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Therefore the contention that under sub section 05 of Section 283 the judgment should have been pronounced on the accused when the accused, who had been tried in *absentia*, was brought before the Court after his arrest is untenable and we reject this argument.

To augment these views of this Court, we would also like to mention sub section 2 of Section 299 which is as follows: *"When a sentence is passed on an accused who was absent at his trial, such sentence shall be put into execution immediately upon his arrest."*

Even sub section 3 of section 299 which specifically deals with sentence of death is to that effect.

Another argument put forward by learned counsel appearing for the accused - appellant, Dr. Jayampathi Wickramaratne, P. C was that if this appeal is not allowed, the Court should invoke its revisionary powers, otherwise the accused - appellant will have no remedy as it would have been extremely impossible that he would have taken an appeal because he was not aware of the conviction and sentence. With regard to this argument, we find that the High Court judge has rejected the explanation of the appellant and refused to vacate the conviction and the sentence. There had been no application for revision and the appellant had the opportunity of moving in revision. On the other hand, if we are to allow this application it would amount to condescending or, the Court lending its hand to a person guilty of contumacious conduct and thereby assisting him. We are of the opinion that the discretionary power of this court invoking the revisionary jurisdiction should not be used in a situation of this sort. Therefore we hold that the petition of appeal is not properly constituted and is out of time. There is no right of appeal against the order made on the 06.01.2002 under section 241 (3) because section 331 gives only the forum jurisdiction. We have perused chapter XVIII (F) under the Heading of **"the Trial in the High Court in the absence of the accused and we find that there is no provision made for appeals against the orders made under section 241 (3)". *(Vide Martin Vs Wijewardane)*** [1].

Assuming without conceding that there is a right of appeal against the order made on 06.01.2003, we find on the naked facts that the appeal

would never succeed because the accused, right from the beginning was well aware of the case. In fact the accused-appellant appeared once in Court on 01.09.98 and thereafter he absented himself. This shows that the accused was well aware that there was a case against him. For nearly three years, till he was arrested, he had absconded.

For the reasons stated, we uphold the preliminary objection raised by the Learned DSG and dismiss this petition of appeal *in limine.*

Sisira De Abrew, J - *I agree*

Appeal dismissed.

NEED WOOD EMMAG (PVT) LTD
V
SITHAMPARAM AND ANOTHER

COURT OF APPEAL
WIMALACHANDRA.J
CALA 357/2005
DC NEGOMBO 10584/M
SEPTEMBER 26, 2006

High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 section 9- Action instituted in the District Court - Order to transfer case to High Court (Commercial High Court) - Legality? Civil Procedure Code - Section 47 - Constitution, Article 154P.

The plaintiff filed action in the District Court of Negombo to recover a sum of Rs. 6,849,372.29 from the defendant. The defendant moved for a dismissal of the plaintiff's action *in limine,* as the claim is based on a commercial transaction and exceeds Rs. 3 Million and the District Court has no jurisdiction to hear and determine the action in terms of Act, No. 10 of 1996. The trial Judge directed that the case be transferred to the Commercial High Court. The defendant sought leave to appeal from the said order.

Held:

(1) The plaintiff's action is governed by Act, No. 10 of 1996 - where Section 9 states that when there is evidence that the value of any action filed in the District Court is one that should have been filed in the Commercial High Court it shall stand removed to the appropriate Court.

(2) It is good law that where statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement a party seeking to enforce the right must resort to that remedy or that tribunal and not to others.

***Per* Wimalachandra, J.:**

"Section 47 of the Civil Procedure Code has no application to the present case as a special provision of law is in force - Section 9 of the High Court of Provinces (Special Provisions) Act, No. 10 of 1996.

APPLICATION for leave to appeal from an order of the District Court of Negombo.

Cases referred to:

(1) Cornel & Company Ltd. Vs. Mitsui & Company Ltd and others 2000 1 Sri LR 57 at 73

(2) Wilkinson vs. Banking Corporation 1948 1KB 721

(3) Hendrick Appuhamy vs. John Appuhamy 69 NLR 29

K. M. Basheer Ahamed with *D. W. Johnthasan* for defendant - petitioner

Ikram Mohamed PC with *Roshan Hettiarachchi* for plaintiff - respondent.

Cur. adv. vult.

September 11, 2007
WIMALACHANDRA. J

This is an application for leave to appeal filed by the defendant- petitioner from the order of the learned District Judge of Negombo dated 31.08.2005. By that order the learned District Judge held that the plaintiff - respondent's

(plaintiffs) action should have been filed in the High Court of the Western Province exercising civil jurisdiction which has the jurisdiction to hear and determine the plaintiff's action and accordingly, made order to transfer the case to the High Court of the Western Province (Civil) Colombo.

Briefly, the facts are as follows:

The plaintiffs filed this action to recover a sum of Rs. 6,849,372.29 from the defendant. The defendant filed answer and pleaded inter alia that the plaintiff's claim is based on a commercial transaction and since the amount claimed by the plaintiffs exceeds Rs. 3 million the District Court has no jurisdiction to hear and determine the action in terms of the High Court of the Provinces (Special Provisions) Act No.10 of 1996 and moved for a dismissal of the plaintiff's action *in limine*.

When this case was taken up for trial on 14.3.2005 the defendant raised the following preliminary issues :

(1) On the averments in the plaint does the plaintiffs cause of action arise out of a Commercial Transaction ?

If so, does this Court have jurisdiction to hear and determine this action?

(2) If the answer to the above issue, is in the negative, should the plaintiff's action be dismissed ?

The plaintiff raised the following issues :

(3) If the answer to the issue No. (2) is in the negative, should this case be transferred to the appropriate Court in terms of section 9 of the Act, No. 10 of 1996 ?

After hearing the parties, the learned Judge directed the parties to file written submissions. Thereafter the learned Judge delivered his order on 31.08.2005 holding that the subject matter of the plaintiffs' action is a commercial transaction where the value of the transaction exceeds a sum of Rs. 9 million and he further held that there is no provision to dismiss the plaintiffs' case. The learned Judge directed that the case be transferred to

the Commercial High Court of Colombo, citing section 9 of the aforesaid Act, No. 10 of 1996.

There is no dispute that the plaintiffs' cause of action arises out of a commercial transaction, the value of which is over Rs. 3 million. It is common ground that the District Court has no jurisdiction to hear and determine this action. The only dispute between the parties is with regard to the correctness of the order made by the District Judge ordering the transfer of the case to the High Court of the Western Province exercizing civil jurisdiction (Commercial High Court).

As regards the question involved in this application, the relevant section is Section 9 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996 which reads as follows:

> **Where there is evidence that the value of any action filed in any District Court is one that should have been filed in High Court established by Article 154 P of the Constitution exercising jurisdiction under section 2, the Judge shall record such fact and make order accordingly and thereupon the action shall stand removed to the appropriate Court"**

In the case of *Cornel & Company Ltd. Vs. Mitsui and Company Limited and others* [1] at 73 Mark Fernando,J has classified the provisions of section 9 of the Act No. 10 of 1996 as follows:

> **"Where an action, which should have been filed in the High Court, is filed in the District Court, Section 9 compels the transfer to the correct Court; it does not require or permit dismissal of the action on that ground."**

His Lordship further clarified section 9 by the following terms:

> **"The first clause (section 9), where there is evidence that the value of any action .... is one the should have been filed ..... is clearly ungrammatical. What seems to have been intended is that if by reason of its value, an action is one which should have been instituted in any High Court, it shall stand removed to the appropriate Court."**

The learned counsel for the defendant appears to contend to get through his point by relying on section 47 of the Civil Procedure Code. The learned counsel submitted that the District Judge was obliged to have the plaint returned to the plaintiffs to have it presented to the proper Court.

In this regard, I am inclined to agree with the submissions made by the learned President's Counsel for the plaintiffs' that special provisions of the law override the general provisions. The plaintiffs' action is governed by the provisions of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, where section 9 of the Act states that when there is evidence that the value of any action filed in any District Court is one that should have been filed in a High Court established by Article 154 P of the Constitution, it shall stand removed to the appropriate Court.

In this regard Fernando. J in *Cornel & Company Ltd. Vs. Mitsui Co. Ltd.* (Supra) said at '73.

"Where an action that should have been filed in the District Court is filed in the High Court; Expressio unius, exclusio alterius and so the inference would be that transfer to the District court is not permissible. That seems even to exclude the principle recognized in section 47 of the Civil Procedure Code." (emphasis added)

The learned President's Counsel for the plaintiffs cited the case of *Wilkinson Vs. Banking Corporation* [2] to substantiate the principle rule that the general law is to be construed as yielding to the special law in respect of the matters contained therein. In *Wilkinson Vs. Banking Corporation* Asquith L. J. said;

> **".... it is undoubtedly good law that where statute creates a right and in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others"**

In the case of *Hendrick Appuhamy Vs. John Appuhamy* [3] Chief Justice Sansoni cited with approval the aforesaid English authority and also cited two other English authorities which support the views expressed by Sansoni, C. J. in the case of *Hendrick Appuhamy Vs. John Appuhamy*[3] where Sansoni, C. J. held that as the Paddy Lands Act provides the sole

machinery to which a landlord must resort to if he wants to have his tenant cultivator ejected, an action filed in the District Court for ejectment of the tenant cultivator cannot be maintained as the plaintiff should necessarily seek his remedy under the Paddy Lands Act.

In the circumstances Section 47 of the Civil Procedure Code has no application to the present case as a special provision of law is in force, i. e. Section 9 of the High Court of Provinces (Special Provisions) Act, No. 10 of 1996.

In these circumstances, I see no reason to interfere with the order of the learned District Judge dated 31.8.2005. Accordingly, I am of the view that the learned Judge was right when he made the said order to transfer this case to the Commercial High Court of Colombo. For these reasons I refuse to grant leave to appeal against the said order and dismiss this application with costs.

Application dismissed.

OCEAN WIND MARITIME SA
V
GUJARAT CHEMINEX LTD

COURT OF APPEAL
WIMALACHANDRA, J
CA 102/2005 LG
HC ADMIRALTY COLOMBO
ACTION IN REM 21/2004
DECEMBER 5, 2005

Arbitration Act, No. 11 of 1995 - Sections 5, Sections 39 - Bill of lading - Does it incorporate an arbitration clause - Does High Court (Admiralty) have jurisdiction - Without referring to arbitration ? - Cause of action - Non disclosure of cargo - Arbitration clause inoperative - Delay ?

The plaintiff company entered into a voyage Charter Party in India by which the owners of the vessel hired the vessel to the plaintiff. In terms of the "charter

Party" the vessel was to carry a cargo of 1500 Mt. of salt for Port of K to the Port of C. 14 bills of lading were issued and a freight invoice was also issued. The plaintiff contended that, the receiver of the Cargo at Port C received only 9500 Mt. of Cargo and the owners of the vessels/agents have sold the remaining Cargo to third parties and instituted action in the High Court (Admiralty). The 2nd defendant - respondent objected to the jurisdiction of the High Court hearing this matter on the ground that the Charter Party entered into between the plaintiff and the owners of the vessel contains an Arbitration Clause, hence the High Court has no jurisdiction. The High Court rejected the objection - the defendant - petitioners moved by way of leave to appeal in the Court of Appeal.

Held :

(1) The plaintiff is the charterer of the vessel as well as the shipper. In its capacity as the charterer the plaintiff had entered into a charter party agreement with the defendant.

The bill of lading incorporates an arbitration clause in the charter party agreement as condition one of the bill of lading. The arbitration clause does not become inoperative or inapplicable. High Court of Colombo (Admirality) has no Jurisdiction.

(2) There was in fact a final discharge of the entire consignment as the receiver at Port C has stated that only 9500 Mt. was received by him, the owners of the vessel/agents have sold the remaining cargo to third parties. Thus there is in fact a final discharge of the entire consignment - this the - plaintiff was aware.

(3) The time period 'referring disputes' within twelve months after final discharge in the arbitration agreement will not enforce a time bar.

LEAVE TO APPEAL from an order of the Commercial High Court (Admiralty).

Shibly Aziz PC with *Rohana Devapriya* for defendant - petitioner.

S. Piyasena for plaintiff - respondent

Cur. adv. vult.

November 2, 2007
Wimalachandra, J.

This is an application for leave to appeal filed by the defendant - petitioners (petitioners) from the order of the learned High Court Judge of Colombo

dated 7.3 .2005. By that order the learned High Court Judge overruled the preliminary objection raised by the petitioners and held that the High Court had jurisdiction to hear and determine the aforesaid action and determine the issues arising out of the Bill of Lading.

When this application for leave to appeal was taken up for inquiry the Court of Appeal granted leave to appeal on the following two questions of law :

(a) Does the Bill of Lading incorporate (include as part of the agreement) an Arbitration Clause, and if so does the High Court (Admiralty) have jurisdiction to hear and determine this action, without referring the matter for Arbitration ?

(b) As the Rider Clause 36 of the charter Party agreement states that all disputes arising out of the Charter Party which cannot be amicably resolved shall be referred to arbitration in London within twelve months of the final discharge of the cargo was there a final discharge of the cargo for the arbitration clause No. 36 in the Charter party to come into effect?

Briefly, the facts are as follows :

The plaintiff is a company duly incorporated in India. The motor Vessel "Ocean Wind", which is a ship in connection with which this claim of US$ 243,861.00 together with interest against the defendants was made, is owned by the 2nd defendant. The plaintiff entered into voyage charter party under a Gencon charter party on 25th November, 2003 in Mumbai India by which the owners of the vessel hired the said vessel to the plaintiff. In terms of the said "Charter Party" the vessel was to carry a cargo of 15,000 Mt of salt from the Port of Kandla to the Port of Chittagong, Bangladesh. Upon the loading of the cargo, the owners of the cargo issued to the plaintiff fourteen bills of lading for a cargo of 14,373 Mts. Upon the issue of the bills of lading the owners of the vessel, though their agents, issued a Freight invoice in a value of US$ 286,211.25.

The plaintiff states that the receiver of the cargo at the Port of Chittagong had received only 9500 mt. of cargo and the owners of the vessel and/or their agents have sold the remaining cargo of the plaintiff to third parties in violation of the terms of the agreement. The plaintiff further states he has

already expended a sum of US$ 164,697 from the sales proceeds from the receivers. The plaintiff states that as the receiver of the cargo at the Port of Chittagong has stated that only 9500 mt. was received by him, the remaining cargo would have been sold to third parties by the owners of the vessel and/or their agents.

The 2nd defendant by its motion dated 24.5.2004 objected to the jurisdiction of the High Court hearing the matter on the ground that the charter party entered into between the plaintiff and the owners of the vessel contains an arbitration clause and hence the High Court has no jurisdiction to hear and determine the matter in view of section 5 of the Arbitration Act No. 11 of 1995.

It is convenient to refer to the Rider Clause 36 of the Charter Party which states as follows:

> **"All disputes arising out of this charter party which cannot be amicably resolved shall be referred to arbitration in London within twelve months after final discharge unless the parties agree upon a sole arbitrator. The reference shall be for two arbitrators, one to be appointed by each of the parties who will have the power to appoint an umpire if they disagree.**
>
> **The arbitrator and umpire shall be members of the London Maritime Arbitrators Association or otherwise qualified by experience to deal with commercial shipping disputes."**

If the matter in respect of which legal proceedings have been instituted in court is in respect of matters arising out of the Charter Party then the High court is devoid of jurisdiction to hear and determine the plaintiff's action. The Arbitration Clause refers to "All disputes arising from the Charter Party, which cannot be amicably resolved shall be referred to Arbitration in London ..... "

The plaintiff states that the plaintiff as the shipper is in any event not bound by the arbitration clause contained in the charter party in that, the said arbitration clause is not incorporated to the Bill of Lading. I cannot agree with this stand taken up by the plaintiff because in this case the plaintiff is the charterer of the vessel, as well as the shipper. In its capacity

as the charterer the plaintiff had entered into a charter party agreement with the defendant. It is to be noted that the Bill of Lading incorporates the Arbitration clause in the Charter party agreement as condition one of the Bill of Lading (X24) which contains that;

> **"all terms and conditions, liberties and exceptions of the charter party, dated as overleaf are herewith incorporated."**

The learned President's counsel for the defendants submitted that the matter in dispute or the cause of action arises from and out of the charter party. The Arbitration Clause is in the charter party and it refers to all disputes arising from the charter party. The defendant's cause of action as stated in paragraphs 26 and 27 of the petition and in the affidavit filed in the High Court reads as follows:

> *"26 The plaintiff states that the owners of the Defendant vessel and/ or their agents have acted in breach of the charter party agreement and the addendum thereto and/or the law and in the circumstances a cause of action has arisen for the Plaintiff to sue the Defendant in a sum of US$ 243,861.00 being the loss and damage suffered by the Plaintiff.*
>
> *27 In these circumstances, a good and valid claim in a sum of US$ 243,861.00 together with interest thereon and costs of suit having arisen to the Plaintiff against the vessel "Ocean Wind" and the Plantiff instituted this action on the 27th of February 2004 and upon support Your Honour's Court was pleased to order the arrest of the said vessel and the issuance of a writ of summons".*

Thus it appears that the cause of action has arisen as pleaded by the plaintiff - respondent, from a breach of the charter party. Moreover the arbitration clause found in the Charter Party has been incorporated in the Bill of Lading. In the circumstances, I am of the view that the Arbitration clause does not become inoperative or inapplicable. Therefore the Colombo High Court (Admiralty) has no jurisdiction hear and determine the plaintiff's action.

The second question that arises for determination is that as there is no final discharge of the cargo as claimed by the plaintiff, does the arbitration clause become inoperative.

The Arbitration Agreement provides inter alia that :

> **All disputes arising out of the charter party which cannot be amicably resolved shall be referred to arbitration in London within twelve months after final discharge ... "**

The operative words are "shall be referred to arbitration within twelve months after final discharge of the Cargo"

It is the position of the plaintiff that there is no final discharge of the cargo and in the absence of a final discharge of the cargo, the arbitration agreement does not come into effect.

The learned President's Counsel for the defendants submitted that the plaintiff cannot take up the position that there was no "final discharge" in view of what is pleaded in paragraphs 16, 17, 18, 20 and 21 of the petition filed by the plaintiff in the High Court. Paragraph 16 of the petition states that the vessel discharged 11,602mt. of the cargo and delivered the same to the receivers and/or third parties. In paragraph 21, the plaintiff states that as the receiver of the cargo at the Port of Chittagong has stated that only 9500 mt. was received by the receiver, the owners of the vessel or their agents have sold the remaining cargo of the plaintiff to third parties. This it will be seen that there was in fact a final discharge of the entire consignment and it appears that the plaintiff had full knowledge of the discharge of the entire cargo and the delivery of the same to the receivers and/or to wrong parties or the delivery of a part of the cargo to the receivers and the balance part to wrong parties. Thus, it appears that there was a final discharge of the entire consignment. It is to be noted that in the plaint filed by the plaintiff in the Supreme Court of Bangladesh High Court Division (Admiralty Jurisdiction) (marked X9), in paragraph 7 of the plaint the plaintiff has stated that without realizing the Bill of Lading or obtaining LOI from the receivers, the owners have delivered all the cargo in breach of the charter part agreement. In these circumstances, it seems to me that the plaintiff knew of the final discharge of the cargo and could have initiated arbitration proceedings within twelve months from the final discharge of the cargo.

In terms of paragraphs 26 and 27 of the petition it appears that the plaintiff instituted proceedings in the High Court of Colombo exercising Admiralty Jurisdiction, on the basis that the 2nd defendant has acted in breach of the

charter party agreement. The arbitration clause makes reference to "all disputes arising out of the charter party" and also the arbitration clause is incorporated in the Bill of Lading.

Since the petitioner has not stated the date of the final discharge, having been aware of the final discharge of the Cargo, the arbitration clause is operative in spite of the time bar of twelve months. Moreover, the plaintiff has taken conflicting positions with regard to the final discharge of the cargo. In the plaint filed in the Supreme Court of Bangladesh the plaintiff has stated that the defendants have delivered all the cargo in breach of the charter party agreement (vide paragraph 7 of the plaint) and in the petition filed by the plaintiff in the High Court of Colombo, he has taken refuge behind an allegation that there was no final discharge. It appears that he has taken this stand in order to avoid arbitration, stating that the arbitration clause has become inoperative and invalid.

Russell on Arbitration, 21st edition, at page 180,339 and 340

discussed the Court's power to extend time limits for the commencement of arbitration.

"there are instances where the Court has power to extend contractual time limits for the commencement of arbitration proceedings. It may do so where it is satisfied that the conduct of one party makes it unjust to hold the other party to the strict terms of the provisions in question". (page 180, paragraph 5 - 010) "Another instance where the time line for the commencement of arbitration proceedings is extended when the conduct of the party to the arbitration agreement causes or contributes to the need for an extension. The court may grant relief to the applicant when it would be "unjust' to hold the applicant to the original time limit" (pages 339 and 340, paragraph 7 - 029)

Somewhat similar provisions are found in our Arbitration Act No. 11 of 1995. Section 39 of the Arbitration Act deals with delay in prosecuting claims. (Section 39 (2)) states that where there has been undue delay by a claimant in instituting or prosecuting a claim pursuant to an arbitration agreement, then, on the application of any party to the dispute, the arbitral tribunal may make an order terminating the arbitration proceedings.

Section 39 (3) states that the arbitral tribunal shall not make an order

under subsection (2) unless it is satisfied,

(a) that the delay has been intentional or inordinate; or

(b) that the delay will give rise to a substantial risk of it not being possible to have a fair determination of the issues in the arbitration proceedings or is such as is likely to cause or to cause serious prejudice to the other parties to the arbitration proceedings either as between themselves and the claimant or between each other or between them and a third party.

In these circumstances it is my considered view that the time period of "within" twelve months after the final discharge of cargo" will not enforce a time bar. Furthermore, if a party to a contract wishes to take cover behind a time bar, he must do so in clear and unambiguous terms.

It is to be observed that, in view of the arbitration clause which states that all disputes shall be referred to arbitration within twelve months after the final discharge of cargo, it would mean that even if the matter in dispute has no relation with the discharge of cargo, the aggrieved party would have to wait until the entire cargo had been discharged to commence arbitration proceedings.

In this case the plaintiff states that out of a total cargo of 14, 373 mt, only 9,500 mt was delivered to the receivers and the remaining balance cargo was sold to third parties. (Paragraph 21 of the petition).

It seems to me that at the time the said arbitration agreement was concluded as to include a clause that all disputes arising out of the charter party shall be referred to arbitration within twelve months.... need for an extension as it arises out of circumstances that were not within the reasonable contemplation of the parties when the agreement was concluded. It is unreasonable to think that the parties ever contemplated this time limit to a claim of this nature.

In the circumstances the contention of the plaintiff that the arbitration clause is inoperative cannot be accepted.

Accordingly, the Arbitration clause has not been rendered inoperative due to the alleged non - discharge of cargo. Of the two questions upon which

leave to appeal is granted, the I st question is answered in the negative in favour of the defendants and the 2nd question is answered in the affirmative in favour of the defendants. As such the arbitration clause remains valid and the dispute between the parties has to be referred to arbitration.

For these reasons I set aside the order of the learned High Court Judge dated 7.3.2005 and I make order that the High Court of Colombo (Admiralty Jurisdiction) has no jurisdiction to entertain and hear the petition of plaintiff - respondent in Action in Rem No. 2/2004.

Accordingly, this appeal is allowed with costs.

BASNAYAKE, J. - I agree.

Appeal allowed.

PREMASIRI AND ANOTHER
V
REPUBLIC OF SRI LANKA

COURT OF APPEAL
SRISKANDARAJAH.J.
SILVA.J
CA 39 - 40/2000
HC RATNAPURA 23/95
JUNE 30, 2003
JANUARY 31,2007

Penal Code - Section 296 - *Murder - Credibility - Perusing statement previously made by witness to determine credibility - Duty of Judge? - Defence of alibi - Dock statement*

The two accused appellants were convicted of the murder of one M. In appeal it was contended that the main witness had a motive to falsely implicate the 1st accused - appellant; that there was a duty cast-on the trial Judge to peruse the police statement and the deposition in the Magistrate's court of the main witness to determine the credibility of the witness, relying on *Kirthi Bandara* and *Muniratna* cases.

It was further contended that the evidence of alibi put forward by the 1st accused had not been adequately considered. The respondent contended that the alleged contradiction was not put to the witness at the time when the witness gave evidence, and without clarifying the position with the witness, the appellant cannot urge the Appeal Court to examine the police statement and the deposition in the Magistrate's Court to ascertain the correctness of the statement.

Held :

Per **Sriskandarajah.J**

"Keerthi Bandara's case and Muniratne's case, are in relation to omission or contradiction of witness in relation to the identity of the accused. The identity of the accused goes to the very root of the case, but in the instant case the so called contradiction or omission is in relation to a statement of fact. Therefore this omission or contradiction cannot be treated as vital and it will not affect the credibility of the witness in any way".

(1) The dock statement or the evidence of witness Piyadasa or both together or separately does not support an alibi; as the defence of alibi is improbable the 1st accused's defence is reduced to a mere denial of his involvement.

Per **Sriskandarajah.J**

"The remark of the High Court judge that non acceptance of the defence confirms beyond doubt the position of the prosecution cannot be construed as suggested by the learned Counsel for the 1st accused that the trial judge utilized the rejected evidence to effectively bolster the prosecution case, but on the other hand it can be construed as the defence case is rejected therefore it is incapable of throwing any doubt on the prosecution case which had been proved beyond reasonable doubt.

(2) It is a misdirection in law if a burden has been placed on the accused to prove a plea of alibi even on a balance of probability.

APPEAL from the judgment of the High Court of Ratnapura.

Cases referred to :

1. *Kirthi Bandara vs. Attorney General* 2000 2 Sri LR at 258 (distinguished)
2. *Muniratne vs. State* 2001 2 Sri LR 382 at 395 (distinguished)

3. *Regina vs. Turnbull & another* - 1977 QB 224 at 228
4. *K vs Marshall* 51 NLR 157
5. *R vs. Fernando* 48 NLR 251
6. *R vs. James Chandresekara* 44 NLR 126
7. *Yahonsi singho vs . Q* 67 NLR 8
8. *Gunepala vs. The Republic* CA 23 26/92 HC Ratnapura 23/88
9. *K vs. De Silva* 17 Law Recorder 89

Dr. Ranjith Fernando with *Amali Udayanganie* for 1st accused - appellant

Ranjith Abeysuriya PC with *Thanuja Rodrigo* for 2nd respondent - appellant

Palitha Fernando DSG for Attorney General

Cur. adv. vult

February 22, 2007
SRISKANDARAJAH.J

The two Accused Appellants have been convicted by the High Court judge sitting without a jury, for the murder of Pithirange Mudalihamy on or about 21st of October 1987. The case for the prosecution was based mainly on the evidence of Alakendra Arachchige Mary Nona, the widow of the deceased. She is the sole eyewitness to the incident. According to her on the day of the incident at about 4.30 - 5.00 p.m. she had gone with the deceased to bring water to a near by well. After filling their cans they had come up to the road when they met three persons coming towards them. The 2nd Accused Wimale had walked up to them and had said that he wanted to meet her husband the deceased. The deceased agreed to go with him and had proceeded about 20 feet. She had remained at a distance where she could see them. She had seen the 1st Accused suddenly embracing her husband the deceased from behind and thereafter seen them running away. She stated that the deceased had then come towards her with a knife embedded in his chest and had told her that the 2nd Accused, "Wimale stabbed me with the knife". He had thereafter removed the knife from his chest and given it to her and had fallen on the ground. She took him to the hospital but on admission he was found dead.

The learned counsel for the 2nd Accused Appellant confined his point of contest in this appeal on the credibility that could be attached to the

evidence of witness Mary Nona. The counsel sought to impeach the credibility of this witness on the ground that this witness had a motive to falsely implicate the 1st Accused Appellant, as he was her son - in - law and he had by that time separated from his wife, the daughter of the deceased and the witness. The learned Counsel for the 2nd Accused Appellant submitted that Mary Nona is not an eye witness to a stabbing but a reporter of a declaration made by her husband as to who is alleged to have stabbed him. The counsel brought to the notice of this Court that in the Police Statement and in the non summary inquiry she had claimed to have seen the 2nd Accused stabbing her husband but when testifying before the High Court she had not claimed that she had seen the stabbing but saw the 1st Accused suddenly embracing her husband the deceased from behind and thereafter seen the 1st Accused and the other person running away. The learned DSG contended that the so-called contradiction was not put to the witness at the time when the witness was giving evidence in the High Court. If it was put to her she would have given a plausible explanation to court on what she meant by seeing the 2nd Accused stabbing her husband. Without clarifying this position with the witness he contended that the learned Counsel for the Accused Appellant cannot urge this court to examine the Police statement and the deposition in the Magistrate's Court to ascertain the correctness of the statement.

The counsel for the 2nd Accused contended that even if it was not put to the witness at the trial it is the duty of the trial judge to peruse the statement previously made by the witness to determine the credibility of the witness. He relied on the judgment in *Keerthi Bandara v Attorney General*[1] *at 258.*

Jayasuriya J. observed :

"Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witnesses box on this point".

And in *Muniratne V State*[2] at 395 Kulathilaka J observed:

"In Francis Fraser, Robert Warren at 162 the Lord Chief Justice remarked that **"where a crown witness gives evidence on oath in direct contradiction of a previous statement made by him which is in the possession of the prosecution it is the duty of counsel for the prosecution at once to show the statement to the Judge."** Lord Widgery, Chief Justice also sounded the same remark at 228 in *Regina vs. Turnbull and Another.*[3] Hence in the interests of justice we perused that portion of the statement relating to the description made by witness Sapatantrige Karunaratne to the CID on 25.05.92 recorded by Inspector Kumarasinghe (vide page 318 of the record) which is to the effect that the person was about 5'7" tall, fat and of fair complexion. Hence we see a material discrepancy between the description of the accused - appellant by Karunaratne in his police statement and his actual appearance which we ourselves observed at the instance of counsel. On this point alone we are inclined to reject the evidence of Karunaratne that it was the first accused - appellant who removed the car from his garage on 21.08.90."

It is pertinent to note that the above two cases cited by the learned counsel for the 2nd Accused is in relation to omission or contradiction of witness in relation to the identity of accused. The identity of the accused goes to the very root of the case. But in the instant case the so-called contradiction or omission is in relation to a statement of fact. In the police statement and in the non summary the witness stated that the 2nd accused stabbed the deceased and in the trial before the High Court she described the incident and she positively identifies the 1st and 2nd Accused and said that the 1st Accused was holding her husband from behind and the 2nd Accused involved in some struggle with her husband, thereafter all three had taken to their heels and the deceased had come to her and had told her that the 2nd Accused stabbed him. In these circumstances the statement given by this witness to police that the 2nd Accused stabbed her husbant and in evidence in High Court she describes the incident. By this description and the deposition of her husband it is reasonable for her to come to the conclusion that the 2nd Accused stabbed her husband. Therefore this omission or contradiction cannot be treated as vital and it will not affect the credibility of the witness in any way.

As learned Deputy Solicitor General submitted that if it was Mary Nona's intention to implicate her estranged son - in law why should she say that the son - in - law only held the deceased from behind, she would not have said so if she wanted to falsely implicate her son - in - law. It is common ground that Mary Nona had no motive against the 2nd Accused to implicate him. He was only a friend of the 1st Accused. However, Mary Nona claimed that her husband told her that it was the 2nd Accused who stabbed. If Mary Nona wanted to falsely implicate the first accused, what prevented her from falsely stating that her husband told her that it was the 1st Accused who stabbed.

The evidence of Mary Nona is that she was present when the two Accused Appellant with another unknown person confronted her husband. The 2nd Accused grabbed her husband from behind. Her husband walked up to her and gave her the knife which was embedded in his chest. He made a dying deposition implicating the 2nd Accused. These facts which were revealed from Mary Nona's evidence were strengthened by the evidence of the Investigating Officer that Mary Nona handed over a knife to him when he arrived at the scene and she pointed out the place of incident. The Evidence of the Judicial Medical Officer also strengthens her evidence, he expressed the view that the deceased could have walked the distance from the place of stabbing to the place where this witness was standing and the deceased could have spoken to her and the knife which was produced in court can cause the injury on the deceased.

The motive for the killing was stated by the witness Pathiranage Weerasinghe, the son of the deceased. He had testified to the effect that his sister was separated from the 1st Accused and his deceased father was planning to get her married to another person.

When considering the evidence of Mary Nona I cannot find any error in the reliance placed by the learned High Court judge in the testimonial trustworthiness of this witness.

The learned Counsel for the 1st Accused Appellant confined his point of contest in this Appeal on the evaluation of the alibi defence raised by the 1st Accused Appellant. Namely; that the evidence of alibi put forward by the 1st Accused had not been adequately considered by the learned trial judge and also that the learned trial judge had not given any acceptable

reason for the rejection of alibi, further he has utilized the rejection to bolster the prosecution case. He has erred in shifting the burden of proof when holding that the court could not accept the evidence of the 1st Accused who attempted to "prove" that he was at Pelmadulla on the day on which the incident occurred.

In a Dock statement made by the 1st Accused he totally denied the charge of murder leveled against him and stated that on the date of the incident he was at Pelmadulla at a relation's place and knew nothing about the incident, thereby raising a defence of alibi. In support of his alibi defence an uncle of the 1st Accused namely; Piyadasa gave evidence.

The learned counsel in support of his argument cited a passage from E.R.S.R. Coomaraswamy - Law of Evidence (Vol II - Book II) page 904 & 905 it reads as follows:

"here it is stated where the Accused pleads a defence of alibi there would be no burden whatsoever on the Accused to prove anything as it is neither a general nor a special exception or proviso as understood per sec: 105 of the Evidence Ordinance".

The learned Author (in Vol I Page 265) states that; "it would be erroneous to consider that there is an onus of proof on the part of an accused regarding his alibi as all that he has to do is to create a reasonable doubt."

The learned counsel for the 2nd Accused Appellant in support of his contention cited *King v Marshall* (4) *R. v Fernando* (5) *R v James Chandrasekera,* (6) *Yahonis Singho v the Queen* (7) and *Gunapala & Others v The Republic.* (8) -

In Gunapala 7 Others v The Republic (supra) Ismail J held:

"Following the principles laid down in *King v Marshall (Supra)* it would be a misdirection in law if a burden has been placed on the accused to prove a plea of alibi even on a balance of probability .... An "alibi" is a plea that he was elsewhere at the time of the alleged act. It is an evidentiary fact by which it is sought to create a doubt whether the accused was present at the time the offence was committed and the accused had no burden of establishing the fact to any degree of probability."

The DSG submitted that the alibi put forward by the 1st Accused Appellant is unreliable and it cannot be called as an alibi. He contended that the 1st Accused called witness Piyadasa in support of his claim of alibi, this witness after 13 years of the incident for the first time stated that the 2nd Accused Appellant was in his house on the day of the incident. However he admitted that the 2nd Accused Appellant was at his house while he was elsewhere to work in a mine. Witness Piyadasa further stated that the 2nd Accused Appellant could well have come home (to the scene of the crime) even if he was residing at his residence. The Learned D.S.G. further submitted that what the learned trial judge has meant by "failed to prove" was that there isn't sufficient evidence of alibi.

It has been held that if the defence of alibi is not improbable on the face, it should be properly considered and if it is rejected reasons should be given. In '*King v De Silva*[9] Herne J held:

"that the case for the prosecution stands or falls on its own and that a defence such as an alibi unless it is on the face of it fantastic or contradictory must be properly considered and if it is rejected reasons must be given."

When considering the proximity of the place of incident and the place where the 1st Accused claimed to have been residing during the relevant period that the said accused could well have gone to the place of incident even if he was residing at the residence of Piyadasa at Pelmadulla. Further the evidence of Piyadasa does not support the fact that the 1st Accused was in Pelmadulla during the relevant time. Therefore the Dock statement or the evidence of Piyadasa or both together or separately does not support an alibi. As the defence of alibi is improbable the 1st Accused defence is reduced to a mere denial of his involvement. Therefore the learned High Court judge had correctly rejected the defence of the 1st Accused and considered the case of the prosecution and decided that the case was proved beyond reasonable doubt.

The remark of the learned High Court Judge that non acceptance of the defence case confirms beyond doubt the position of the Prosecution, cannot be construed as suggested by the learned Counsel for the 1st Accused that the trial judge utilized the rejected evidence to effectively bolster the

prosecution case. But on the other hand it can be construed as the defence case is rejected therefore it is incapable of throwing any doubt on the prosecution case which had been proved beyond reasonable doubt.

For the reasons stated above this Court has no reason to interfere with the judgment of the learned High Court judge. The Appeal of the 1st and 2nd Accused Appellants is dismissed and the conviction and sentence of the 1st and 2nd Accused Appellants are affirmed.

Ranjit Silva. J - I agree

Appeal dismissed.

PAN ASIA BANK LTD.
V
BENTOTA MPCS LTD AND ANOTHER

COURT OF APPEAL
WIMALACHANDRA.J
BASNAYAKE.J
CALA 169/2004
D.C. MT. LAVINIA 462/03/SPL
DECEMBER 10,2004
JUNE 27, 2005
JULY 5,2005

Interim Injunction - Restraining Bank from obtaining payment on a Bank guarantee - The effects of a Bank guarantee - Plea of fraud - Does it have an effect?

The plaintiff - respondent was appointed as the distributor of milk powder for a certain area by the defendant - respondent. For the purpose of the distribution ship, the plaintiff furnished a Bank guarantee in favour of the 3rd defendant - petitioner Bank.

The plaintiff - respondent claiming that the defendants were acting in collusion fraudulently obtained a Bank guarantee in a manner which was different to what he envisaged, and sought and obtained an interim injunction restraining the 3rd defendant - petitioner from obtaining payment on the Bank guarantee. The District Court issued an interim injunction. On leave being sought.

Held :

(1) The Judges who are asked to issue an injunction restraining payment by a Bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is any challenge to the 'validity' of the letter, bond or the guarantee itself. If there is not, ... *prima facie* no injunction should be granted and the Bank should be left free to honour its contractual obligations.

(2) A bank has given a guarantee and it is required to honour it according to its terms and is not concerned whether either party to the contract which underlay the contract was in default.

(3) In the absence of fraud the seller is entitled to be paid on the presentation of genuine documents. A mere plea of fraud will not suffice.

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia.

Cases referred to :

(1) Alphonsu Appuhamy vs Hettiarachchi and another - (1973) 77 NLR 131.
(2) Hotel Galaxy and others vs Mercantile Management Ltd 1987 1Sri LR at 36
(3) Walker and sons & Co. Ltd. Vs. Wijeyasena 1997 1 Sri. LR 293 at 301 and 302
(4) Smith vs Hughes 6 QB 597 at 605
(5) Lord Simon of Glasdee L. Schuller A. G. vs Wickman Machine Tool Sales Ltd 1974 AL 235, 263 - 1973 All ER 39 at 35.
(6) Bolovinter Oil SA vs Chase Manhattan Bank 1984 1 All ER 351
(7) Indica Traders Pvt Ltd vs. Seoul Lanka Construction (Pvt) Ltd - 1994 3 Sri LR 387
(8) Edward Owern Engineering Co. Ltd., vs Barclays Bank International Ltd 1978 All ER 976 at 983, 1978 1 Lloyds LR 146.
(9) Power Curber vs. Bank of Kuwait 1981 3 All ER 607 at 614
(10) Intertec contractingAS vs Ceylinco Seylan Development Ltd and another 2002 2 Sri LR 246
(11) Hyderbad Industries Ltd vs DAC Trading (Pvt) Ltd and two others 1995 2 Sri LR 304 at 309

S. Parathalingam PC with Varuna Senadheera for 3rd defendant - petitioner

Wijedasa Rajapakse PC with Rasika Dissanayake for 4th defendant - respondent

Ikram Mohamed PC with Jagath Wickramanayake for plaintiff - respondent

Cur. adv. vult.

July 20, 2007
Eric Basnayake, J.

The 3rd defendant respondent (hereinafter referred to as the 3rd defendant) filed this leave to appeal application to have the order of the learned District Judge of Mt. Lavinia dated 29.4.2004 set aside. By this order the court had issued an interim injunction restraining the 3rd defendant from obtaining payment on a bank guarantee.

The 1st and the 2nd defendant respondents (hereinafter referred to as the defendants) were partners dealing with a milk powder called "Lak Cow". By an agreement between the defendants and the plaintiff respondent (hereinafter referred to as the plaintiff) the plaintiff was appointed as the distributor of this milk powder for Bentota area. For the purpose of this distribution ship, the plaintiff was required to furnish a bank guarantee of Rs. 1500000 (1.5 million) in favour of the 3rd defendant. The agreement states thus; "3. For the aforesaid purpose the distributor shall have a bank guarantee of Rs. 1.5 million for the purpose of distribution and sale of Lak Cow milk powder in favour of the Manager, Pan Asia Bank, Colombo 4" (X6). The bank guarantee was issued accordingly.

The plaintiff stated that he became aware that the bank guarantee was issued in a manner which was different to what he envisaged. The plaintiff claimed that the defendants acting in collusion fraudulently obtained this bank guarantee. The plaintiff filed this action for a declaration that the bank guarantee (X7) is void. The plaintiff also sought a restraining order to restrain the 3rd defendant from recovering payment on the bank guarantee.

It is not disputed that the plaintiff was not indebted to the defendant for the supply of milk powder. The learned Disrict Judge said that the bank guarantee was against payments due on the supply on milk powder by the defendants to the plaintiff and as there were no dues on the supply of milk powder, the 3rd defendant is not entitled to claim against the bank guarantee,

Submission of the learned counsel for the plaintiff

The plaintiff entered in to an agreement (X6 or P1g) with the defendants and in that the plaintiff had agreed to "have a bank guarantee of Rs. 1.5 million for the purpose of distribution and sale of Lakcow milk powder in favour of Pan Asia Bank (the 3rd defendant). The agreement provided that "if the distributor (the plaintiff) wishes to terminate this agreement before the expiry of the agreed period, he shall give notice in writing and 30 days thereafter the supplier shall appoint another distributor for that area and release the bank guarantee of the distribution". The learned Counsel submitted that the bank guarantee was given by the Bank (the 4th defendant) only as security for the appointment of the plaintiff as distributor. The learned President's Counsel submitted that the defendants have committed a fraud in obtaining the bank guarantee by fraudulently misrepresenting that it is to secure payments due from the plaintiff as the distributor whereas it was fraudulently worded to secure the credit facilities extended by the Pan Asia Bank (the 3rd defendant) to the defendants.

However the learned counsel appearing for the 4th defendant submitted that the plaintiff had suppressed material facts. He submitted that the bank guarantee was issued on the instructions given by the plaintiff and in accordance with the draft format submitted by the plaintiff. It was the submission of the learned counsel that the plaintiff is not entitled to obtain injunctive relief due to the suppression of material facts. (*Alponsu Appuhamy vs Hettiarachchi and another* [1] *Hotel Galaxy Ltd and Others vs. Mercantile Hotel Management Ltd. 1 at 36* [2] *Walker and Sons & Co. Ltd. vs Wijeyasena.* [3]

The bank guarantee reads thus "we (the 4th defendant) hereby guarantee and undertake to pay the beneficiary a sum of Rs. 1.5 million in the event the principal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal.

The liability of the bank arises "in the event the principal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal". The plaintiff is not a party to the above guarantee. The parties to the guarantee are the 1st and the 2nd defendants (principal debtors), the 3rd defendant (beneficiary) and the 4th defendant (guarantor). No where in the guarantee is it stated that the 4th

defendant will be liable in the event the plaintiff defaults payment in respect of milk powder supplied.

Although the bank guarantee was issued at the instance of the plaintiff by the plaintiff's bank, the liability could be attached only by interpreting the bank guarantee. The effect of a guarantee, like that of other contracts, depends on the words of the contract. In *Smith vs Hughes*[4] at 607 Blackburn J said "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters in to the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the party's terms". The question to be answered always is what is the meaning of what the parties have said? not what did the parties mean to say (Lord Simon of Glaisdae *L Schuler AG vs Wickman Machine Tool Sales Ltd.* [5]

The Judges who are asked to issue an injunction restraining payment by a Bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is any challenge to the validity of the letter, bond or the guarantee itself. If there is not ... *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligations .... The wholly exceptional case where an injunction may be granted, is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. If save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking ... by obtaining an injunction the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds will be undermined *Bolovinter Oil SA vs Chase Manhattan Bank*[6], *Indica Traders Pvt. Ltd. Vs. Seoul Lanka Construction (Pvt) Ltd.* [7]

"A bank has given a guarantee it is required to honour it according to its terms and is not concerned whether either party to the contract which underlay the contract was in default." Lord Denning in *Edward Owen Engineering Ltd. Vs Barclays Bank International Ltd.* [8]

Letters of credit (or bank guarantees) have become established as a universally acceptable means of payment in international transactions.

They are regarded by merchants the world over as equivalent to cash ; they have been rightly described as the life-blood of international commerce. The bankers promise to pay the seller is wholly independant of the underlying contract between the seller and the buyer, or of any other contractual dispute that may arise between them. In the absence of fraud the seller is entitled to be paid on presentation of genuine documents." (Griffiths LJ in *Power Curber v. Bank of Kuwait*) [9]. A mere plea of fraud put in for purpose of bringing the case within this exception and which rests on uncorroborated statements of the applicant will not suffice (*Intertec Contracting A/S vs. Ceylinco Seylan Development, Ltd and another* [10] *Hyderbad Industries Ltd vs. DAC Trading Pvt Ltd and two others* [11] at 309.

In this case although fraud was alleged in the plaint, no reliance was placed by the learned District Judge in the impugned order. The authorities support the view that where there is no fraud committed an injunction should not be issued. In the light of the above facts I find that the plaintiff will not be able to establish a *prima facie* case which is the first requirement in obtaining an injunction. When the plaintiff fails to establish a *prima facie* case an application for injunction has to fail. Therefore I am of the view that the learned Judge erred in the granting of the interim injunction. Thus the order of the learned District Judge is set aside with costs.

Wimalachandra, J - I agree

Application allowed.