

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

Kirihamige Ratnayake
1st Defendant-Appellant

Vs

CA 798/96(F)
DC Colombo 40554/MHP

Mercantile Credit Ltd.

Plaintiff-Respondent

Before : Sisira de Abrew J &
KT Chitrasiri J

Counsel : Dr. Sunil Cooray with Sudarshani Cooray
for the 1st Defendant-Appellant.
Prabath Semasinghe with Deepika Ratnayake
for the Plaintiff-Respondent

Argued on : 31.1.2011

Decided on : 23.3.2011

Sisira de Abrew J.

The 1st defendant appellant entered into a hire purchase agreement (P4) with the plaintiff respondent and purchased vehicle No.41 Sri 4864 with financial assistance given by the plaintiff respondent. After making several installments the 1st defendant appellant failed to pay balance amount by way of installments as agreed in the said agreement. The plaintiff respondent after terminating the hire purchase agreement by letter dated 3.6.87 marked P9 filed action to recover the balance amount due on the agreement. The learned trial Judge by her judgment dated 4.11.96 held in

favour of the plaintiff respondent. Being aggrieved by the said judgment the 1st defendant appellant has appealed to this Court.

One of the points urged by learned counsel for the appellants is the frustration of contract. She submitted that the 1st defendant could not do business as expected with the vehicle due to terrorist activities in the area. The 1st defendant in his evidence stated that after 1986 he could not use the vehicle due to terrorist activities and that on a certain day terrorists by using force took his vehicle. However on the following day he recovered the vehicle. It has to be noted here that he never requested the plaintiff respondent, the absolute owner of the vehicle to take back the vehicle as he could not do business with the vehicle. He had in fact given the vehicle to the Army on rent. There is no evidence either from the Superintendent of Police of the area or from the Commanding Officer of the Army camp of the area that the people in Kabathigollawa area where the 1st defendant lived could not do their day to day work due to terrorist activities. In these circumstances it is not possible for the 1st defendant to plead frustration of the contract. I therefore reject the above contention of learned counsel for the appellant.

Learned counsel for the appellant next contended that the plaintiff's case should fail on the ground of jurisdiction. She submitted that contract P4 was entered into in Kandy but not in Colombo. She therefore contended that District Court of Colombo did not have jurisdiction to hear this case. She submitted that all payments including the 1st payment on 1.8.86 were made in Kandy. She therefore submitted that contract P4 was entered into in Kandy. She further submitted that learned trial Judge had

failed to take into consideration the receipts marked V1 to V13 issued by Kandy branch regarding payments made by the appellant. Although payments were made in Kandy one cannot forget the letter (P5) issued by the 1st defendant on 1.8.1986 addressed to the plaintiff. The said letter (P5) was addressed to 'Mercantile Credit Ltd., 51-55 Janadhipathi Mawatha, Colombo'. The learned trial judge concluded that contract P4 was entered into in Colombo. When I consider the evidence led at the trial, I hold the view that there is no reason to interfere with the said conclusion of the learned trial judge.

Under Section 9 of the Civil Procedure Code (CPC) the plaintiff is entitled to file action at the place where the cause of action arose. The cause of action in this case arose as a result of non payment of installments agreed upon in the contract marked P4. The question that must be considered is where the installments should be paid? According to clause 29 of the contract (P4), the installments should be paid at the plaintiff's office in Colombo. The 1st defendant failed to pay installments as agreed upon in P4. Thus the cause of action arose in Colombo. In this connection I would like to consider the judgment of Berterm ACJ in Dias Vs Constantine 20 NLR 338 wherein Supreme Court observed that: "Plaintiff, a resident of Galle, entered into an agreement with the defendant, who was residing and carrying on business at Kalutara, to supply goods at Kalutara.

There was no express agreement as to the place of payment. Plaintiff brought this action in the District Court of Galle for the value of goods supplied.

Held, that the Court had jurisdiction. Prima facie, in commercial transactions, when cash is to be paid by one person to another, that means

that he is to be paid at the place where the person who is to receive the money resides or carries on business.”

In Ponniah Vs Kanagasabai 35NLR 128, Macdonell CJ observed: “When a promissory note made by the defendant in favour of the plaintiff was silent as to the place of payment-

Held: that an action may be brought on the note in the Court within whose jurisdiction the plaintiff resided, as the debtor must seek out the creditor at his residence or place of business.”

In the instant case one must not forget that the contract between the parties was a commercial agreement which is governed by the English law. Under the English law in respect of commercial contracts the principle is that the debtor must seek out the creditor at his residence or place of business. This principle was observed in Ponniah’s case (supra) and Dias’s case (supra).

Considering the facts of this case and above legal literature, I hold that the cause of action in this case arose at the place of business of the plaintiff. I therefore hold that the district Court of Colombo had jurisdiction to hear and determine the case. I therefore reject the contention of learned counsel for the defendant appellants.

For the above reasons I hold that there is no merit in this appeal and dismiss it but without costs.

Appeal dismissed.

Judge of the Court of Appeal.

K.T.Chithrasiri J

I agree.

Judge of the Court of Appeal