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

In the matter of an Appeal from the Judgment dated 3rd March 2015 of the High Court [Civil Appeal] of the Western Province (Holden in Colombo) made under and in terms of Section 5 (c) of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Daya Constructions (Private) Limited,
No. 362,
Colombo Road,
Pepiliyana,
Boralesgamuwa.

Plaintiff

SC APPEAL 64/2019
SC/HC/CALA/131/15
WP/HCCA/COL/13/2009(F)
District Court of Colombo
Case No.37756/MR

Vs.

Hovael Constructions (Private) Limited,
No. 245/55,
Old Avissawella Road,
Orugodawatta

Defendant

AND BETWEEN

Hovael Constructions (Private) Limited,
No. 245/55,

Old Avissawella Road,
Orugodawatta.

Defendant-Appellant

Daya Constructions (Private) Limited,
No. 362,
Colombo Road,
Pepiliyana,
Boralesgamuwa.

Plaintiff-Respondent

AND NOW BETWEEN

Olympus Constructions (Private) Limited,
No.445/1/2,
Colombo Road,
Pepiliyana.

Formerly knowns as;
Daya Constructions (Private) Limited,
No. 362,
Colombo Road,
Pepiliyana,
Boralesgamuwa.

Plaintiff-Respondent-Appellant

Hovael Constructions (Private) Limited,
No. 245/55,
Old Avissawella Road,
Orugodawatta.

Defendant-Appellant-Respondent

Before : **P. Padman Surasena, J**
Achala Wengappuli, J
K. Priyantha Fernando, J

Counsel :
Nihal Fernando, PC with
Rehan Dunuwile for the Plaintiff-Respondent-Appellant.

Dr. Sunil Cooray for the Defendant-Appellant-Respondent.

Argued on : 20.09.2023

Decided on : 22.11.2023

K. PRIYANTHA FERNANDO, J

1. On 15.09.2003, the company named *Olympus Constructions (Private) Limited* (formerly known as *Daya Constructions (Private) Limited*) (hereinafter referred to as the 'plaintiff') instituted an action against the company named *Hovael Constructions (Private) Limited* (hereinafter referred to as the 'defendant') in the *District Court of Colombo* praying, *inter alia*, for the recovery of an additional sum of Rs. 2,704,178.94 in respect of asphalt supplied and laid on a public road in *Negombo*.

2. After trial, the learned Additional District Judge pronounced judgment on 18.02.2009 in favour of the plaintiff. Thereafter, the respondents filed an appeal against the judgment of the learned trial Judge, upon which the learned Judges of the *High Court of Civil Appeal* of *Colombo* by their judgment dated 03.03.2015, allowed the appeal setting aside the *District Court* judgment which was entered in favour of the plaintiff.

3. Being aggrieved by the decision of the learned Judges of the Civil Appellate High Court, the plaintiff preferred the

instant appeal, whereby this Court on 20.02.2019, granted leave to appeal on the questions of law set out in paragraph 13(a), (b) and (c) of the petition dated 02.04.2015.

The said questions of law are as follows,

(a) Have the learned Judges of the High Court of Civil Appeal erred in law in failing to take cognisance of and/or appreciate the difference between a "Measure and Pay Contract" and a "Lump Sum Contract"?

(b) Have the learned Judges of the High Court of Civil Appeal erred in law in concluding that in a "Measure and Pay Contract", the Respondent was not contractually obliged to pay on the actual material used by the Petitioner?

(c) Have the learned Judges of the High Court of Civil Appeal erred in law in concluding that in a "Measure and Pay Contract", there is a requirement for the parties to have a further agreement to pay for the utilization for over and above the minimum requirement stated in the contract?

In addition, further leave was granted on the following question of law raised by the learned Counsel for the respondent,

> "Has the Plaintiff-Respondent-Petitioner proved that extra tonnage reflected in P17 (1) to P17 (139) was used under the contract?"

Facts in Brief:

4. The plaintiff company entered into an agreement with the defendant company to lay and compact an asphalt wearing course with 50mm thickness, on a 7m wide road of approximately 5.5km long, leading from *Kurana Junction* to *Browns Beach Hotel Junction,* according to RDA specifications.

5. The defendant company, as the main contractor, has entered into an agreement with *Urban Development and Low Income Housing Project* (also referred to as the Employer), for the making of the roadway leading from *Kuruna Junction* to *Browns Beach Hotel Junction.*

6. According to the contract entered between the defendant company and the Employer, the defendant company is obliged to clear the road surface, construct drains and to raise the level of the existing road using and/or laying aggregate base course (hereinafter referred to as 'ABC') to the parameters set out by the Consultant Engineer. ABC is a mixture of small stones and quarry sand.

7. The defendant company has then entered into an agreement with the plaintiff company (who is now a sub-contractor to the Employer) to lay asphalt on top of the ABC layer laid down by the defendant company.

8. According to the contract entered between the defendant company and the plaintiff company, the plaintiff company is to lay asphalt at a thickness of 50 mm (+/-5mm). However, the plaintiff company claims that during the course of the project and particularly towards the latter part, they have discovered large undulations on the ABC layer laid by the defendant company.

9. The plaintiff company holds that the large undulations on the road surface has resulted in them laying asphalt layer

in excess of the predetermined thickness of 50 mm (+/-5mm).

10. The plaintiff company claims that consequent to a core sample test, the average thickness of the asphalt layer laid was found to be 62.72 mm thick and therefore claims that they had been obliged to lay over and above the agreed average thickness in order to complete the works to the satisfaction of the Employer and its engineer.

11. The defendant company claims that they are only obliged to pay a sum of Rs. 6,684,385.11 to the plaintiff company for the work they have done. However, the plaintiff company claims that an additional sum of Rs. 2,704,178.94 should be paid to them by the defendant company for the extra tonnage of asphalt which they have had to use due to the large undulations on the ABC road surface prepared by the defendant company.

12. The plaintiff company claims that this contract is a 'measure and pay' contract, and for that reason the defendant company is liable to pay for the additional tonnage used by the plaintiff company.

Written Submissions on Behalf of the Plaintiff-Respondent-Appellant:

13. The learned President's Counsel for the plaintiff, drawing the attention of this Court to the evidence of the witness for the defendant company namely, *Shantha Surin Senanayake Alagiyawanna,* the Civil Engineer, submitted that the said witnesses evidence together with several documents submitted by the plaintiff, is proof to show that the actual agreement entered into between the parties is a 'measure and pay' contract and that it is not based on a theoretical figure.

14. The learned President's Counsel submitted that, a 'price per ton' was agreed upon by the defendant company for the reason that the exact quantum of asphalt to be used was unknown at the time of tender.

15. The learned President's Counsel further submitted that, if not, there was no difficulty in agreeing on a lump sum for the entire contract at the beginning itself. Therefore, takes the position that the defendant company is now liable to pay for the extra amount of asphalt used.

16. The plaintiff company tendered to this Court delivery notes marked as [**'P17 (1) to P17 (139)'**], which contains the quantities of asphalt delivered to the work site in order to substantiate the fact that extra tonnage of asphalt was being used.

17. The learned President's Counsel for the plaintiff submitted that, the plaintiff company by these delivery notes has established the actual tonnage supplied to the site. It was his contention that, the fact that the delivery notes were not proved is untenable as they have been signed by the site supervisor.

18. The learned President's Counsel further submitted that the defendant company entered into agreement with the plaintiff company to lay asphalt, approximately one month after the ABC layer had been placed by the defendant company. Subsequently, the ABC surface as a surface which consists of stones and quarry dust, is prone to deterioration due to vehicle movements and in particular rain, therefore there could be undulations on the ABC surface by the time the plaintiff was made to lay the asphalt layer.

19. The learned President's Counsel further submitted that, the plaintiff company in the interest of executing the contract to the best of its ability had informed of the

undulations to the site supervisors and the Managing Director of the defendant company namely, *Mr. Joel Selvanayagam.*

20. Furthermore, the learned President's Counsel draws the attention of this Court to the document marked [**'P10'**]. This document ['P10'] was a letter sent by the defendant company to the plaintiff company on 04.10.2002 as a response to the plaintiff company's letter dated 02.10.2002, which was marked as [**'P9'**]. The learned Counsel submitted that, as per the said letter, the director of the respondent company has categorically stated that, the plaintiff should forward core sample test results and based on the same, payment will be made to the appellant. The learned Counsel has cited the paragraph from the letter marked as [**'P10**']. What is stated in ['P10'] reads as follows:

"We will need the above information to work out the tonnage supplied, laid and compacted to make payment to you".

21. Moreover, the learned President's Counsel submitted that, the fact that core samples were taken at the request of the respondent is ex facie further proof of the fact that the contract was not a 'lump sum contract' but a 'measure and pay contract'. Therefore, puts forward the position that the defendant company having made representation and written undertaking to make payment on the actual tonnage used, cannot thereafter, refuse to pay for the asphalt by alleging that the basis of payment was some other method.

Written submissions on behalf of the Defendant-Appellant-Respondent:

22. In respect of the delivery notes marked [**'P17 (1) to P17 (139)'**], the learned Counsel for the defendant company submitted that, the defendant company has denied all the

delivery notes and made the submission that none of the delivery notes have been proven as against the defendant. Therefore, the defendant is not liable to pay for extra asphalt allegedly used as per those documents.

23. The learned Counsel further submitted that, none of the delivery notes were seen by the project engineer of the defendant company on the site, nor by anyone else on behalf of the defendant.

24. In addition to that, the learned Counsel submitted that the defendant company had admitted that the contract entered between the two parties is a 'measure and pay' contract and not a 'lump sum' contract. Further, submitted that if the plaintiff in fact has used more asphalt than was estimated originally, the plaintiff company must have proved the extra quantity.

25. The learned Counsel submitted that the plaintiff company had totally failed to prove the extra quantity by its failure to prove documents marked, ['**P17 (1) to P17 (139)**'].

26. It was contended by the learned Counsel that, the day of completion of asphalting the road was 02.10.2002, and only on that day did the plaintiff company send the letter marked ['**P9**'] informing about the large undulations for the first time and the need to increase the amount of asphalt used.

27. The learned Counsel further submitted that, the site engineer of the defendant, one *Shantha S. Senanayake Alagiyawanna,* who gave evidence for the defendant company, had been in attendance every day during the period from the commencement of the work up until the completion date. He has testified that he was never made aware at any time that any extra tonnage of asphalt was being used for any reason.

28. It was put forward by the learned Counsel that by letter dated 10.10.2002, marked as [‘**P11**’], the defendant has informed the plaintiff company that, they do not agree that there were large undulations on the ABC surface and that, the ABC surface had in fact been approved by the Consultant staff prior to asphalting. The learned Counsel submitted that, through the letter marked [‘**P11**’], the defendant company has further informed the plaintiff company that they should have brought such undulations to the notice of the defendants before laying the asphalt wearing course.

29. The learned Counsel draws the attention of this Court to the evidence led in this action in the *District Court* by both the plaintiff and the defendant with regards to the documents marked [‘**P17 (1) to P17 (139)**’]. The learned Counsel submitted that the witness for the plaintiff company itself, could not identify the signatures on the said documents.

30. It was further submitted that the delivery notes have not been acknowledged either by the witness of the defendant’s company namely, *Shantha S. Senanayake Alagiyawanna* (the Civil Engineer of the defendant), nor its site engineer or any of its agents. Moreover, none of the other officers of the defendant's company had been aware of those documents. Therefore, the learned Counsel takes the position that those documents have not been proved and hence there is no proof that any such extra quantity of asphalt was used on the job.

31. It was further submitted that, no person who had allegedly weighed the asphalt laden trucks at the plaintiff’s premises at *Boralesgamuwa* had been called to prove any of the delivery notes.

32. The learned Counsel hence contended that, the defendant company had correctly calculated the amount due from

the defendant to the plaintiff in terms of the contract and sent the letter marked [**'P12'**] dated 05.11.2002 with the full and final balance payment due as Rs. 684,385.11.

Answering to the Questions of Law:

33. Having heard learned Counsel for both parties at the hearing, and at the perusal of the petition, written submissions, proceedings of the trial, and documents tendered to this Court, I shall now resort to answering the questions of law before this Court and whether the defendant company is obliged to pay the sum of Rs. 2,704,178.94 to the plaintiff company.

34. I will first resort to answering the question of law raised by the learned Counsel of the defendant as to whether the plaintiff-respondent-appellant has proved that an extra tonnage was used under the contract, as reflected in the delivery notes tendered by the plaintiff.

35. It could be observed from page 287 of the brief (proceedings dated 26.07.2006) during the evidence of the witness for the plaintiff company, the Managing Director namely, *T.D.Roshan*, when questioned as to whether he was able to identify the signatures placed on the delivery notes, he answered that he could not recognize them.

    Furthermore, on page 6 of the proceedings dated 18.02.2008, during the evidence of the witness for the defendant's company, the Civil Engineer namely**,** *Shantha Surin Senanayake Alagiyawanna* was also questioned as to the signatures placed on the delivery notes. He had answered that the defendant's company had not placed such signatures. He has further stated that, if such delivery notes were to be signed at the site, he was the one who was in charge to sign such documents.

ප්‍ර: තමන් කියල තිබෙනවා පැ 17 රිසිට් පත ගැන තමන් කිව්ව මේක අත්සන් කර නැත කියලා?

පි: ආයතනයෙන් අත්සන්කර නැත. මේවා අත්සන් කර තිබෙන්නේ අපේ ආයතනයේ කෙනෙක් නොවේ. අත්සන් කරනවා නම් මම අත්සන් කරන්න ඕනේ.

36. **Section 67** of the **Evidence Ordinance No.15 of 1895**, provides,

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be his handwriting".

In the instant case, there is no evidence to show that the plaintiff had taken steps to prove as to who had signed the delivery notes. It is evident from the testimony of the witness of the plaintiff company, that the plaintiff company itself is not aware of who has signed the delivery notes. Therefore, the extra tonnage of asphalt cannot be proven, as the documents marked ['**P17 (1) to P17 (139)**'] have not been proved by the plaintiff.

37. It is provided in the explanation to **Section 154(1)** of the **Civil Procedure Code** that,

"*If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it."*

38. Further, it was held in the case of ***Cinamas Ltd. v Soundaranrajam [1998] 2 S.L.R. 16*** that, in a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the

document unless the document is forbidden by law to be received and no objections can be taken in appeal.

39. It was stated by his Lordship, Hon. Chief Justice Samarakoon, in the case of **Sri Lanka Ports Authority and Another v Jugolinija-Boal East [1981] 1 SLR 18,**

"If no objection is taken, when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the cursus curiae of the original civil courts".

40. It could be seen through case law precedents that although the production of the document is objected to during the trial, if the party objects to the document fails to object to same at the closure of the case, it is evidence for all purposes.

41. However, now it is enacted law through Section 3(a)(ii) of the Civil Procedure Code (Amendment) Act No.17 of 2022 (that amends section 154 of the Civil Procedure Code) where it provides,

"3. (a) (ii) if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence,

the court shall admit such deed or document as evidence without requiring further proof;

42. During the trial, when the delivery notes were marked through the witness of the plaintiffs company, *T.D. Roshan*, they were objected to by the defendant's company. Further, at the end of the case for the plaintiff company, when the documents were referred to in closing the plaintiff's case, the objection was confirmed by the learned Counsel for the defendant.

43. On the evidence placed before the *District Court*, it is clear that the plaintiff company has made the claim for the additional amount based on the delivery notes marked ['P17 (1) to P17 (139)']. The plaintiff company has clearly failed to prove those documents as hereinbefore mentioned. By mere producing core sample test reports before the *District Court,* the plaintiff company has failed to demonstrate that the above claimed amount is due. Plaintiff has failed to prove that they got prior approval or consent from the defendant to apply additional asphalt nor they have proved that additional asphalt was used. Therefore, this question of law raised by the defendant company is answered in the negative.

44. In answering the two questions of law under paragraph 13(a) and (b), I hold that when delivering the judgment by the learned High Court Judges dated 03.03.2015, the learned Judges were fully aware that the contract entered between the plaintiff company and the defendant company was a measure and pay contract and that, the defendant company was obliged to pay for any tonnage of asphalt used for the job. The learned High Court Judges set aside the *District Court* judgment on the basis that prior consent had not been obtained by the plaintiff to increase the thickness of the asphalt wearing course.

45. At the perusal of the documents marked ['P1 to P17'] tendered to this Court, it is evident that the two parties have initially agreed on the parameters of the length, width and thickness, and as held by the learned Judges of the High Court, the plaintiff company ought to have realized upon inspection of the road, that they needed an additional quantity of asphalt due to the large undulations on the ABC surface.

46. It is my view that the plaintiff company as a construction company, with experience in such asphalt works, should have at first instance done an inspection on the standard

of the ABC surface laid by the defendant company, in order to ascertain as to whether there are any such undulations. In the circumstances of such undulations, the plaintiff company ought to have informed the defendant company and obtained their approval or consent before initiating the project.

47. As was clearly highlighted by the learned High Court Judges, the last delivery note sent by the plaintiff company is dated 02.10.2002, and the letter marked ['P10'] informing about the need to use more asphalt due to undulations on the ABC surface is also dated 02.10.2002. As stated in the judgment of the High Court, had the plaintiff company brought this to the notice of the defendant company prior to completion of the contract and obtained their permission, there was no reason for them to write the letter ['P9']. It is therefore evident that the position taken by the plaintiff company that they have informed the defendant company of the need to use a higher quantity of asphalt is incorrect. As the learned High Court Judges clearly stated, there is no evidence in record to show that prior consent had been obtained by the plaintiff company to increase the thickness of the asphalt wearing course.

48. I must also address that, in response to the submission made by the learned President's Counsel for the plaintiff that, the plaintiff company has taken core samples at the request of the respondent. The learned Counsel for the defendant contends that, the defendant company has requested for core sample reports through letter dated 04.10.2002 marked as ['P10'], however this has not been a response to ['P9']. It is evident that the defendant company has responded to the letter marked as ['P9'] by a letter dated 10.10.2002, which is marked as ['P11'], informing the plaintiff company that they do not agree that there were large undulations on the ABC surface while giving reference to the letter dated 02.10.2002 of the plaintiff company. Therefore, it is clear that the

defendant company has never approved any extra tonnage to be used when they rejected the claim of undulations.

49. Hence, the learned High Court Judges were correct when they found that the plaintiff is not entitled to the amount claimed. Therefore, on the above premise, the questions of law under paragraphs 13(a) and (b) of the petition are answered in the negative.

50. The third question of law raised by the appellant under paragraph 13(c) of the petition is as to whether the learned Judges of the High Court erred in law in concluding that there is a requirement to have a further agreement to pay for the utilization for over and above the minimum requirement stated in the contract.

    The learned High Court Judges do not conclude that any such further agreement is required but rather holds that, there had been no understanding between the parties to pay for anything more than what was agreed upon by them, and had the plaintiff company informed of the need to increase the quantity of asphalt initially, the defendant company would have considered approval and paid.

51. The thickness of 50mm stated in the contract is the standard thickness of asphalt that the defendant company is required to lay. This thickness is agreed by both parties. As I have discussed above, where the plaintiff company was required to lay more than what was needed, they should have informed the defendant company at the outset.

52. Therefore, the question of law raised by paragraph 13(c) is also answered in the negative.

53. For the reasons stated above the Judgment of the High Court of Civil Appeal dated 03.03.2015 is affirmed.

Appeal dismissed with costs.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI.

I agree

JUDGE OF THE SUPREME COURT