

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

C.A. No. 922/96 F

D.C. Colombo Case No. 3553/MHP

The Finance Company (Pvt) Ltd,  
No. 68, 3<sup>rd</sup> Floor,  
Ceylinco House,  
Janadipathi Mawatha,  
Colombo  
**Plaintiff**

**Vs.**

Warnakulasooriya Kalugamage  
Francis Salis Fernando,  
No. 243, Halawatha Road,  
Wennappuwa.

Warnakulasooriya Leo Herbert  
Ranjith Fernando,  
Pulungashandiya,  
Lansigama, Marawila.

Paththinikuttige Herbert Nonis  
Mawathagama, Dankotuwa.  
**Defendants**

And

Warnakulasooriya Leo Herbert  
Ranjith Fernando,  
Pulungashandiya,  
Lansigama, Marawila.  
**Defendant-Appellant**

**-Vs-**

The Finance Company (Pvt) Ltd,  
No. 68, 3<sup>rd</sup> Floor,  
Ceylinco House,  
Janadipathi Mawatha,  
Colombo  
**Plaintiff-Respondent**

**-And-**

1. Warnakulasooriya Kalugamage Francis  
Salis Fernando,  
No. 243, Halawatha Road,  
Wennappuwa. (deceased)
  2. Paththinikuttige Herbert Nonis  
Mawathagama, Dankotuwa.
- Defendant-Respondents**

Before : **A.W.A. Salam, J.**

Counsel : Mahinda Ralapanawe with Hashan Chandrapala for  
2<sup>nd</sup> Defendant-Appellant and I.S. Silva with Vishva  
Meththananda for the Plaintiff-Respondent.

Argued on : 23.11.2010

Written submissions tendered on : 24.01.2011

Decided on : 31.10.2011

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A W Abdus Salam,J

This appeal arises from the judgment and decree of the learned additional district judge of Colombo, granting relief to the plaintiff against the 2<sup>nd</sup> defendant in a money recovery case. The facts briefly are that the plaintiff filed action against the 1st, 2nd and 3rd defendants seeking relief arising from the hire purchase agreement. Admittedly the 1<sup>st</sup> defendant had entered into an agreement with the plaintiff whereby the latter had extended the former a facility to purchase three machines on the basis of a hire purchase agreement. The 2nd and 3rd defendants featured in the agreement as guarantors of the said agreement. On the 1st defendant violating the terms and conditions of the agreement the plaintiff dominated the same and filed action to recover the

machines and the monies due under the said agreement. The agreement in question has been attested before a Notary Public.

The 2<sup>nd</sup> defendant being one of the guarantors who contested the claim made by the plaintiff on the grounds that the said agreement was not explained to him by the notary and that he signed certain blank sheets instead of a written agreement. He further alleged that no consideration passed on the agreement and that it had not been made in conformity with the provisions of Act No 29 of 1982.

At the trial, the plaintiff led the evidence of one of its officers who was present at the execution of the agreement and closed it's case reading in evidence documents marked P1 to P12. The 2<sup>nd</sup> defendant neither gave evidence nor did he produce any documents. Although the 2<sup>nd</sup> defendant maintained that he signed certain blank papers and therefore nothing was explained to him, he did not opt to give evidence or call witnesses to establish his position. The learned additional district judge at the conclusion of the trial rejecting the position taken up by the 2<sup>nd</sup> defendant held inter alia that he is liable to pay the plaintiff the sum of money claimed in the plaint. This appeal has been preferred against the said judgment.

On a perusal of the evidence adduced at the trial, it appears that the finding of the learned addl. district judge relating to the alleged failure on the part of the plaintiff to explain the agreement cannot be faulted as the 2<sup>nd</sup> defendant has not been able to discredit the witness who testified on behalf of the plaintiff. In addition the trial judge is also entitled to conclude in the way he decided the matter

by reason of the failure on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to adduce any evidence on the alleged grounds to avoid the contract. The question relating to want of consideration also has not been substantiated by the 2<sup>nd</sup> defendant.

Even though the 2<sup>nd</sup> defendant claimed that the plaintiff is not entitled to proceed against him by reason of his inaction to execute the judgment entered exparte against the defendant no such defence had been pleaded in the answer nor have they been raised by way of issues at the trial. In the circumstances, the failure on the part of the plaintiff to make any claim in the insolvency proceedings in respect of the 1<sup>st</sup> defendant and the alleged inaction to enforce the judgment against the 1<sup>st</sup> defendant cannot be considered as valid grounds to set aside the impugned judgment.

As regards the question relating to want of consideration it is to be observed that the 1<sup>st</sup> defendant has unequivocally admitted having received the consideration and also acknowledged that he had defaulted to honour the terms and conditions of the hire purchase agreement. Taking all these matters into consideration, it cannot possibly be accepted that the defence put forward by the 2<sup>nd</sup> defendant had been established. In the circumstances, the findings of the learned additional district judge against the 2<sup>nd</sup> defendant appear to arise on the evidence led by the plaintiff and quite consistent with the law applicable. In the result, I am not inclined to take the view that the learned addl. district judge has erred in his judgment when he came to the conclusion favourable to the plaintiff.

For reasons stated above, I am compelled to affirm the judgment of the learned addl. district judge entered against the 2<sup>nd</sup> defendant and dismiss this appeal.

Plaintiff respondent is entitled to recover costs of this appeal.

Judge of the Court of Appeal

NT/-