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

Ceylinco Profit Sharing Investment
Corporation Limited
No. 153/1/1, Dharmapala Mawatha,
Colombo 7.

PLAINTIFF

C.A 179/2013 (Revision)
CHC Case No. 187/10/MR

Vs.

1. Serandib Clothing Lanka (Pvt.) Ltd.,
   No. 52B, "Dutugemunu Mawatha",
   Kalubowila, Dehiwela.

2. M. L. A. M. Hizbullah
   Telecom Road,
   Kaththankudi - 01.

DEFENDANTS

AND NOW BETWEEN

M. L. A. M. Hizbullah
Telecom Road,
Kaththankudi - 01.

2ND DEFENDANT-PETITIONER

Vs.

1. Ceylinco Profit Sharing Investment
   Corporation Limited
   No. 153/1/1, Dharmapala Mawatha,
   Colombo 7.

PLAINTIFF-RESPONDENT

2. Serandib Clothing Lanka (Pvt.) Ltd.,
   No. 52B, "Dutugemunu Mawatha",
   Kalubowila, Dehiwela.

1ST DEFENDANT-RESPONDENT

Ceylinco Profit Sharing Investment
Corporation Limited
No. 153/1/1, Dharmapala Mawatha,
Colombo 7.

PLAINTIFF

Vs.

C.A. 180/2013 (Revision)
CHC Case No. 188/10/MR

1. Serandib Clothing Lanka (Pvt.) Ltd.,
   No. 3A, Vihara Mawatha,
   Meetotamulla, Wallampitiya.

2. M. L. A. M. Hizbullah
   Telecom Road,
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DEFENDANTS

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2ND DEFENDANT-PETITIONER

Vs.

1. Ceylinco Profit Sharing Investment Corporation Limited
No. 153/1/1, Dharmapala Mawatha,
Colombo 7.

PLAINTIFF-RESPONDENT

2. Serandib Clothing Lanka (Pvt.) Ltd.,
No. 3A, Vihara Mawatha,
Meetotamulla, Wallampitiya.

1ST DEFENDANT-RESPONDNET

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: Chrismal Warnasuriya, Dushantha Kularatne and Sonali Wanigabaduge for the Petitioner

SUPPORTED ON: 01.07.2013

DECIDED ON: 03.07.2013

GOONERATNE J.

We have heard learned counsel for the Petitioner in these Revision Applications. The 2nd Defendant-Petitioner seeks to revise the Order of the learned High Court Judge dated 26.4.2013 marked and produced as X13 filed along with the Petition dated 21.6.2013 of the Petitioner.

This court observes that the certified copy of the High Court record as stated in the petition has not been made available to court. In a Revision Application of this nature it is essential to produce the entire record of the case as it may become necessary to peruse both the Journal Entries and the proceedings of the Original Court to enable the Appellate Court to satisfy itself as to the legality and propriety of the Order of the High Court. As such the excuse made by the Petitioner is highly unacceptable and at the very outset this court observes that the Petitioner is in breach of the Appellate Court Procedure Rules. (Rule 46).

Nevertheless the main ground urged in this application is as regards the preliminary issues raised (issue Nos. 15 to 18) on behalf of the 2nd Defendant-Petitioner who attempted to demonstrate that in the trial court the learned Trial Judge erred by rejecting his application to try them as preliminary issues. By the

Order of the learned High Court Judge he has very specifically held that the above issues cannot be tried as preliminary issues and that same need to be answered after a proper trial and hearing of all evidence.

The grounds on which revision of the impugned Order is sought are embodied in paragraph 13 of the Petition, and more particularly sub paragraph F of paragraph 13. The learned High Court Judge has expressed his views very carefully on the suggested preliminary issues. We will consider same before expressing our views on the other matters adverted to this court.

The trial Judge very correctly has given his mind to the provisions contained in Section 147 of the Civil Procedure Code and had discussed in his Order as to when and the circumstances in which a court need to proceed to hear a case as in Section 147 of the Civil Procedure Code. The trial Judge has very correctly and carefully stated, having given several instances and as demonstrated in the Order that when mix questions of fact and law are apparent trial should proceed and court should arrive at a conclusion upon hearing evidence of parties.

We find that the trial Judge has discussed each and every issue (Nos. 15 – 18) and given cogent reasons to reject the application of the Petitioner to try them as preliminary issues. Entirety of the plaint has been considered by the

learned High Court Judge and had discussed the transaction between parties that had been initiated in the facility called 'Muraba' under the Islamic faith and law. In order to prove such a transaction all details need to be elicited by way of evidence, which cannot be dealt as a preliminary issue. In the impugned order it is stated that the several causes of actions are embodied in the plaint and all what is pleaded would be essential and as held by the trial Judge it is not unnecessarily prolix.

We find that the trial Judge in his Order at pgs 7, 8, 9 & 10 dealt with all aspects of the transactions and the case and given cogent reasons not to accept issue No 15 in its entirety as a preliminary issue. This court is possessed of all those points dealt by the trial Judge and we see no basis to interfere with same. As regards issue Nos. 16, 17 & 18 the reasons are contained in the rest of the impugned order.

In order to obtain the relief prayed for in the plaint the agreement or the transaction between parties and its factual position, disbursement of funds, acceptance of same, default etc. are matters of evidence. The admission recorded in the case in hand cannot be the source to be used as a media on which

oral/documentary evidence could be shut out. Unless evidence is led the trial court would not be in a position to arrive at a correct decision.

The investment proposal discussed in the plaint and the documents annexed to the plaint marked P2, P9, P14, P18 & P23 are not admitted. The Defendant's documents and P13 would not be the only items of evidence to decide whether an agreement is established. All this has to be decided on evidence. On a plain reading of the pleadings alone would not suffice to decide on question of prescription, and the question of written or implied agreement. The other question whether necessary parties are before court cannot in the context of the case be decided only on a perusal of the pleadings. On a plain reading of the plaint it appears that there is no necessity to bring another party to the suit and in the absence of such party being in the case action should not be rejected in the manner suggested by the Petitioner. I would in this order incorporate that portion of the impugned order of the trial Judge which gives the impression to this court that the trial Judge has very carefully and correctly gone into those issues.

කෙසේ වෙතත් පැමිණිල්ල පහසුකම් සැපයීම 1 වෙනි විත්තිය වෙත බවත්, ඇපවීම හා හානි පූර්ණ 2 විත්තිය වෙතින් බවට කියාපාන බැවින් පැමිණිල්ලේ ස්වරූපය අනුව

තවත් පාර්ශවයක අවශ්‍යතාවක් නොපෙනේ. 1 විත්තියේ නෛතික පැවැත්ම ඉහත කී ලෙස මේ වන විට අහෝසි වී ඇත්නම් 1 විත්තිය අධිකරණය ඉදිරියේ නොමැතිවීම නඩුව ගෙන යෑමට බාධාවක් ලෙස සැලකිය නොහැක. 2 විත්තිය ලබා දී ඇති පැ 5, පැ 12, පැ 17, පැ 21, පැ 26, යන උද්දේශිත ඇපකර හා හානිපුරණ පොරොන්දු වල සිත්ති රම්සියා සහබිදීන් යන 1 විත්තිකාර සමාගමේ අධ්‍යක්ෂක ගැන සඳහන් වූ පමණින් ඇ ගැනද රෙකමදාරුවක් කර තිබූ පමණින් ඈ වෙත පහසුකම් සැපයූ බවක් පැමිණිල්ලේ කියා නැත. ඒ අනුව ඇය පාර්ශවයක් කිරීම සඳහා අවශ්‍යතාවයක් මේ අවස්ථාවේදී පැමිණිල්ල තුලින්ම නොපෙනේ. වෙනත් කරුණු වේ නම් ඒ සක්ෂි තුලින් මතු විය යුතු වේ.

Issue Nos. 16 to 18 cannot be decided in the absence of evidence. On the other hand the trial Judge observes that the ousting legal personality of the 1st Defendant should not be a bar to proceed with this action. That view need to be respected and the Defendant cannot be permitted to take any undue advantage on that alone.

Even in the absence of the original case record such a view expressed by the trial Judge cannot be faulted. If the court has been made aware of the legal status and the absence of the 1st Defendant i.e summons could not be served and based on the fiscal report the Plaintiff cannot be, in the interest of Justice, denied proceeding further with the suit in hand against the other Defendant. The trial

Court is entitled to assess the version for 1st Defendant's absence and communication referred to as in paragraph 13e of the Petition cannot be ignored by court. There is no violation of the Rules of natural Justice if one really is aware of the basics of the Rules natural Justice. I reject the position taken up by the Petitioner on this aspect which is only a mere assertion, which cannot prejudice the case of the 2nd Defendant. Further the 2nd Defendant has played a major role, in this transaction. Documents P5, P12, P17 & P26 are not admitted. As such evidence need to be led. The contract of guarantee could be proved in various ways. Trial Judge has referred to the case of 'Ratnam' 17 NLR 230. We are possessed of the views expressed therein.

The 2nd Defendant's default of payment under a guarantee and or his evasive conduct also need to be established by evidence. On this aspect issue No. 18 would be another important issue and the absence of the 1st Defendant cannot prejudice the case of the 2nd Defendant since the trial Court has to arrive at a proper conclusion based on all material to answer issue No. 18. Trial Judge would have to consider the absence of the 1st Defendant and decide on mix question of fact and law to answer this issue.

If a case is to be disposed of on a preliminary issue it should be pure question of law which goes to the root of the case. "Judges of Original Couert should, as far as practicable, go through the entire trial and answer all issues unless they are certain that on a pure question of law would suffice to conclude the case. Muthukrishnan Vs.Gomez 1994 (3) SLR 01.

If issues of law arises in relation to a fact or factual position in regard to which parties are at variance that issue ought not to be tried as a preliminary issue. Question as to how or in what manner the issues have to be tried or dealt with is primarily a matter best left to the discretion of the Trial Judge. As such the Appellate Court ought to be cautious or slow to interfere in exercising revisionary powers. Pure Beverages Ltd. Vs. Shamil Fernando 1999 (3) SLR 202 Section 147 of the Code permits only issues of law to be tried first. If issues of law arises upon facts, those facts must be first ascertained either by way of admission or proving them at the trial. CALA 170/2003; D.C. Moratuwa 958/M.

We see no legal basis to grant any relief to the Petitioner in this type of application. This is no doubt a frivolous application filed merely to delay proceedings in the Original Court. So called exceptional circumstances referred to in the petition are not exceptional circumstances and would not go to the root of

the suit in the manner pleaded by the 2nd Defendant-Petitioner We have already dealt with the questions of 1st Defendant's absence in other two cases supported before this bench (CA 177 & 178) our views expressed therein would be relevant to these applications also. In any event we thank the learned counsel for the Petitioner is assisting this court with his views on the subject matter of this suit.

We are not inclined to grant any relief, and as such, issuance of notice is refused. Applications dismissed.

Notice refused and application dismissed, in both applications.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL