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

M. Razeen Salih
No. 1017, Silom Road,
Bangkok, Thailand and
No. 5, Palmyrah Avenue,
Colombo 5.

**PLAINTIFF-APPELLANT**

C.A. 1135/93(F)
D.C Colombo 84831/M

Vs.

1. Chandra Ukwatta
No. 28, Ward Place,
Colombo 7.
Substituted as legal Representative
of the late U.K. Edmund

2. MacCallum Breweries (Ceylon) Ltd.,
No. 299, Union Place,
Colombo 2.

**DEFENDANTS-RESPONDENTS**

**BEFORE:** Sisira de Abrew J. &
Anil Gooneratne J.

**COUNSEL:** Romesh de Silva P.C with Sugath Caldera
for the Plaintiff-Appellant

Dr. Harsha Cabral P.C with Illangatilaka
For Defendant-Respondents

**ARGUED ON:** 10.12.2010

**DECIDED ON:** 22.02.2011

**GOONERATNE J.**

This was an action filed in the District Court of Colombo by a non-resident about 3 decades ago based on an agreement (marked 'A' annexed to the plaint) entered on or about 5th March 1975 for the sale of 27,500 ordinary shares in Ceylon Hotels Limited for a purchase price of Rs. 4,750,000/-. It is pleaded that the Plaintiff-Appellant was the registered holder of 27508 shares in Ceylon Hotels Limited. The facts relevant to the case is simply that the Plaintiff-Appellant having transferred the full 27,500 shares to the Defendants, only part payment was paid. The action in the District Court was to recover the balance due on the sale of shares being a sum of Rs. 1,999,200/-.

The Appeal before us is on the dismissal of the plaintiff's action by the District Court on 7.9.1993. In the answer filed by the Defendants, they deny liability to pay the said sum for the reason that permission which was required for the above sale of shares from the Controller of Exchange and permission was given subject to the condition that purchase price be reduced to Rs. 2,750,800/- which permitted price was paid by the Defendant.

The matter that needs to be decided in this appeal is whether Plaintiff- Appellant is entitled to the balance sum, and more particularly, the statutory provisions which empowers the Controller of Exchange to determine a purchase price for the sale of shares would be different to the price agreed upon by the parties to the action and whether statutory provisions do not extend to granting of permission to transfer shares involving payment of local currency not contravening provision of the Exchange Control Law. The admissions recorded at the trial indicates that there was no denial of agreement marked 'A' (P1) annexed to the plaint, the part payment (Rs. 2,750,800/-) as aforesaid and that transfer of shares to the 2nd Defendant as in paragraph 5 of plaint. In the petition of Appeal filed against the Judgment of the District Court, there is also reference to a letter dated 22.12.1980, (P1) the contents of which briefly are as follows:

(i) Minister has no objection for payment of the price agreed upon as long as no part of the price is remitted abroad.

(ii) The above decision conveyed to Deputy Governor of the Central Bank.

Parties proceeded to trial on 7 issues. Plaintiff has suggested only issue No.(1). I find that there is no consequential issue suggested on issue No.(1). It is the District Judge who should frame the issues in an acceptable manner. Issue No.(1) refer to balance payment based on agreement P1. Issue No. (2) raised by the Defendant's state that only an amount of

Rs. 27,50,800/- approved by the Controller of Exchange need to be paid. Issue No. 4 refer to the letter of 75.09.05 of the Controller (D1 ඉ1) which is final and conclusive. Issue No. (5) refer to the date in the above letter which is final and that Defendant acted upon same. Based on issues (4) & (5) issue No. (6) is suggested to the effect that Plaintiff is estopped in making any claim. Issue No. (7) is on prescription, which the learned District Judge did not wish to answer in view of his judgment and answers to other issues.

The agreement in question, transfer of shares and part payment by the Defendants are all matters not in issue. Exchange Control Act confers powers on the Central Bank and impose certain duties, which spread over on a variety of matters, which seeks to place restrictions in relation to gold, currency, payments, securities, debts and import, export etc. (as in the preamble). Central Bank is the sole authority under the Act to administer the provisions of the Act. Therefore one cannot conclude that the case in hand does not involve any foreign exchange transactions and be satisfied only in that respect. The provisions of the said act cannot be taken lightly especially when the transaction involves a non-resident. The interpretation section (54) of the said Act defines securities to include shares etc.

The burden of proof at the trial was on the Defendant and evidence of a Deputy Controller of Central Bank was led by Defendant. The

Defence-Witness has in his evidence stated that transaction of this nature involving shares by a non-resident were subject to Exchange Control Laws. This evidence and document D1 marked through the witness was un contradicted. D1 is an application made by Messrs Forbes and Walkers who were the brokers who sought approval from the Controller on behalf of the Plaintiff-Appellant. Examination of document D1 makes it clear. The reverse of D1 indicates that permission was granted for only a certain sum of money which was duly paid by Defendant-Respondents (D1A). As such Plaintiff- Appellant cannot now take up the position that he was unaware of such an application (D1). Defendant's witness also state that he is unaware of any transaction based on document P1.

The evidence on D1 and D2 has been considered by the learned District Judge and he has given his mind to the above stated matters. Trial Court Judge in this regard has considered Section 45 & 46 of the said Act. Section 45 & 46 reads thus:

45. Every decision of the bank to grant or refuse any permission under this Act, or to revoke any permission which has been so granted, or to rescind, add to or vary any conditions or to extend or reduce any time limit to which the permission granted is subject, shall be communicated in writing by the bank to the person by whom application for the permission was made or, as the case may be, to whom the permission was granted.

46. A person in regard to whom the bank makes a decision under this Act may, if he is dissatisfied with that decision , make a written appeal against he decision to the Minister within ten day s after that decision is communicated to him.

Trial Judge also refer to the finality aspect of the decision of the Central Bank. Section 47 enacts finality of decision by the Bank. It is also apparent that there was no appeal from document D1 within the stipulated period of 10 days. As such I am unable to disagree with the views of the District Judge on the above stated matters.

Unlike applications for Judicial review by way of a prerogative writ, the ouster clause as contained above in Section 47 of the Act cannot be ignored. In an writ application one could challenge the ouster clause on the basis that order is 'ex facie' outside the powers of the authority or on a breach of natural justice. This being an appeal Trial Judge's views on finality clause need not be disturbed. The position of the framers of the Exchange Control Act which could only bind the original court as stated by Justice Wanasundara in Abeywickrema Vs. Pathirana 1986 (1) SLR at a82 .. was that the public service must be made the exclusive domain of the Executive without interference from courts. This remark was made by Justice Wanasundara only to explain the attitude of the legislature which of course does not bind the Appellate Courts.

On a perusal of the proceedings, Plaintiff's 1st witness was not able to identify his signature in document P1 relied upon heavily by Plaintiff. The file maintained relating to document P1 was not produced as same was not available. It was the 2nd witness for Plaintiff who identified the signature in P1. However the circumstances as to how P1 emerged was not in evidence since the relevant file was not available.

The learned District Judge takes the view that no appeal was made to the Minister within the 10 day stipulated period. He further state that P1 refer to a discussion and it was not an appeal as required by the Statute. Judge refers to the dates in D1 & P1 and refer to lapse of long period.

The learned District Judge's following observations of letter P1 are relevant.

අවසර දී ඇත්තේ 1975 මැයි 12 වෙනි දිනය. නමුත් 1980 දෙසැම්බර් 22 වෙනි දින හෝ 1980 අප්‍රල් 16 වෙනි දින හෝ ගත් විටක එය දින 10 කාලයක් නොව අවුරුදු ගණනාවක කාලයක් ගත වී ඇති අවස්ථාවක් හැටියට ඉතාමත් පැහැදිලිව පෙනී යයි. මේ ලිපියට අනුව පැමැණිලිකරු උත්සහ කරන්නේ ඇමති වරයාට අභියාචනයක් කිරීමේ මුවාවෙන් සහ එක් කොන්දේසියක් මත ඇමති වරයා ට මුදල් ගෙවීමට එකඟ වීමෙන් තමන්ගේ 46 වෙනි වගන්තියේ අවශ්‍යතාවයන් ඔප්පු කර ඇතැයි පෙන්වීමටය. කිසියම් අවස්ථාවක ඇමතිවරයාට

තම අභිමතය පරිදි කටයුතු කල හැකි යැයි මෙම පනතින් විධිවිධාන සලස්වා නැත.

I have considered the judgment of the Original Court, especially the Trial Judge's views on document P1. The following points need to be expressed on the said document.

(a) The reference made to letter of 16.4.1980 in P1 not produced before the original Court. There is no clue on same.

(b) File relevant to issue of P1 not made available or evidence based on it not adduced. As such no evidence transpired on same at least to understand the circumstance on which P1 emerged other than a discussion. An official witness need to give evidence based on departmental files. It was not done.

(c) Authority of Minister concerned is in doubt to issue P1. No material placed to indicate any statutory provisions based on P1.

(d) Long time lapse between D1 and P1 (5 years)

We have considered the case of both parties and the Written Submissions. It is too late to advert to the fact that an admission was not recorded of non-residence of Plaintiff-Appellant. This fact was never urged in the Original Court and it is somewhat misleading when one looks at the entirety of the plaint especially paragraph 4 and agreement marked 'A' with the plaint. Vide terms/condition 2 of agreement 'A' state payment to be paid in Sri Lankan rupees to the credit of a non-resident block account. A party cannot approbate and reprobate the same transaction.

20 N.L.R. at 124...

> 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."

The evidence of Plaintiff-Appellant was very brief other than a long line of questions to prove signature in P1 and comparison of P1 with P2 & P3, to identify signature. In contrast Defendant's evidence was on point to establish issue Nos. (2) – (6) and as such version of the Defendant-Respondents becomes more probable. In fact the defence version was supported by statutory provisions, namely Exchange Control Act. Plaintiff-Appellant does not rely on any statutory provisions but only argue that the above statute has no application to the facts of this case. I am unable to agree with the Plaintiff-Appellant on that argument.

The Exchange Control Act was enacted not only to control payment of money out side Sri Lanka. This is a wrong notion. Act includes several parts and considers a variety of restrictions. Part II relate to payments Section 7 reads thus:

Except with the permission of the bank no person shall in Sri Lanka –

(a) make any payment to or for the credit of a person resident outside Sri Lanka, or

(b) make any payment to or for the credit of a person resident in Sri Lanka by order or on behalf of a person resident outside Sri Lanka, or

(c) place or hold any sum to the credit of any person resident outside Sri Lanka.

Provided that where a person resident outside Sri Lanka has paid a sum in or towards the satisfaction of a debt due from him, paragraph (c) of this section shall not prohibit the acknowledgement or recording of the payment.

District Judge very correctly understood the contents of letter P1 and it's validity in law. Permission of Exchange Controller was always essential for the transaction concerned. In the Written Submission of Appellant it is suggested of an inquiry for which he was not a party, held by the Exchange Controller. We are not in a position to accept such a submission in the absence of an iota of evidence in this regard by the Plaintiff-Appellant in the Original Court. The several lapses of the Appellant cannot be cured by making allegations in this way without a base, and from the point of issuance of document D1 to the Brokers, one cannot plead ignorance of an inquiry. In the absence of an appeal or challenge to document D1 at the proper stage as required by law, the Plaintiff-Appellant's argument as contained in the Written Submissions would fail.

I am in agreement with the following submissions of the Defendant Respondent.

(a) Section 7 of the said Act makes no distinction as regards monies paid out side or inside Sri Lanka if the person concerned is a non resident. Permission of the Controller of Exchange is essential
(b) Further payment or balance payment would be illegal.
(c) Failure to appeal under section 46 of the Act makes the decision final under Section 47 of the Act.
(d) P1 indicates only a discussion which also confirm a delay of more than 4 years and 7 months from issuance of D1
(e) Defendant's above conduct results in estoppel accruing for the benefit of the Defendants and thus prevents Plaintiff-Appellant suing for the balance sum.

When we consider the entirety of this case there are two principles of law that cannot be easily ignored i.e illegality and estoppel. Further performance of the contract disregarding Exchange Control Act amounts to illegality. I would refer to the following authorities to demonstrate illegality.

"The illegality of a Contract would ordinarily result in its voidance. It would more over attract an age old principle – in pari delictioo potior est conditio defenentis by virtue of which a party to an illegal contract is denied the assistance of a court of law...."

- Justice C. G Weeramantry – The Law of Contracts – General Principles.

The same sentiment was solidly laid down, by Lord Wilmot CJ in Collins v Blantern, "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community. It is void by common law, and the reason why the common law says such contracts are void, is for the public good: You shall not stipulate for

> iniquity. All writers upon our law Ex agree in this, that no polluted hand, shall touch the pure fountain of Justice. Whoever is a party to an unlawful contract, if he has once paid the money, stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again, you shall not have the right of action when you come in to a Court of Justice in this unclean manner to recover it back. Procul O! Procul esse profane".
>
> Per Lord Wilmot CJ in Collins v Blantern (1767)

The Plaintiff-Appellant's failure to Appeal from the decision contained in document D1, which attracts finality to such decision would give rise to the doctrine of estoppel. Plaintiff-Appellant subsequent to issue of D1 never took any steps in terms of the statute. He cannot rely on document P1 (after a lapse of 5 years from D1) for relief.

> An estoppel will arise where the person who makes the representation so conduct himself that a reasonable man would take the representation to be true and believe that it was intended to be acted upon. 16 N.L.R. at 125; 25 N.L.R. at 206. To establish an estoppel it must be proved that the action taken by the party seeking to establish the estoppel was directly connected with the false impression caused by the representation or conduct of the party sought to the estopped. The representation or the conduct must be, in effect, an invitation to the party affected by it to do a particular act. But it need not be proved that the party sought to be estopped knew the truth about the facts which he by his statement or his conduct misrepresented. 21 NLR 360.

In all the above circumstances we dismiss the Appeal, without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Sisira de Abrew J.

I agree.

JUDGE OF THE COURT OF APPEAL