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

S.D.M.Farook
Mayadevi Industries
No.609. Peradeniya Road
Kandy.
1st Defendant-Appellant

C.A. NO.44/98(F)
D.C.COLOMBO CASE NO.41365/MHP

G.Kodituwakku Arachchi
No.615, Peradeniya Road
Kandy.
2nd Defendant-Appellant

Vs

L.B.Finance Ltd.
No.275/75, Prof.Stanley Wijesundera Mawatha
Colombo. 07.
Plaintiff- Respondent.

M.M.Nazi
No.345/23, Kuruppu Lane
Colombo.08
3rd Defendant-Respondent

BEFORE : **K. T. CHITRASIRI, J**

COUNSEL : Dulani Warawewa, Attorney-at-Law for the 1st defendant-Appellant

B.O.P.Jayawardene, Attorney-at-Law for the 2nd defendant-Appellant

Athula Perera instructed by Harshani Mapatuna, Attorneys-at-Law for the Plaintiff-Respondent

ARGUED ON : **15.03.2013**

WRITTEN SUBMISSIONS FILED ON : 01st April 2013 by the Plaintiff-Respondent

DECIDED ON : **10. 06. 2013**

CHITRASIRI, J.

Two appeals have been filed by the 1st defendant-appellant (hereinafter referred to as the 1st defendant) and the 2nd defendant-appellant (hereinafter referred to as the 2nd defendant) seeking to set aside the judgment dated 03.12.1997 of the learned District Judge of Colombo. In those two appeals the appellants have also moved that the plaintiff's action filed in the District Court be dismissed. Both appeals were taken up for argument together and the Court then heard the two Counsel appearing for the two appellants as well as the Counsel for the respondent in support of their respective cases.

The decision of the learned District Judge is for the plaintiff-respondent (hereinafter referred to as the plaintiff) to obtain the reliefs sought in his plaint from the 1st and the 2nd defendants. The case against the 3rd defendant-respondent was not taken up for trial as the summons was not served on him.

The plaint of the plaintiff is on the basis of the two agreements entered into on 18.3.1988. These two agreements had been marked as **P3** and **P3A** in evidence. Learned District Judge basically relying upon the terms and conditions of those agreements had concluded that the 1st and the 2nd defendants are liable to pay the

amounts calculated in accordance with the manner referred to in the prayer to the plaint.

When the matter was taken up for hearing before this Court, Counsel for the 1st defendant restricted his argument to the defence that the 1st defendant has taken up at the trial whilst the 2nd defendant's Counsel confined his case to the fact that the terms and conditions referred to in the agreement marked **P3A** was not read over and explained to the 2nd defendant at the time he placed his signature on the said document. The defence of the 1st defendant was that the vehicle bearing No.50 Sri.6915 which is the subject matter of the agreement put in suit was forcibly taken away by terrorists in the month of March 1989 and thereby he was prevented from using the said vehicle. In accordance with the aforesaid submissions of the Counsel appearing for the two appellants, this Court decided to consider only those issues and therefore the matters raised in the petition of appeal other than the aforesaid two matters stand not pursued.

As mentioned hereinbefore, Counsel for the 1st defendant contended that the subject matter namely the vehicle 50 Sri 6915 was forcibly taken away by terrorist and therefore the contract put in suit has been frustrated. He therefore argued that the plaintiff cannot in law recover damages for the breach of the terms and conditions contained in the said contract marked P3. At the trial in the District Court, an issue has been raised to this effect on behalf of the 1st defendant. (Issue No.30) The 1st defendant, in his evidence has stated that the said vehicle was forcibly taken away when it reached Mankulam having ordered the passengers including the 1st defendant to get

off from the van. (Vide proceedings at page 139 in the brief). He has further stated that the driver of the vehicle had then complained to Chavakachcheri Police of the incident. According to the 1st defendant, he could not trace the vehicle since then. He has further stated that the incident was informed to the plaintiff company and the letter by which it was communicated to the plaintiff was marked as **1V2.** (Vide proceedings at page 140 of the brief and the said document marked **1D2** is found at page 263 of the brief) Those are the circumstances, under which the 1st defendant took up the defence of frustration of the contract (P3) upon which the claim of the plaintiff was rested upon.

At this stage, it is necessary to note that, even though the 1st defendant in his evidence has stated that he has informed of the alleged incident to the plaintiff company by letter marked **1D2,** the witness for the plaintiff company has denied receiving such a letter. No evidence is forthcoming as to the mode of delivery of the said letter as well. Therefore, it is seen that the evidence as to the informing of the incident to the plaintiff company by letter marked **1D2** does not carry much weight. Furthermore, if such a letter had been sent, then it is the burden of the 1st defendant to establish that it was sent to the plaintiff company since such a fact is within the knowledge of the 1st defendant. (Section 106 of the Evidence Ordinance) Even assuming that the letter marked **1D2** had been sent by the first defendant to the plaintiff, nothing is found in that letter as to the date on which the vehicle was taken away by terrorists. Therefore, it is not incorrect to decide that no such letter was sent to the plaintiff company informing the plaintiff of any incident taken place in the month of March 1989 in relation to the vehicle 50 Sri 6915 leased out to the 1st defendant.

In his evidence, the 1st defendant has stated that the vehicle was taken away in Mankulam. He has also stated that a complaint had been made to this effect to Chavakachcheri Police Station. However, the 1st defendant has failed to produce a copy of the complaint made to Chavakachcheri police at the trial held in the original court. Moreover, a person has to travel more than 80 k.m. in order to arrive at Chavakachcheri from Mankulam. Then a question arises as to the reason why such a distance had been travelled passing several police stations to make a complaint of such a grave incident of a robbery of a vehicle. No explanation is found on this point. In the circumstances, it is clear that the decision of the learned District Judge to reject the evidence led on behalf of the 1st defendant as to the taking away of the vehicle is not incorrect.

In this regard, it is important to quote from the Law of Contract by Professor C.G. Weeramantry on the question of frustration of contracts. In his Book, he has stated thus:

> *" Where one party and not the other, foresees the event which is said to have frustrated the contract, that party is not entitled to plead frustration. The position in regard to this aspect of the doctrine is clear and has been authoritively laid down in Walton Harvey Ltd. v. Walker & Homfrays Ltd." (1951) 2 KGB at 965)*
> [The Law of Contract Vol. II, at page 794]

I will now consider the law referred to above with that of the facts of this case. The 1st defendant has stated that the alleged incident has taken place in the month of March 1989. It was a period in which terrorist activities were in place to a great extent in the Northern area of the country. Under those circumstances, the 1st defendant certainly would have foreseen incidents of this nature when he sent the vehicle to the

North of the country. It is more so due to the reason of large number of vehicle robberies reported during this period not only in the North but also in the other areas of the country. Such matters were in the common knowledge amongst the people of the country. Therefore, even assuming that the facts pertaining to the defence of the 1st defendant are correct, the Law will not permit him to have the cover of the defence of frustration in this instance. In the circumstances, I am not inclined to agree with the contention of the learned Counsel for the 1st defendant as to the defence of frustration of the contract marked P3.

The contention of the Counsel for the 2nd defendant is that the terms and conditions contained in the Guaranteed Bond marked **P3A** was not read over and explained to the 2nd defendant when he signed the guarantee bond marked P3A. In this connection, it is important to quote the relevant evidence of the 2nd defendant in this regard.

,ප්‍ර : තමන් මොකටද අත්සන් කලේ ?

උ : පාරුක් මුදලාලිට වාහනයක් ගන්න ඕනෑ නිසා එයට මුදල් ගන්න ඕනෑ නිසා **මම ඇපකරුවෙක් ලෙස අත්සන් කලා .**

ප්‍ර : **ඇපකරුවෙක් ලෙෂ කරන්න ඕනෑ මොනවාද කියලා තේරුනාද ?**

උ : **ඔව්.**

මම සාමාන්‍යයෙන් දැන සිටියා මුදල් ගත්ත කෙනා පාරුක් මුදලාලි සල්ලි අරගෙන ඉවර වෙලා නොගෙව්වොත් යම්කිසි අවස්ථාවකදී ඔහුගේ දේපල තිබෙනවා කිව්වා, ගෙව්වේ නැත්නම් දේපල විකුණා ගන්නවා, ඉතිරී සල්ලි මම ගෙවන්න ඕනෑ කියලා මට තේරුණා. "

The aforesaid evidence of the 2nd defendant clearly shows that he was well aware of the terms and conditions contained in the Guaranteed Bond marked **P3A** when he signed the guarantee bond. In that agreement, he has consented to be a guarantor to the facilities obtained by the 1st defendant having understood the terms and conditions found therein. The said evidence had not been controverted. Therefore, it is correct when the learned District Judge decided to reject the defence of not explaining the terms and conditions of the Guaranteed Bond **P3A** to the 2nd defendant.

At this stage, it is also necessary to note that these two appeals were argued basically to challenge the manner in which the learned District Judge had considered the evidence in relation to the facts of the case. No particular question of law has been raised. Therefore, Trial Judge being the best person to arrive at a decision as to the facts of the case having seen even the demeanor of the witnesses, this Court is reluctant to interfere with the findings of the leaned District Judge. This proposition in law had been upheld in many decisions including that of:

- **De Silva vs. Seneviratne (1981) (2) SLR at page 8.**
- **Frad vs. Brown & Co. 20 NLR at page 282**
- **Alwis vs. Piyasena Fernando (1993) (1) SLR at page 119.**

In the decision mentioned last, G.P.S.de.Silva, J (as he then was) has held thus:

"It is well established that findings of primary facts by a Trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal"

For the aforesaid reasons, it is clear that both the facts of the case and the law relevant thereto do not support the applications of the two appellants. Therefore, I am not inclined to interfere with the findings of the Learned District Judge.

Accordingly, the two appeals are dismissed with costs.

Appeals dismissed.

JUDGE OF THE COURT OF APPEAL