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

Singer Company Limited
No. 83, Chatham Street,
Colombo 1.

Presently at
No. 320, Union Place,
Colombo 2.

PLAINTIFF

C.A 32/1998 (F)
D.C. Gampaha 32882/MB

Vs.

1. Abdul Gaffoor Fathima Zuhara.
2. Mohamed Hiyaz Mohamed Kamar
3. Mohamed Hiyaz Mohamed Aflal
4. Mohamed Hiyaz Mohamed Hismy
5. Mohamed Hiyaz Fathima Fahika
6. Mohamed Hiyaz Mohamed
7. Mohamed Hiyaz Mohamed Bakir
8. Mohamed Hiyaz Mohamed Nazik

All of No. 225/1, Piddenipola,
Warapalana Road, Thihariya.

DEFENDNATS

AND NOW BETWEEN

1. Abdul Gaffoor Fathima Zuhara.
2. Mohamed Hiyaz Mohamed Kamar
3. Mohamed Hiyaz Mohamed Aflal
4. Mohamed Hiyaz Mohamed Hismy
5. Mohamed Hiyaz Fathima Fahika
6. Mohamed Hiyaz Mohamed

7. Mohamed Hiyaz Mohamed Bakir
8. Mohamed Hiyaz Mohamed Nazik

All of No. 225/1, Piddenipola,
Warapalana Road, Thihariya.

DEFENDNAT-APPELLANTS

Vs.

Singer Company Limited
No. 83, Chatham Street,
Colombo 1.

Presently at
No. 320, Union Place,
Colombo 2.

PLAINTIFF-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: S. N. Vijithsingh with S. Rajapaksa
for the Defendant-Appellants

N. Bahaudeen with Athula Rajapakse for Plaintiff-Responent

ARGUED ON: 14.06.2012

DECIDED ON: 16.10.2012

GOONERATNE J.

The main point that need to be decided in this appeal is whether the debt due to the Plaintiff Company by an approved dealer of the company

named A.M.M. Hiyas, who died pending the action filed (4656/M) by Plaintiff Company to recover the debt from Hiyas could be recovered from the heirs (Appellant) who had undertaken (according to Plaintiff) to repay the company in the above case 46565/M and entered into a Mortgage Bond (P1) to secure the re-payment of the debt, in favour of the Plaintiff-Respondent, could put the Bond in suit and recover the amount specified in Bond P1. In the case filed in the District Court of Gampaha against the heirs who are the Defendants-Appellants, resisted the District Court case on the following grounds as averred in the answer.

(a) Not bound in law to repay the amount due from the said A.M.M. Hiyas as they were compelled to sign the Mortgage Bond (P1).
(b) Mortgage Bond P1 invalid as no consideration passed between Plaintiff-Respondent and the appellant.
(c) No valid contract which is enforceable between the Plaintiff Company and the Appellant to settle the debt due
(d) 8th Defendant-Appellant was a minor and as such the Bond is invalid.

Parties proceeded to trial on 13 issues and judgment was in favour of the Plaintiff. This appeal is against the judgment, based mainly on grounds suggested in (a) to (d) above which in fact were some of Defendants issues in the trial court and Defendant raised issue Nos. 4 – 13. I would refer to the

factual position by reference to evidence before considering the legal position as adverted by the Appellants.

1. P1, is the Bond (marked in evidence) attested by a Notary, in which names of heirs of Hiyas are contained and described as obligors'. Singer Company is the 'obligee'. That the obligors firmly bound unto Singer Company in sum of Rs. 277,800/- Hiyas was appointed approved dealer of Singer Company. Hiyas entitled to land described in the schedule. Hiyas indebted to Rs. 277,800/= company filed action to recover the said sum in case No. 4656/M in D.C Colombo. He died on 27.10.1986 before summons could be served. Obligors jointly entitled to the land described in schedule, obligors have agreed to mortgage the land etc.
2. In P1 the 2nd schedule marked as V9 in the course of trial. The 2nd schedule reads:

(i) on acceptance by the company the first order of goods a payment of Rs. 1000/-.
(ii) Second order and every subsequent order up to nine orders each Rs. 2500/-.

3. P2 motion filed by Plaintiff (Singer Company) in case No. 4656/M and Journal Entry 16.10.1989. J.E of 16.10.1989 action dismissed.
4. Evidence of Plaintiff's 1st witness inter alia refer to the fact that the Defendant-Appellants undertook to repay the debt of Hiyas and entered into Bond p1. Refer to the 2nd schedule payment scheme in P1, and state that debts paid up to Rs. 8500/- and thereafter defaulted payment. Two of the Defendnats and sons of Hiyas appointed as dealers of Plaintiff Company (2nd & 3rd Defendants).

In cross-examination witness admits that the Defendant-Appellants were not parties in case 4656/M. No settlement in the above case with the Defendant-Appellant. No consideration passed but P1 suggest as to how Defendant entered into P1 and the payment scheme.

It was the position of the learned counsel for Appellant that English Law applies to this case and emphasized that no consideration passed between parties on execution of Bond P1. He further argued and stressed that in law on a moral obligation and or on past considerations parties cannot be bound by contracts and as such not enforceable in law. On matters of fact/law on the aspect of consideration in contract, is governed by English Law and not our Common Law.

I have read with much interest the entirety of the written submissions of both learned counsel. I find that the learned counsel for Appellant has supported his case with several authorities and decided cases. Though thinking at a certain point of time or period was on the lines of English Law being applicable on 'consideration' I don't agree with that line of argument, especially as regards the case in hand. I would simply introduce the subject or concept of 'Justa Causa' being applicable in our courts and more particularly to the case in hand. The reasonable and probable cause for parties to enter into a transaction as that of the case in hand, is the undertaking given by the Appellants to settle the dues. The entirety of the transaction could be clearly separated into two distinct portions. Firstly the moral obligation. Secondly the idea of mortgaging the

property devolved on the heirs. The moral obligation gradually took the form of a legal obligation by entering into Bond, p1.

Our Ceylon Courts as stated by Professor Weeramantry, in his worldwide or world acceptable famous book on Law of Contracts, (Vol. 1 – Part I & II Section 263 pg. 263 – 265) showed an appreciation of the distinction between 'consideration' and 'causa' and was always ahead of South African Courts and as such decided to apply the principle of causa to those contracts in Ceylon which are governed by the Common Law which is the Roman Dutch Law. Therefore in order to fully understand the real issue the following extract from the Law of contracts Weeramantry are incorporated.

The early cases may have ruled on English Law relating to consideration in determining the existence of rights on contract.

In Lipton Vs. Buchanan (1904) 8 NLR 49 confirmed in review by a Bench of 3 Judges in 10 NLR 58)

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Thomas Lipton had promised Buchanan not to sue him for a debt due to Lipton from Buchanan's former partner till he had taken all steps against such partner personally. It was held in the lower Court that the effect of such agreement must be determined by English law and not by Roman-Dutch law, and that consequently the agreement was bad for want of consideration. The Appeal Court, holding that the law applicable was the

Roman-Dutch law, pointed out that the maxim of Roman law – ex nudo pacto non oritur actio – did not obtain in the Roman-Dutch law. In view, inter alia, of Voet's observation that nude pacts made in earnest and with a deliberate mind gave rise equally with contracts to an action, and Grotius' statement that it was the rule and practice that all promises based upon any reasonable cause gave a right both of action and of exception. Wendt, J. held that though there might be no consideration for Lipton's promises according to English law, there was sufficient causa according to Roman-Dutch law. Wendt, J. after a review of the authorities defined causa as follows: "causa denotes the ground, reason or object of a promise giving such promise a binding effect in law. It has a much wider meaning than the English term consideration and comprises the motive or reason for a promise and also purely moral consideration.

Jayawickreme V. Amarasuriya 20 NLR 289..

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Which is now an established authority on the subject of causa in the modern Roman-Dutch law. The plaintiff averred that the defendant held certain property received by him from his mother in trust for the defendant and the plaintiff in equal shares; that the plaintiff had threatened to institute action against him to compel him to perform the trust; that the matter was settled on the understanding that the plaintiff should refrain from bringing the contemplated action and that the defendant should in view of this promise pay the plaintiff Rs. 150,000/- in five yearly instatements. The Privy Council held that even if no action had been threatened and no compromise effected, still the promise to pay was enforceable inasmuch as it was made deliberately in discharge of a moral obligation resting upon the defendant. To quote Lord Atkinson, it may well be that according to English law as a general rule an existing moral obligation not enforceable at law does not furnish good consideration for a subsequent express promise, but according to Roman-Dutch law a promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence can be enforced at law, the justa causa debendi sufficient according to the latter system of law to sustain a promise being something far wider than what the English law treats as good consideration for a promise.

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Our Courts have had occasion recently to consider the question of causa in a case where a person who was administering his deceased father's estate and had benefited from it, had promised to pay another a due proportion of a statute barred debt which his father had owed. Soertsz, J., considering the requirement that "the agreement must be a deliberate serious act, not one that is irrational or motiveless," held that the promise in question was of that nature although it resulted from the web of circumstance in which the defendant found himself at the time. Consequently there was justa causa and the promise was held to be enforceable. 46 NLR at 512. A further reference to the difference between causa and consideration occurs in the judgment of Dias, J. in Public Trustee V. Udurawana 51 NLR at 197 a case of a claim by an employee to enforce a promise made by it, his employer to pay him a pension or gratuity in consideration of past faithful services. Dias, J. observed: "since the decision of the Privy Council in Jayawickrema V. Amarasuriya, it is settled law that a lawful promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence can be enforced under the Roman-Dutch law – the justa causa debendi to sustain a promise being something far wide than what the English law treats as good "consideration" for a promise.

As Professor Weeamantry stress that the controversy between 'Consdieration' and 'causa' is at an end. Therefore the case in hand revolves around the concept of 'Justa Causa' and not consideration. The evidence led at the trial no doubt suggest and support the view that the Defendant have made a lawful promise deliberately made to discharge a moral duty and an obligation to repay the debt owed to Plaintiff-Respondent Company, and

thereby Bond P1 has to be put in suit to obtain the results normally available on Mortgage Bonds.

This court also observes that the Appellants have agreed to admit liability and settle the dues by means of a Bond and has also made certain part payments. The law should not shrink to entertain a party to approbate and reprobate.

Approbate & Reprobate

20 NLR at 124..

In the case of Mukhunlal v. Srikrishna Singh the Privy Council said:

When one party ..... is permitted to remove the blind which hides the real transaction ....., the maxim applies that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist upon its apparent character to prejudice his adversary ..... The maxim is founded not so much on any positive law as on the broad and universally applicable principles of justice."

21 NLR at 41...

The law, however, furnishes exceptions to its own salutary protection, one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction; as, for instance, in cases of fraud, illegality, and redemption; in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary ." That case has been followed in India in Himmat Sahai Sing v. Llewhellen, although it may be noted that that case might have been decided on anther ground, as explained on page 491 of the report. It has also been followed in another case in India, viz., the case of Baboo Meah v. Z Zumeerood-deen, referred to in Bose's Digest, vol. 2 page 3921. It has, more over, been followed in our own Colony in the recent case of Kiri Banda v. Marikar.

Section 115 of the Evidence Ordinance reads thus:

"When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.,

The Appellants are in any event estopped in denying their liability. On the question of minority of one of the Defendants, I would not wish to shift away and disturb the findings of the trial Judge on that aspect. As such I am not inclined to consider such a plea at the Appeal stage.

In all the above facts and circumstances of this case, this court is not incline to disturb the judgment of the learned District Judge. Even if the trial Judge has not seriously given his mind to the discussion on 'Justa Causa' still his ultimate conclusions are correct and should not be reviewed. As such I affirm the judgment of the District Court and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL