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

Azem Morina
Gllareve,
32000 K Line,
Republic of Kosovo, Gllareve
Trading Company,
Kosovo.

Plaintiff

SC CHC Appeal 10/2015
HC (CIVIL)478/2011/MR

Vs.

1. Saman Weranjan Kasthurirathna
   No. 171, 3/B, Model Farm Road
   Colombo 08.
   And also of
   No. 511/7, Galle Road,
   Rawathawatta, Moratuwa.

2. Tea Masters Ceylon (Pvt) Ltd,
   No. 16, Thissa Mawatha,
   Borupana Road, Rathmalana.

Defendants

AND NOW

Azem Morina
Gllareva,
32000 K Line,
Republic of Kosovo, Gllareva
Trading Company,
Kosovo.

Plaintiff-Appellant

Vs.

1. Saman Weranjan Kasthurirathna
   No. 171, 3/B, Model Farm Road
   Colombo 08.
   And also of
   No. 511/7, Galle Road,
   Rawathawatta, Moratuwa.

2. Tea Masters Ceylon (Pvt) Ltd,
   No. 16, Thissa Mawatha,
   Borupana Road, Rathmalana.

Defendants-Respondents

Before : Hon. Jayantha Jayasuriya, PC, CJ
Hon. Murdu N.B. Fernando, PC, J.
Hon. S. Thurairaja, PC, J

Counsel : N.R. Sivendran with Senal Opallage instructed by Ms. V.J. Senaratne for the Plaintiff-Appellant.

Written submissions filed : 07.05.2024 by Plaintiff-Appellant.

Argued on : 27.03.2024

Decided on : 11.09.2024

Jayantha Jayasuriya, PC, CJ

The Plaintiff-Appellant who is a foreign national resident in Kosovo instituted proceedings in the Commercial High Court by plaint dated 1st November 2011, against the 1st and 2nd Defendants–Respondents. He instituted this action to recover a sum of Rs.5,557,238/- arising from the first cause of action and to recover a sum of Rs.2,000,000/- together with legal interest arising from the second cause of action.

The Plaintiff-Appellant claimed that as per an agreement between the Plaintiff and the Respondents to engage in a business of tea export, the Plaintiff remitted a total sum of Euro 37,960/- in three instalments to the bank account of the 2nd Defendant-Respondent in the months of March, April and May 2007 but, the two Respondents failed to honour the promise to export tea as per the aforesaid agreement. Further, the Plaintiff-Appellant contended that the Respondents had defrauded the Plaintiff and fraudulently and unlawfully acquired the said sum. He claimed that the Respondents had the use and benefit of these funds for a period of around three years. Therefore, Plaintiff-Appellant claimed in the first cause of action a sum of Rs.5,557,238/- as the interest on the principal sum that was transferred. The Plaintiff-Appellant claims that the failure of the commercial transaction resulted in the Plaintiff having to expend monies for the institution of the criminal proceedings, for travel to and from, and within Sri Lanka, and the damage caused to her trade consequent to the failure of this commercial transaction to supply tea. Thus, the Plaintiff-Appellant's second cause of action is to recover a sum of Rs.2,000,000/- from the 1st and 2nd Defendants-Respondents for the aforesaid expenses that she had to incur.

The two Defendants-Respondents by their answer dated 10th May 2012 whilst denying that there are any monies payable to the Plaintiff, further denied that any loss or damage has been caused to the Plaintiff-

Appellant. They *inter alia* pleaded that the Plaintiff-Appellant cannot have and maintain the action in the Commercial High Court, in view of Case No. B 1718/2009 in the Magistrate's Court of Fort.

At the trial in the Commercial High Court, a Power of Attorney holder of the Plaintiff-Appellant testified. In the course of his testimony an affidavit of the Plaintiff and several other documents were produced. On behalf of the Plaintiff-Appellant no other witness was called to testify. One of the items of evidence presented on behalf of the Plaintiff-Appellant is a certified copy of the case record in the Magistrate's Court Fort case No. B 1718/2009. None of the Defendants-Respondents testified at the trial and no witness was called on behalf of the Defendants-Respondents. However, the case record of the Fort Magistrate's Court case No. B 1718/2009 and the cross examination of the sole witness for the plaintiff *inter alia* the following facts were revealed:

On 07th November 2009 the Plaintiff-Appellant lodged a complaint against the two Defendants-Respondents at the Criminal Investigations Department. Accordingly, on 04th December 2009 the 1st Defendant-Respondent had been arrested and produced before the Learned Magistrate and the Defendant-Respondent has accepted that a sum of Euro 37,960 is due to be paid to the Plaintiff-Appellant. He had undertaken that the total sum would be paid to the Plaintiff-Appellant within six months. Thereafter, the investigators having concluded the investigation had sought advise from the Attorney-General. Thereafter, once again, the 1st Defendant-Respondent on 24th February 2010, has undertaken to pay a sum of Rupees 5,475,374.89 in the Magistrate's Court. On 03rd March 2010, the 1st Defendant-Respondent has paid a total sum of Rupees 5,475,374.89 in open Court. The Power of Attorney holder has accepted the said sum on behalf of the Plaintiff-Appellant. It was accepted that by this payment the total sum due to the Plaintiff over this commercial transaction is received. Thereafter on 17th March 2010, the 1st Defendant-Respondent was discharged from the proceedings in the Magistrate's Court. It was nearly twenty months thereafter, the Plaintiff-Appellant initiated proceedings in the Commercial High Court.

The Learned High Court Judge by his judgment dated 25th July 2014 dismissed the Plaintiff-Appellant's action as well as the Defendants-Respondents' claim in reconvention.

The Learned trial Judge in the impugned judgment has answered issues pertaining to the transfer of funds by the Plaintiff-Appellant to the Defendant-Respondents and the Defendant-Respondents accrued the benefit of such funds and failed to return those funds, in favour of the Plaintiff-Appellant. However, thereafter answering issues Nos. 9, 10, 11, 12, 13 and 14 the Learned trial Judge had concluded that the Plaintiffs had to lodge a complaint with the Criminal Investigations Department to recover the monies due and proceedings were instituted in the Magistrate's Court consequent to such complaint. In such proceedings, the 1st Defendant-Respondent has paid a sum of Rupees 5,475,374.89 as a full and final settlement of the amount due having accepted his liability to make the payment.

The aforesaid issues read as;

"09. Did the complainant have to make a complaint to the Criminal Investigation Department of Sri Lanka in order to recover the said money?

10. Did the Criminal Investigation Department of Sri Lanka instituted proceedings in the Fort Magistrate's Court (Case No.B1718/09) against the 1st Defendant, on the allegation that he committed offences under Sections 386, 389 and 400 of the Penal Code?

11. In the said Magistrate's Court case, did the 1st Defendant-

(a) Admit the receipt of the said money?

(b) Admit that the said money should be returned?

(c) On or about the 3rd of March 2010, was the total amount of Euro 37,960.00 equivalent to Sri Lankan Rupees 5,475,374.89 returned to the complainant in Sri Lankan Rupees?

12. On 3rd March 2010, did the Defendants admit their obligation to pay the said amount to the Plaintiff?

13. Did the Defendants return only the original amount of Euro 37,960.00 equivalent to Sri Lankan Rupees 5,475,374.89? "

Furthermore, the Learned trial Judge has answered issues 33 and 35 in the affirmative and issue 34 in the negative, on the premise that the Plaintiff cannot maintain the action in view of the case that was initiated in the Magistrate's Court and the Plaintiff is estopped from having and maintaining the action in the Commercial High Court.

The aforesaid 33, 34, 35 issues read as follows;

"33. Is the Plaintiff estopped from having and maintaining the present action?

34. Can the Plaintiff have and maintain this action in view of the case No. B 1718/2009 in the Magistrate's Court of Fort?

35. Is the Plaintiff's action misconceived and/or wrongful in law? "

Therefore, the reasoning of the Learned trial Judge and the manner in which he answered issues clearly set out the basis for the judgment. The Learned trial Judge has proceeded on the premise that the Defendant-Respondent's acceptance of liability and making full satisfaction of the sum due by repaying the total amount claimed in the Magistrate's Court by way of a settlement, precludes the Plaintiff-Appellant from initiating further proceedings to recover interest and other expenditure is against the whole basis on which the proceedings were terminated in the Magistrate's Court.

Being aggrieved by the aforesaid judgment the Plaintiff-Appellant invoked the appellate jurisdiction of this Court. The Learned Counsel for the Appellant contended that the judgment of the Learned High Court Judge is contrary to law, the High Court Judge has considered irrelevant matters and overlooked material facts, has misdirected himself in failing to analyse and evaluate the uncontradicted evidence of the only witness of the Plaintiff-Appellant, erred in law in taking the view that the payment made in Magistrate's Court is the full and final settlement and failed to appreciate that there was no complaint for the recovery of interest and/or no steps could be taken regarding the recovery of interest in the Magistrate's Court. He further contended that the Learned Judge of the High Court erred in law when he failed to appreciate that the action initiated in the Commercial High Court was an action for the recovery of interest on the principal sum and damages due to the expenditure incurred in the process of initiating proceedings, whereas the Magistrate's Court proceedings was primarily focusing on the guilt or innocence of the Defendant-Respondent in relation to the criminal charges framed against him.

In considering challenges to the impugned judgment, it is pertinent to observe that there are many instances where civil and criminal liability arises from the same conduct of a person. In such situations, initiation of criminal proceedings is not a bar to initiate civil proceedings against the same person as well as *vice versa.* Therefore, having parallel proceedings based on criminal and civil liability in two different sets of proceedings *per se* is lawful and the conviction or an acquittal in criminal proceedings

cannot have a direct impact on the maintainability or the outcome of the civil proceedings. In this regard it is also pertinent to observe that the decision to initiate and continue with a prosecution for alleged offences rests with the State other than in instances where criminal proceedings are instituted by a private individual whereas initiating proceedings based on civil liability always rests on the party who claims, that a cause of action has arisen based on the conduct of the opposing party. It is also important to note that one of the core differences between the two sets of proceedings is that the main objective of criminal proceedings is punitive in nature whereas civil proceedings are to remedy the wrong caused to a party. However, despite this marked difference in the two sets of proceedings, provision is made in criminal proceedings to grant compensation to victims too. Therefore, the issue arises as to whether acceptance of compensation in criminal proceedings should deprive a claimant to have recourse to civil litigation against the same person who paid compensation in the course of criminal proceedings. In my view this issue needs to be considered in the context of facts peculiar to each situation.

In this context it is also pertinent to note that the concepts of *"Res Judicata"* as well as *"Autrefois acquit"* and *"Autrefois Convict"* are well-established principles recognized by our Courts. One of the core objectives of these principles is to protect parties from repetitive claims on the basis of an issue that has already been decided fully and finally by a Court of Law. These doctrines further find its justification based on the maxim of *'interest reipublicae ut sit finis litium'*, i.e. *"in the interest of the state that there be an end to litigation".*

In ***Arumpalam et al v Kandavanam*** 41 NLR 304, De Kretser J citing Balkishan v. Kishan Lal [11 All. 149] quoted, *"...the main object of the doctrine of res judicata is to prevent multiplicity of suits and interminable disputes between litigants...".***(at page 305)**

In ***Sockalingam Chetty v Kalimuttu Chetty*** 44 NLR 330, Soertsz S.P.J quoted *Spencer Bower "...a judicium for purposes of estoppel means a decision or determination or adjudication of some question of law or fact, whether such decision takes the form of an express judicial declaration or is, necessarily, involved in the command or prohibition which constitutes the judgment or judicial act in its coercive or operative aspect. Everything which an answers to this description…is deemed a judicial decision; and nothing falls short of it…is so deemed".* **(at pages 334 and 335)**

In ***Karunaratna v Amarisa*** 66 NLR 567, Justice Tambiah held that ,

"The doctrine operates when the following essentials are present:—

(1) There must be a judgment of a court of competent jurisdiction (Ibrahim Baay v. Abdul Rahim [12 N.L.R 177]).

(2) There must be a final judgment (Fernando v. Menika [3 Bal. 115]).

(3) The case must have been decided on its merits (Annamalai Chetty v. Thornhill [34 N.L.R 381]).

(4) The parties must be identical or be the representatives in interest of the original parties. (Sivakolunthu v. Kamalambal [(56 N.L.R 52]).

(5) The causes of action must be identical (Dingiri Menika v. Punchi Mahatmaya [13 N.L.R 59])" **(at page 568)**

Jurisprudence set out above clearly sets out the parameters within which the legal principle of "*Res Judicata"* operates as recognized by the Civil Procedure Code.

Examination of these pronouncements of our Courts clearly show that the facts and circumstances relating to the impugned proceedings before this Court do not strictly fall within the parameters of the principle *"res judicata"*. However, the following salient features are deducible from a closer scrutiny of all matters placed before the trial Court including the oral evidence and the affidavit of the sole witness, the Power of Attorney granted to the sole witness by the Plaintiff and the certified copy of the proceedings in the Magistrate's Court of Fort case No. B 1718/2009.

The Plaintiff-Appellant made a complaint to the Criminal Investigations Department on 07th November 2009 against the Defendants-Respondents and on 04th December 2009, the 1st Defendant-Respondent was produced before the Magistrate. On the very same day the Defendant-Respondent has accepted that a sum of Euro 37,960/- is due to be paid to the Plaintiff and has undertaken to make the payment within six months. When the same matter was called in the Magistrate's Court on 24th February 2010, the Defendant-Respondent had repeated his desire to make the full payment to the Plaintiff. Thereafter, on 03rd March 2010, the Defendant-Respondent has made the full payment in open Court and the witness in his capacity as the Power of Attorney holder of the Plaintiff-Appellant has accepted the payment on

behalf of the Plaintiff. The Defendant-Respondent had been released from the proceedings by the Learned Magistrate on 17th March 2010.

It is one year and eight months thereafter the Plaintiff-Appellant invoked the jurisdiction of the Commercial High Court against the Defendant-Respondents on the basis that the Defendants-Respondents are liable to pay the interest on the principal sum and other expenses incurred by the Plaintiff-Appellant.

The sole witness for the Plaintiff-Appellant in the course of cross-examination has admitted that the only written authority he received to act on behalf of the Plaintiff is by the Special Power of Attorney executed on 12th February 2010. Thereafter, no written authority has been granted to the witness to act on behalf of the Plaintiff-Appellant. The Plaintiff by the aforesaid Special Power of Attorney No.01/2010 had granted the authority to the witness *"...to accept Sri Lankan Rupees 5,539,608/- which is equivalent to Euro 37,960/- in settlement in respect of my complaint made to Criminal Investigation Department on 07/11/2009 in the present Magistrate Court of Fort, bearing case No. B 1718/09 from the accused Saman Neranjan Kasthuriratne on 24th February 2010* ***as a full and final settlement.****"* (emphasis added).

The evidence of the sole eye-witness, proceedings in the Magistrate's Court and the Special Power of Attorney granted by the Plaintiff establishes in no uncertain terms that the Plaintiff lodged the complaint with the Criminal Investigations Department with the intention of recovering the amounts due from the Defendant and accepted Rupees 5,539,608/- from the 1st Defendant-Respondent "as a full and final settlement" of the amounts due from the commercial transaction between the Plaintiff and the Defendants-Respondents. The Plaintiff has recovered such a sum through the judicial proceedings initiated by the complaint made to the police. Therefore, the Plaintiff's attempt to recover additional funds from the Defendant through another set of judicial proceedings initiated more than twenty months thereafter is a total disrespect to the initial settlement that was reached through judicial process. The conduct of the Plaintiff amounts to an abuse of process even though the initial proceedings through which the settlement was reached between the parties were criminal in nature. If not for the undertaking that the payment by the Defendant is accepted as a full and final settlement, the Defendant could have contested and sought an acquittal from proceedings without accepting his responsibility. In such a

scenario the Plaintiff would have had to establish the responsibility of the Defendant by presenting admissible evidence before the trial court, if he is to succeed in his claim.

Furthermore, the Learned trial Judge had come to a specific finding on issues 24 and 25 to the effect that the Plaintiff failed to prove that he suffered a great loss due to the misconduct of the Defendants and therefore, the Plaintiff suffered a loss and/or damages of Rs.2,000,000/-. The aforesaid issues read as follows;

> "24. As presented by the facts, represented and agreed, did the plaintiff suffer huge losses in the plaintiff's trade due to the defendants' failure to supply the tea leaves due to the Defendants' inappropriate and wrongful actions?
>
> 25. As a result of that, did the plaintiff have to suffer a loss of Rs.2,000,000/-? "

The Learned trial Judge has answered these issues, in the negative. In my view there is no material to establish that the Learned trial Judge erred in answering these two issues.

In view of the findings that I have enumerated hereinbefore, in my view there is no basis to interfere with the judgment of the Learned High Court Judge. Therefore, the impugned judgment of the Learned High Court Judge dated 25th July 2014 in Case No. 478/2011/MR, Commercial High Court of Colombo is affirmed and the appeal is dismissed with costs.

Chief Justice

Murdu N.B. Fernando, PC, J.
I agree.

Judge of the Supreme Court

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court