

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

In the matter of an application for appeal from a judgment of the High Court of the Western Province Holden at Colombo under Section 755(3) of the Civil Procedure Code read with Section 5(1) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996

Lanka Kect (Pvt) Limited
Plaintiff

SC CHC 19/2008
HC Civil 222/2001 (1)

Vs

1. DA Wickramasinghe,
Director Buildings,
Buildings Department, Battaramulla.
2. Secretary.
Ministry of Public Administration and Reforms
3. The Attorney General
Defendants

And now Between

1. DA Wickramasinghe,
Director Buildings,
Buildings Department, Battaramulla.
2. The Attorney General
Defendant-Appellants

Vs

Lanka Kect (Pvt) Limited
Plaintiff-Respondent

Before : Eva Wanasundera PC, J
Buwaneka Aluwihare PC,J
Sisira J de Abrew J

Counsel : Viraj Dyaratne DSG for the Defendant-Appellants
GJT Alagaratnam PC with Lasantha Gurusinghe for the
Plaintiff-Respondent

Argued on : 27.6.2014
Decided on : 5.9.2014

Sisira J de Abrew J.

This is an appeal by the defendant-appellants against the judgment of Commercial High Court dated 11.1.2008 wherein the leaned High Court Judge by her judgment dated 11.1.2008 decided the case in favour of the Plaintiff-Respondent (hereinafter referred to as the Plaintiff) who claimed that the 1st Defendant-Appellant (hereinafter referred to as 1st Defendant) was guilty of breach of contract entered into between them (the Plaintiff and the 1st Defendant).

The 1st Defendant, by document marked P11, called for tenders for the design, supply, installation and operation of a prop up assembly for reconstruction of Jaffna library. The plaintiff, by its letter dated 27.8.99 marked P12, placed a bid and offered to supply equipment on rental basis. Plaintiff, in the said letter, inter alia stated the following matters.

1. One month rental should be paid in advance.
2. Daily rental should be paid as soon as the goods are delivered whether the material is used or not.

3. The charges should be levied as soon as the goods are delivered to the port of Colombo and would continue to be levied till the goods are returned to the port of Colombo.

The 1st defendant, by his letter dated 6.9.99 marked P13, accepted the tender (P12) submitted by the Plaintiff. The heading of letter marked P13 is 'letter of acceptance.' Thereafter both parties entered into the contract marked P14. It has to be noted here that initially when the contract was signed, the office of the 1st Defendant was held by TMW Gunasekara. Later he was replaced by DA Wickramasinghe. It has to be noted here that according to the terms and conditions of the contract, the Plaintiff would supply equipments on hire to the 1st Defendant and he (the 1st defendant) would pay rentals until the goods are returned to the Plaintiff. According to the terms and conditions of the contract, there was no responsibility on the part of the plaintiff to deliver goods to the work place of the 1st defendant in Jaffna. He had to only supply goods to the port of Colombo. Once he delivers the goods to the port of Colombo his responsibility of delivering goods ceases. Thereafter it was the responsibility of the 1st Defendant to bring the goods to the work place in Jaffna. In returning the goods the 1st Defendant must deliver goods to the port of Colombo.

The 1st Defendant, Complying with terms of the contract, made a deposit with the plaintiff against the capital cost of equipments. However since the 1st Defendant defaulted the rentals, this deposit was set off against the rentals up to 31.3.2000. The 1st Defendant defaulted payment of rentals under the contract. The Plaintiff made several requests to the 1st Defendant for the return of the equipment but these requests were refused by the 1st Defendant. The Plaintiff filed this case for breach of contract. He claimed overdue rentals and return of the equipments or

in the alternative value of the equipments. The learned High Court Judge decided the case in favour of the Plaintiff.

The position of the 1st Defendant was that the contract of hire could be converted into a contract of supply and as such it was not necessary for him to pay rentals. He further tried to contend that this was a contract of hire with an option to purchase the equipments.

Can the 1st defendant convert the contract of hire to a contract of supply or purchase? The 1st defendant, by letter marked P30, stated that he unilaterally converted this contract to a contract of supply. The question that must be considered in this case is whether the 1st Defendant could convert the contract of hire to a contract of supply. I now advert to this question. Is there any specific clause in the contract marked P14 which empowers the Director Building to purchase the equipments? His own witness Thiruchelvam admitted in cross-examination that there was no such clause in the contract marked P14. It is interesting to state Thiruchelvam's own words in cross-examination on this point. He stated thus: "these props would not be of much use to the department and that is why we went for the hire option (page 341 of the brief). Thus it is clear that the intention of the 1st Defendant was to hire equipments. On this point it is interesting to consider the paragraph 7 of P12 by which the plaintiff submitted its offer. It states thus: "Payment terms - one million rental to be paid in advance, daily rentals to be paid as soon as goods are delivered whether material is used or not. The charges would be levied as soon as the goods are delivered to the port of Colombo and would continue to be levied till the time the goods are returned to the port of Colombo." The 1st Defendant agreed to these conditions. If the Plaintiff was going to levy rentals for the equipments from the time that the goods were delivered to the port of Colombo, how can it be a contract of sale? Further the letter of

acceptance (P13) signed by the 1st Defendant speaks about hire charges on daily basis. Further the 1st Defendant, by letter dated 29.10.2001, has sought permission of the Plaintiff to convert the contract into a supply of contract. The question that has to be asked is if the purported 'option to purchase' was already available for the 1st Defendant why did he seek permission of the plaintiff to convert the contract into a supply contract.

The above material and the observation made by me go on to show that the contract entered into by both parties was not a contract of supply or purchase and that there was no option available in the contract for the 1st Defendant to purchase the equipments. When I consider all the above matters, the above contention of the learned DSG fails. I reject the said contention of the learned DSG.

The learned DSG next tried to contend that there was a delay on the part of the Plaintiff in delivering the equipments. I now advert to this contention. Thiruchelvam who was a witness of the 1st Defendant when asked whether the plaintiff delayed the performance of the contract answered in the negative (vide page 341 of the brief). Under the contract, the duty of the plaintiff was to deliver the goods only to the port of Colombo. Under the contract there was no obligation on his part to deliver the goods to the port of Jaffna. Shipping of goods to the port of Jaffna was the responsibility of the 1st Defendant. According to the evidence led at the trial there was no delay in delivering the goods to the port of Colombo. When I consider all the above matters, I am unable to agree with the above contention of the learned DSG.

There is another matter that needs consideration. When the amended plaint was filed in the trial court on 20.5.2002, the original caption was also amended placing the present caption in the case record. But when the learned trial Judge prepared the judgment she continued to type the old caption. This appears to be a

mistake by the trial Judge. This mistake is not a ground to set aside the judgment of the learned trial Judge.

When I consider all the above matters, I hold the view that there are no grounds to interfere with the judgment of the learned trial Judge. I therefore upholding the judgment of the learned trial Judge dismiss the appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Buwaneka Aluwihare PC, J

I agree.

Judge of the Supreme Court.