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

C.A.142/1997 (F)
D.C. Colombo 13193/MR

Indrani Ranasinghe
No. 80, "Senasuma"
Sanchi Aratchiwatta,
Colombo 12.

**PLAINTIFF**

Vs.

Anura Kartheris
No. 118/D, Abeysekera Road,
Kawdana, Dehiwela.

**DEFENDANT**

AND NOW

Indrani Ranasinghe
No. 80, "Senasuma"
Sanchi Aratchiwatta,

Colombo 12.

**PLAINTIFF-RESPONDENT**

Anura Kartheris
No. 118/D, Abeysekera Road,
Kawdana, Dehiwela.

**DEFENDANT-APPELLANT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** D. Akurugoda for the Defendant-Appellant

Plaintiff-Respondent absent and unrepresented

**ARGUED ON:** 20.06.2011

**DECIDED ON:** 03.08.2011

**GOONERATNE J.**

This was an action filed in the District Court of Colombo to recover a sum of Rs. 616,200/- and for legal interest on Rs. 390,000/- as prayed for in sub-paragraph (a) of the prayer to the plaint. In paragraph 2 of the plaint it is pleaded that the Defendant-Appellant had given a cheque to the Plaintiff-Respondent in a sum of Rs. 390,000/- bearing No. IGE 069162 dated 1.10.1986 (marked 'අ' annexed to the plaint) for valuable consideration received by the Plaintiff. When the cheque was presented for payment to the Maradana Branch of the People's Bank, same was returned with the endorsement account closed. It is further pleaded that (paragraph 4 of plaint) having noticed Defendant about the dishonoured cheque, and having demanded payment the Defendant-Respondent wrongfully failed and

neglected to pay the said amount or part thereof. Parties proceeded to trial on three issues (though Defendant raised certain number of issues, it had been disallowed by the District Judge) Judgment was delivered in favour of the Plaintiff on 28.02.1997.

The appeal arises from the said judgment. On the date of hearing the Defendant-Respondent was absent and unrepresented. The minute of 20.06.2011 contained in docket would indicate that proxy of Defendant-Respondent was revoked by the registered Attorney but the Respondent had not taken any further steps to participate at the hearing before this court. The learned Counsel for the Appellant inter alia submitted to this court the following:

(a) No reason given in the order of 17.7.96 by the learned District Judge for rejecting Defendant's issues He relies in the case of Delpuchitra Vs. Tamitagama. The Colombo Appellate law report 1996 Vol. III part I pg. 63.

(b) In the preliminary order dated 21.4.1996 court has considered document 'x' of 26.3.1987 submitted by plaintiff along with the written submissions, which was not produced with the plaint or pleaded in the plaint. As such no opportunity for Defendant-Appellant to cross-examine, Plaintiff on document 'x', or to comment on document 'x'.

(c) Date in letter 'x' altered.

(d) Cheque in question not issued by Defendant and he is not the signatory. Nor is he the account holder. As such not liable.

The only three issues were considered by court and had to be answered by court. Issue No. 1 deals with valuable consideration for which a cheque had been issued by Defendant. Then issue No. 2 is to the effect that the cheque had been dishonourd. Issue No. 3 is more or less a consequential issue praying for relief.

The evidence led on behalf of the Plaintiff is very brief. Evidence in chief is as follows:

(i) Action filed on a cheque (ಅ.1)

(ii) Cheque issued by defendant and presented to Bank for payment, did not receive money from Bank

(iii) Cheque not honoured and endorsement on the cheque state 'account closed' with the date 03.02.1987.

(iv) The amount in cheque should be paid by Defendant.

The cross-examination of Plaintiff seems to explain that the cheque was signed by Defendant and given to Plaintiff on the same day it was written (01.08.1986). This court observes that even the cross-examination had been only on very limited matters. However there seems to be an absence of material to suggest that a party had given a promise or perform an act or some detriment suffered by a party receiving a promise. On what promise, performance of act or detriment suffered by party is in evidence?

In brief the Bank witness state the cheque in question was transacted with the Maradana People's Bank and presented on 03.02.1987. A/C No. 1283 and account closed on 20.02.1986, about 8 months prior to the date of cheque. The account holder was one Abeygoda Liyanarachchi Dayananda Nissanka Karathelis of 879, Etul Kotte. The witness cannot say whether the Defendant Karathelis signed the cheque.

This court observes that the Defendant is not the account holder of the cheque in question. The evidence of the Defendant confirm this fact and suggest that it was Defendant's brother who was the account holder of the cheque. On the side of the Defendant-Respondent there is a total denial of Plaintiff's case i.e never gave a cehque to Plaintiff and denies any transaction with Plaintiff or knowledge of Plaintiff.

At this point before I proceed to comment, on the judgment of the learned District Judge I would prefer to summarize the law relating to valuable consideration and or the meaning of consideration.

The English concept of consideration forms an essential part of legal study in our country. It is a benefit received by a party who gives a promise or performs an act, or some detriment suffered by a party who receives a promise.

*Charles worth's Mercantile Law – 12 Ed.pg. 36/37 ...*

It may also be define as 'that which is actually given or accepted in return for a promise." It was defined by the court in Currie v. Misa (1875) L.R. 10 Ex. 153 as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other," but to this definition there should be added that the benefit accruing or the detriment sustained was in return for a promise given or received.

Examples – (1) A receives £5 in return for which he promises to deliver goods to B. Here, the money A receives is consideration for the promise he makes to deliver the goods.

(2) C promises to deliver goods to D, and D promises to pay for the goods when they are delivered. Here, the benefit C receives is D's promise to pay, and in return for it he promises to deliver the goods.

(3) X lends a book to Y and Y promises to return it. Here, the advantage is entirely on Y's side, but X suffers a detriment in parting with his book, and this is consideration to support Y's promise to return it.

Consideration is some quid pro quo agreed upon showing that the promise is not gratuitous. It may be described as any act forbearance or the promise thereof which is lawful and is made done or forborne by one party to a contract in exchange for the promise of the other party and is of value in the eye of the law. Where a grant is made in pursuance of a contract the consideration for the grant is one of its essential terms. 21 N.L.R at 41. Past consideration is no consideration at all unless it was moved by a previous request or unless it was rendered under such circumstances that a request is implied. 21 N.L.R 410.

I have to examine the judgment as well as prior interim orders made by the learned District Judge. The proceedings of 07.11.1994 shows that issues were raised and issue No. 4 on prescription was tried by way of

written submissions. The learned Trial Judge made order on issue No. 4 by order of 21.04.1995, disallowing the Defendant to raise issue No. 4 on prescription. Conclusion to reject the issue was two fold by the learned Trial Judge. Firstly as the answer does not reveal or plead that the Plaintiff's action is prescribed the Judge's very correctly relying on the case of Brampy Appuhamy Vs. Gunasekere 50 N.L.R 253 rejected the issue. In the said case it was held:

> Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence.

However as regards the 2nd reason, the fault lies in this order, though the decision to reject the issue was correct the fault lies by considering document 'x' of 26.03.1987, which was submitted to court by the Plaintiff along with the written submissions. This was done to demonstrate probably to take the case out of prescription and bring it within Section 12 of the Prescription Ordinance. Document 'x' was never pleaded or averred in the plaint. At the trial stage parties never agreed to submit document 'x'. It was introduced with the written submission. Therefore the Defendant never had an opportunity to challenge document 'x' or comment

on same. However the trial Judge has taken and considered document 'x' also to shut out issue No. 4. In a way this amount to a breach of the rules of natural justice. Defendant-Appellant being denied the right to examine and cross examine or comment on document 'x'. No opportunity for Defendant to review document 'x', at an earlier stage of the suit.

On perusing the proceedings I find that further trial was re-fixed for 17.7.1996. On that date the Defendant-Respondent raised 5 additional issues but court disallowed all 5 issues. District Judge merely state without giving any reasons that "**චිත්තියේ විසඳිය යුතු ප්‍රශ්ණ අවශ්‍ය නැති බවට නියෝග කරමි**". I am of the view that the trial Court Judge should give reason if issues are rejected although it is the duty of court to frame issues. One of the issues suggested by the Defendant was an issue connecting letter 'x'. Defendant's point of view was that latter 'x' was written on duress. If the Trial Judge was of the view that document 'x' and other issues (although the Judge considered 'x' in the order of 24.04.1995) do not go to the root of the action, explanation or reason for such rejection would be material. The rational for such view is dealt in the case of Delpachitra v. Tamitagama. The Colombo Appellate Law Reports (1986) C.A.L.R – Vol III – Part I.

Two applications for Revision and Leave to Appeal arose from an order by the District Court refusing to permit three additional issues to be framed in the trial. It was agreed that one order should dispose of both applications.

The District Judge had disallowed an attempt by the defence during the course of the trial to frame three additional issues based on illegality which had not been pleaded. The Court refused to allow additional issues to be raised no reasons being given but stating that reasons for refusal will be delivered along with the judgment in the case. It is from this order that these applications were made.

Held –

The record shows the importance placed by the defence on the contention of illegality. In these circumstances it is singularly inappropriate and unsatisfactory for the judge to state that the issues are disallowed and that reasons for it would be given along with the judgment as it would be too late for the Defendant to seek Leave to Appeal from that order. The questions of whether the issues alter the scope of the action and whether the transaction has been illegal and thus deprives the Plaintiffs of any relief in a Court of law cannot be dismissed summarily without reasons. Once illegality has been brought to the notice of Court, the Court must permit such an issue and determine it.

If one considers the above matters and the initial orders made by the district Judge the proper procedure would have been for the party concerned to move court by way of leave to appeal at an earlier stage of the District Court case. In any event such failure to move for leave to appeal/revision cannot offend Appellant's right of Appeal. Nor would the Appellant be prevented from testing it's legality in the final appeal. Fernando vs. Fernando (1920) 8 CWR 43 ...

It is a well established rule that even if an interlocutory appeal is not taken against an incidental decision, its legality can be canvassed in a final appeal.

Dicta in Fernando's case followed in C.A L.A 152/2003 & D.C Colombo 19894/L (Ganesh Rasakulasuriar Vs. Earl's Court) Pvt. Ltd. Minute of 14.01.2004.

On perusing the judgment I find at folios 84 & 85 of same that once again the Trial Judge considers document 'x', and state about cheque P1 that no explanation had been given by the Defendant-Appellant as to how the cheque in question which the account holder was his brother came to be handed over to the Plaintiff. This is not a sound view to be expressed in circumstances where there is a total denial of any transaction by the Defendant-Appellant. Trial Judge has referred to the aspect of duress relating to document 'x' and observes that duress aspect has not been explained by the Defendant in his answer and not suggested in cross examination of Plaintiff or in the evidence in chief of Defendant. Usually Appellate Court need not interfere in factual matters, but in this instance I see no cogent reason for the Trial Judge to consider document 'x' and the above material as one cannot conclude that based on document 'x' which was not pleaded by Plaintiff or properly led in evidence could be considered to arrive at conclusions unfavourable to Defendant-Appellant. Merely because the Plaintiff though it fit to introduce a document not referred to in

his pleadings and without proper notice to the opposing party, court should be more cautious not to act upon same and arrive at conclusions. Court should only rely on documents properly led in evidence or admitted at the trial.

I am mindful of the fact that court exercising Appellate powers ought to be slow to interfere with the discretion of the original court on facts. In this instance I am compelled to interfere with the conclusions arrived at by the Trial Judge as it is apparent to this court of patent and or obvious errors are committed by the Trial Court Judge.

The other glaring error is the reference made to the letter of demand by the Trial Judge. In the case in hand no letter of demand was produced by way of evidence, but in evidence reference had been made to the receipt of the letter of demand and Defendant's failure to reply or deny. Why was the letter of demand not produced in evidence with at least notice to the other party as required by the Evidence Ordinance? In the absence of the letter of demand itself being produced at the trial, there is no clue as to the nature of the transaction between the parties. What was the real agreement between the Plaintiff and Defendant? How can court come to a conclusion that this was a commercial or a business transaction. In England

and Sri Lanka no doubt view has been expressed that in business maters in certain circumstances, the failure to reply to a letter amount an admission made therein. Vide Weideman vs. Walpola (1891) 2 QB 534; Saravanamuthu vs. De Mel 49 N.L.R 529. This principal cannot be applied or extended to the facts of the case in hand, in the absence of evidence to explain the transaction and on failure to produce the letter of demand.

Apart from above I find that the learned District Judge has considered the following irrelevant matters.

(a) Transaction for Rs. 15,000/= in letter P2 – How can one conclude this transaction to be extend to the case in hand, which is alleged to be a cheque transaction.

(b) Transactions of Plaintiff's husband with Defendant. On this alone can one conclude that Defendant was well known to Plaintiff and alleged about the very unclear required proof suggested in issue No. 1 raised in this case.

(c) Defendant's ancestral house being mortgage for Rs. 60,000/= by Defendant's mother to Plaintiff's husband.- The nexus between Plaintiff and Defendant cannot be inferred merely because of relationship.

When I consider the totality of the judgment and the very brief evidence led at the trial which does not suggest or demonstrate the agreement parties had with each other, and absence of material to support and prove acceptable valuable consideration in a contract, I am of the view that the District Judge was in error and had been misdirected in both fact and in law. What was actually given or accepted in return for a promise? What is

the right, interest, profit or benefit that accrued to one party and what was the loss or responsibility suffered by the other party? There is absolutely no material to suggest any of the ingredients mentioned above. It is no answer to merely state that this is an action based on a cheque. If that be so the available procedure under Chapter 53 of the Civil Procedure Code should have been followed.

In all the above circumstances I set aside the judgment of the District Court and allow this appeal with costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL