavakachcheri* v *Devabalan* (1962) 68 NLR 10.

APPEAL from the judgment of the Provincial High Court of the Western Province holden in Colombo.

Faiz Musthapha, P.C. with *N.M. Saheid and Faizer Markar* for defendant-appellants.

Chanaka de Silva for plaintiff-respondent.

Cur.adv.vult.

July 28, 2008

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Provincial High Court of the Western Province holden in Colombo (hereinafter referred to as the High Court) dated 22.09.2000. By that judgment learned Judge of the High Court held in favour of the plaintiff-respondent

(hereinafter referred to as the respondent) and granted the respondent the reliefs prayed for and dismissed the defendants-appellants (hereinafter referred to as the appellants) claim in reconvention. The appellants appealed to this Court.

The facts of this appeal as submitted by the appellants, *albeit* brief, are as follows:

The respondent filed action in the High Court against the appellants for the recovery of,

a) a sum of Rs. 3,280,289/58 together with interest on the capital sum of Rs. 2,582,406/- at 28% per annum from 01.09.1993 until payment in full and turnover tax and defence levy on such interest at 5% and,
b) a sum of Rs. 445,366/65 together with interest thereon at 28% per annum for 01.09.1993 until payment in full and turnover tax and defence levy on such interest at 5%,

being the amounts claimed to be due to the respondent from the appellants respectively on account allegedly of a pledge loan granted to the appellants and an overdrawn balance in the current account of the appellants.

The appellants in their answer prayed for a dismissal of the respondent's action and claimed in reconvention a sum of Rs.222,351/- with legal interest. The position taken up by the appellants were that,

a) by reason of the fact that the goods imported are pledged with the respondent and the respondent is in possession thereof, the respondent cannot have and maintain this action;
b) the respondent has wrongly paid an additional sum exceeding Rs. 300,000/- to the Sri Lanka Customs without reference to the appellants.

When this matter was taken up for hearing, it was agreed that the appeal would be considered mainly on the following grounds:

"Was the learned Judge of the High Court right in holding that the respondent was acting in compliance with the provisions of Section 85(2) of the Mortgage Act, in not proceeding to sell the pledged goods and seeking an order of Court to sell, without considering the effect of

clause 11 of the Pledge Agreement (P4) which confer on the respondent the right to sell the pledged property?"

The contention of the learned President's Counsel for the appellants was that the High Court had failed to understand and appreciate the scope and ambit of Section 85(2) of the Mortgage Act and the respondent had acted unreasonably and/or negligently and/or contrary to law in not selling the goods pledged to it by the appellants even though such goods were in the custody and possession of the respondent and that the respondent was entitled in law to sell the goods and set off the proceeds against the amounts due.

Learned Counsel for the respondent submitted that there are only two considerations for the Court to decide on the defence taken up by the appellants. Those defences included the following:

a) whether the respondent was under an obligation to immediately sell the goods and mitigate losses; and
b) whether the respondent has the right to recover the sums paid as revalued customs duty since the respondent did not obtain the specific approval of the appellants to make such payments.

Learned Counsel for the respondent therefore submitted that both these defences would fail on the basis of the overwhelming evidence and material before this Court.

Having stated the contentions of both learned President's Counsel for the appellants and the learned Counsel for the respondent, I would now turn to examine the question that has been raised before this Court.

The following facts were undisputed and agreed upon by the appellants and the respondent:

a) the appellants had applied for certain facilities from the respondent;
b) upon the application, the respondent entered into a Pledge Facility Agreement (P2) with the appellant for a sum of Rs. 2,500,000/- which was disbursed to the appellants;
c) under and in terms of the said Pledge Facility Agreement, the appellants executed a Promissory Note (P3) and the pledge document (P4);

d) The respondent bank took steps to clear the consigned goods, incurring related expenses;

e) the respondent bank has granted to the appellants credit facilities amounting to Rs. 2,582,406/52;

f) the respondent bank in fact expended the amounts set out in the plaint on account of the facilities granted to the appellants; and

g) the statement of accounts produced by the respondent bank in the action filed in the original Court is correct and accurate.

Accordingly, the only question that has to be considered would be as to whether the respondent was entitled in law, to sell the goods in terms of the Mortgage Act and the agreement entered into between the appellants and the respondent.

Section 85(1) is contained in Part V of the Mortgage Act, which deals with mortgages of movables and reads as follows:

"Where a mortgage of any corporeal movables is created in favour of an approved credit agency, it shall be lawful for the agency, subject to the provisions of sub-sections (2) and (3), to sell any of the movables subject to the mortgage which may for the time being be actually in the possession and custody of the agency.

On a plain reading of Section 85(1) of the Mortgage Act, it is apparent that, a credit agency could sell any of the movables in the possession and custody of such agency. The restrictions that should be taken into consideration, prior to such a sale have been referred to in Sections 85(2) and 85(3) of the Act. These two Sub-sections are as follows:

"85(2) The power conferred on the agency by Sub-section (1) to sell any movables shall be exercised only if the instrument of mortgage or an agreement between the parties contains provision referring to this section and empowering the agency to exercise the power of sale conferred thereby, and if either of the following conditions is fulfilled,

that is to say –

(a) where the mortgage is created as security for the payment of any moneys stated to be payable on

demand, if the mortgagor fails to make payment of the moneys due and payable under the mortgage within one month of the issue to him by the agency of a notice of demand in accordance with the provisions of section 86; or

(b) where the mortgage is created as security for the payment of any moneys stated to be payable on a specified or ascertainable date, if the mortgagor fails to make payment of the moneys due and payable under the mortgage within one month of the issue to him by the agency, after that date, of a notice of demand in accordance with the provisions of section 86.

(3) Every sale in exercise of the power conferred by subsection (1) shall be by public auction, and it shall be the duty of the agency to take such steps as are necessary to ensure –

(a) that a notice containing a description of the movables to be sold and specifying the date fixed for the sale, is published in two issues of a daily newspaper circulating in Sri Lanka at least one week before the date fixed for the sale, and

(b) that the sale takes place on the date so specified, or if the sale is postponed, that a further notice containing the particulars specified in sub-paragraph (a) is published at least one week before the date to which the sale is postponed."

Section 86 of the Mortgage Act, refers to the notice of demand of payment prior to the exercise of power of sale and reads as follows:

"86(1) The power of sale conferred by section 85 shall not be exercised unless the instrument of mortgage contains an address to which notice of demand of payment may be sent to the mortgagor by the agency; or where there is no such instrument unless the mortgagor has in writing signed by him furnished an address as aforesaid to the mortgagee:

Provided, however that upon any change of address, the mortgagor may notify his new address to the agency, and such new address, if acknowledged in writing by the agency, shall for the purposes of section 85 be the address to which a notice of demand of payment may be sent.

(2) Every such notice of demand of payment shall be sent by registered post in a letter to the address of the mortgagor as stated in the instrument of mortgage or the writing referred to in subsection (1), or to such new address as may, for the time being have been notified and acknowledged as provided by that subsection."

On an examination of Sections 85(1), 85(2) and 85(3) of the Mortgage Act, it is quite clear that a mortgagee, if it is an approved credit agency could sell the property, which is in its possession, if provision is contained in the instrument of mortgage or in an agreement between the parties, which refers to Section 85(2) of the Mortgage Act and empowers the agency to exercise the power of sale.

It is common ground that the appellants and the respondent had entered into a Pledge Agreement (P4) on 03.08.1992. Learned Judge of the High Court while referring to the said Pledge Agreement had held that the said 'instrument does not contain provisions empowering the agency (the respondent) to exercise the power of sale conferred'. Learned Judge of the High Court had also referred to the relevant requirement in Section 85(2) of the Mortgage Act and had stated that, Section 85(2) does not empower the respondent to sell the pledged goods by itself without first obtaining a judgment from a competent Court.

Accordingly, the important question that has to be examined is whether there is provision contained in the Pledge Agreement (P4) regarding a sale in the event of non-payment and whether Section 85(2) of the Mortgage Act empowers the respondent to carry out such a sale and if so whether there is a necessity to first obtain an order from a competent Court.

On an examination of the Pledge Agreement (P4), it is evident that clause 11 of the said Agreement refers to Sections 85(1), (2)

and (3) of the Mortgage Act and therefore it would not be correct to state that the Pledge Agreement 'does not contain provisions empowering the respondent to exercise the power of sale conferred'. The said clause 11 clearly empowers the respondent to exercise the statutory power of sale conferred by Sub-section 1 of Section 85 of the Mortgage Act, with regard to the securities held by the respondent subject to the observance of the provisions of Sub-sections 2 and 3 of the Mortgage Act. Clause 11 reads as follows:

> "That upon the moneys due to the Bank upon the said Cash Credit Account becoming payable (whether under the provisions of the 9th or 10th clauses of this Agreement) it shall be lawful for the Bank to exercise the statutory power of sale conferred by Sub-section 1 of section 85 of the Mortgage Act in respect of the Securities held by the Bank subject to the observance of the provisions of Sub-sections 2 and 3 or if the Bank shall think fit so to do forthwith or at anytime thereafter and without any notice to the Borrowers to sell or otherwise dispose of all or any of the Securities either by public auction or by private contract and subject to such conditions as the Bank shall think fit under the express authority to do so which the Borrowers hereby give the Bank. The nett proceeds of such sale (whether made in exercise of the statutory power conferred by Section 85 of the Mortgage Act or of the contractual power hereby conferred) shall be applied in liquidation of the balance then due to the Bank upon the said Cash Credit Account."

In the event, if after executing the respondent's right of sale, there is insufficient funds from the nett sum realized by the sale to cover the balance due, clause 12 would permit the respondent to apply any other money in the hands of the Bank standing to the credit of the appellant. If there is any surplus of the nett proceeds of sale after payment of all principal and interest due by the appellants, in terms of clause 14 of the Agreement such amount is directed to be paid to the appellants.

Section 85(1) of the Mortgage Act, referred to above, stipulates, quite clearly that the mortgagee could sell the subject that has been

pledged. This is however subject to conditions, which are stated in Sections 85(2) and 85(3) of the Mortgage Act. On an examination of all three (3) Sections, the conditions stipulated by the relevant provisions for a sale stated in Section 85(1) of the Mortgage Act could be summarised as follows:

1. the pledged property must be corporeal movables;
2. mortgage should be in favour of an approved credit agency;
3. such property at the time material, must be in the possession and custody of the approved credit agency;
4. the instrument of mortgage or the agreement between the parties in regard to the mortgage should contain provision referring to Section 85(2) pf the Mortgage Act and empower the credit agency to exercise the power of sale conferred; and either of the following condition should be fulfilled -
   A. the mortgage is created as security for the payment of money stated to be payable on demand and if the mortgagor had failed to make payment within one month of the issuance of a notice of demand by the agency in terms of Section 86 of the Mortgage Act;

   or

   B. Where the mortgage is created as security for the payment of any money to be paid on a specified or ascertainable date and if the mortgagor had failed to make payment within one month of the issuance of a notice of demand by the agency in terms of Section 86 of the Mortgage Act;
5. Section 86 of the Mortgage Act specifies the need of having an address contained in the instrument of mortgage to which notice of demand of payment may be sent to the mortgagor by the agency and the process in which such demand should be sent and the steps that must be taken in the event of any change of address.

Accordingly it is apparent that none of these provisions refer to the requirement of first obtaining an order from a competent Court as stated by the learned Judge of the High Court. The basic requirement in terms of Section 85 of the Mortgage Act is that the availability of the instrument of mortgage or an agreement between

the parties with reference to Section 85(2) of the Mortgage Act and due notice being given to the mortgagor by way of a notice of demand granting him one months time to make a payment to the relevant credit agency.

It is not disputed that the pledged property, comes within the category of movables and that the mortgage was in favour of an approved credit agency. It was also common ground that the property in question was in the possession and custody of the respondent. As stated earlier, the instrument of mortgage being the Pledge Agreement, had referred to Section 85(2) of the Mortgage Act. Accordingly it is apparent that considering the provisions contained in Section 85 of the Mortgage Act and the contents of this appeal, the respondent was empowered to exercise the power of sale conferred to it and the only issue that has to be examined is whether due notice in terms of Section 85(3) had been issued.

On a perusal of the documents filed by both the appellants and the respondent, it is evident that several reminders from the respondent about the payment and the requests from the appellants to grant further time had been made during the period of October 1992 and November 1993. Thereafter on 11.11.1993, the respondent had issued the notice of demand to the appellants (P16), which clearly stated, *inter alia*, that,

> ".... Accordingly I have been advised by my client to demand Rs. 3,725,656/23 being the total amount outstanding from the Pledge Loan Facility and the Overdraft Facility as at 31/08/93 together with interest thereon from 01/09.93.
>
> Therefore I do hereby demand that you pay my client the said sum of Rs. 3,725,656/23 along with the interest thereon and Rs. 315/- being the Letter of Demand charges on or before 14.12.93...."

The Letter of Demand had been sent under Registered Post to the address of the appellants as stated in the Pledge Agreement in terms of Section 86(2) of the Mortgage Act.

It is therefore apparent that statutorily as well as contractually, the respondent had the authority to sell the pledged goods and depending on the amount realized by the sale the respondent

should have taken steps as provided by clauses 12 and/or 14 of the Pledge Agreement.

Notwithstanding the above, the material placed before this Court on the basis of the evidence that was before the High Court further strengthens the position that the respondent had the authority to sell the pledged goods, in terms of the Mortgage Act and in terms of the Pledge Agreement.

The witness of the respondent, one Mr. W.A. Don Keerthithilake, who was a Senior Manager in his evidence given on 15.09.1999 had clearly testified to this effect,

"Q : If not settled in three months what would you have done?

A : We would have sold the goods.

Q : That is the basic concept in a pledged facility?

A : Yes.

Q : You were keeping the goods and you were seeking to recover the money given to the defendants?

A : Yes.

Q : For almost eight years you have not sold the goods?

A : Yes.

Q : The pledged facility you gave him was Rs. 2.5 million?

A : Yes.

Q : You are now seeking to recover Rs. 2.5 million with interests for eight years and also keeping the goods?

A : Yes.

Q : As a prudent Banker can you do that – can you keep the goods with you and also at the same time recover the money you have been given as the pledged loan?

A : No.

Q : That is what you have done in this case."

A : Yes."

Further to the aforementioned, it is to be noted that the appellants had not objected, when the respondent made an application to sell the pledged goods, to the High Court on 20.03.1997, provided the sale proceeds were set off against the amounts claimed by the respondent.

The proceedings of 20.03.1997, which is re-produced below, clearly supports the aforementioned position:

"නඩු අංකය : 176/96(1) 1997.03.20 දින

පෙනී සිටීම පෙර පරිදි.

මේ අවස්ථාවේදී පැමිණිලිකරුවන් වෙනුවෙන් මෙම ඉල්ලීම ඉදිරිපත් කර සිටී.

'එනම්, මෙම නඩුවේ විත්තිකරුවන්ගේ භාන්ඩ තොගයක් පැමිණිලිකරුගේ භාරයේ ඇත. එම භාණ්ඩ ප්‍රසිද්ධ වෙන්දේසියේ විකුණා ලැබෙන මුදල විත්තිකරුගෙන් අය වීමට ඇති මුදලින් අඩු කර ගැනීමට පැමිණිලිකරු අදහස් කර ඇත. මෙම භාණ්ඩ ප්‍රසිද්ධ වෙන්දේසියේ විකිණීමට ඒ අනුව ගරු අධිකරණයෙන් ඉල්ලා සිටිමි.'

ජනාධිපති නීතිඥ පරතලිංගම් මහතා මෙසේ කියා සිටී:

මෙම ඉල්ලීම සම්බන්ධයෙන් හේතු වශයෙන් දක්වා ඇති කරුණු පිළිබඳව මම එකඟ නොවෙමි. මගේ අදහස වන්නේ, මෙම භාණ්ඩ පැමිණිලිකරු විසින් විකිණීමට විත්තිකරුවන්ගේ කැමැත්ත හෝ අනුමැතිය අවශ්‍ය නොවන බවය. කෙසේ වෙතත් විත්තිකරුගේ උත්තර වාදය ඉදිරිපත් කළ කුවිතාන්සි වලට, අගති රහිතව පැමිණිලිකරුවන් විසින් එවැනි පියවරක් ගෙන භාණ්ඩ විකුණා මෙම මුදල් විත්තිකරුගෙන් අය විය යුතු යැයි කියන මුදලෙන් අඩු කර ගැනීම ගැන, විත්තිකරුගේ විරෝධතාවයක් නැති බව ගරු අධිකරණය වෙත දන්වා සිටිමි.

....

මෙම තත්ත්වය යටතේ, පැමිණිල්ල විසින් මෙම පියවර ගෙන, ඉන් උද්ගත වන තත්ත්වය සම්බන්ධයෙන් අධිකරණයට වාර්තා කිරීමට නියම කරමි.

නඩුව විභාග රෝලෙන් ඉවත් කරමි. ඒ අනුව, අද දින සහ 24 වෙනි දින විභාග දිනයන්ද ඉවත් කරමි.

නඩුව කැඳවන්න : 1997.06.13 වෙනි දින."

Irrespective of the fact that the respondent was given time to take steps and report, the respondent had failed to file a report, when the case was called on 13.06.1997. No steps to that effect were taken even thereafter. It is not disputed that the goods that were imported under the Pledge Agreement remained in the

custody and possession of the respondent and was not handed over to the appellants.

Considering all the aforementioned circumstances it is abundantly clear, as stated earlier, that in addition to the authority granted to the respondent under and in terms of the clause 11 of the Pledge Agreement (P4) and Sections 85 (1), (2) and (3) of the Mortgage Act, the appellants also had not objected to the sale of the pledged goods.

Accordingly it is evident that the learned Judge of the High Court had erred when he considered the applicability of Section 85(2) of the Mortgage Act and the effect of clause 11 of the Pledge Agreement and therefore I answer the question on which this appeal was considered in the negative.

There is one other matter that I have to consider, before I part with this judgment.

Learned President's Counsel for the appellants also contended that the customs surcharge paid by the respondent cannot be claimed from the appellants.

The contention of the learned President's Counsel for the appellants was that the respondent claimed a sum of Rs. 445,366/65 on the basis of an additional payment by way of customs surcharge, This payment had been made by the respondent on a revaluation of the said goods by the Sri Lanka Customs.

Learned Counsel for the respondent however took up the position that the appellants had not protested about the payment of customs duty by the respondent Bank. Learned Counsel for the respondent had referred to the document marked P10 in support of his contention.

The letter marked P10 is a document sent by the 1st appellant to the respondent. It was addressed to Mr. W.A.D. Keerthithilake and the relevant paragraphs reads as follows:

"....

2. Regarding your additional payment of Rs. 320.228/- you are aware that you made the Payment without consulting us. In fact we were informed about the

payment only after it was made."

...."

It is therefore evident that the appellants had not been aware of the said payment by the respondent. Moreover the proceedings of 15.09.1999 further strengthens the contention of the learned President's Counsel for the appellants that they had not agreed to pay the additional amount.

"Q : Did you inform your client before you were going to pay the additional customs duty?

A : No.

Q : If you informed the defendants he would have objected to the payment of additional customs duty?

A : Yes.

Q : You only informed the defendants after your payment of additional customs duty.

A : Yes.

Q : You admit that payment was outside the agreement regarding the pledged facility you gave the defendants.

A : Yes.

It is therefore abundantly clear that the additional payment made by respondent was not only outside the purview of the Pledge Agreement, but also had been paid without any prior authority from the appellants. Moreover, as conceded by the respondent it had not taken any steps to mitigate the damages as the officer, who represented the respondent had categorically stated that if they had sold the pledged goods in 1994, the outstanding dues would have been considerably less. The question that has to be examined therefore is that whether the respondent is responsible for not taking steps to minimize the loss.

Admittedly, the respondent had claimed an additional sum of money. It is also clear on an evaluation of the evidence of the representative of the respondent that the damages could have been minimized if the respondent in terms of the accepted banking practice had taken action to sell the goods, which were in its custody in terms of the provisions of the Mortgage Act, the Pledge

Agreement and moreover as the appellants had no objection in such action.

Learned President's Counsel for the appellants relied on several authorities in support of his contention that it is the duty of a party claiming damages to take all steps to minimize loss consequent to a breach of contract.

Cheshire and Fifoot (Law of Contract, 13th Edition, pg. 632) clearly refer to the consequences when acting unreasonably in given circumstances and had stated that,

> "Alike in contract and in tort a plaintiff may claim compensation only for the loss caused by the defendant's wrongful act; any loss created by his own unreasonable conduct he must bear himself. In a case in 1955, Hodson LJ. had to consider the question,
>
> > "Whether the damages flow from the breach in accordance with the ordinary law of damages for breach of contract. Were they the natural and probable consequences of the breach? If not, they are too remote .... The question is one of causation. If the master, by acting as he did, either caused the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the [defendants] would be relieved, accordingly from the liability, which would otherwise have fallen upon them.' [*Compania Naveira Maropan S.A.* v *Bowaters Lloyd Pulp and Paper Mills Ltd.*(1) at 98-99]"

Prof. C.G. Weeramantry (The Law of Contracts, Vol. II, pg. 906) has also taken the view that regarding mitigation of damages that 'it is the duty of a party claiming damages to take all steps to minimise the loss consequent to a breach of contract'. Professor Weeramantry had referred to the decision of Lord Haldane in *British Westinghouse Electric Co.* v *Underground Electric Railways*(2), where it was stated that,

> "There are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain .... is to be placed, as far as

money can do it, in as good a situation as if the contract has been performed .... but this first principle is qualified by a second, which impose on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

This position had been considered by our Courts in several cases. For instances in *Noorbhai and Co.* v. *Karuppan Chetty*[3], Jayewardene, A.J. had held that,

"But the law casts on the seller in such a case the duty of minimizing the damages resulting from a breach of contract to purchase."

Again in the cases of *Wimalasekera* v *Parakrama Samudra Co-operative Agricultural Production and Sales Society Ltd.*[4], and *Town Council, Chavakachcheri* v *Devabalan*[5], the Supreme Court had held that it is the duty of a party, who is entitled to claim damages to take all reasonable steps to minimise the damages.

The appellants' position was that if the respondent had taken steps to sell the pledged goods at the time the question arose and especially at the time the High Court had sanctioned the sale, the damages could have been minimised.

The appellants had made a claim in reconvention stating that a sum of Rs. 222,351/-, which amount was advanced to the respondent had been lost due to the respondent's failure to sell the pledged goods.

Learned Judge of the High Court had held that the appellants had not adduced evidence in support of their claim in reconvention and dismissed the application for the claim in reconvention.

The proceedings of 15.09.1999 referred to the respondent's evidence stating that a sum of Rs. 222,351/- had been paid to the respondent by the appellants as the 10% margin of the letter of credit and other statutory charges. After the High Court had stated that no evidence had been adduced by the appellants in support of the contention, it is not disputed that one of the admissions of this matter is that the appellants had paid the respondent a sum of Rs.222,351/-. The proceedings of 16.01.1997 clearly indicated that

the appellants had adduced sufficient evidence in support of their claim in reconvention.

For the reasons aforesaid this appeal including the claim in reconvention is allowed and the judgment of the High Court dated 22.07.2000 is set aside.

I make no order as to costs.

RAJA FERNANDO, J. - I agree.

AMARATUNGA, J. - I agree.

Appeal and the claim in reconvention allowed.
The judgment of the High Court set aside.