

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

M. J. A. Dias, Sole Proprietor of the  
Business carried under the name and  
style of S. J. Enterprises  
No. 86/5, Keyser Street,  
Colombo 11.

Plaintiff

C.A. No. 774 / 2000 F

**Vs.**

D.C. Colombo No. 9479 / MR

Air Lanka Limited,  
No. 14, Sir Baron Jayathilake Mawatha,  
Colombo 1.

Defendant

**AND NOW BETWEEN**

M. J. A. Dias, Sole Proprietor of the  
Business carried under the name and  
style of S. J. Enterprises  
No. 86/5, Keyser Street,  
Colombo 11.

Plaintiff Appellant

**Vs**

Air Lanka Limited,  
No. 14, Sir Baron Jayathilake Mawatha,  
Colombo 1.

Defendant Respondent

BEFORE : UPALY ABEYRATHNE, J.  
COUNSEL : Harsha Soza PC with Kamran Aziz for  
the Plaintiff Appellant  
Romesh De Silva PC with Sugath  
Caldera for the Defendant Respondent

ARGUED ON : 10.07.2013

DECIDED ON : 26.11.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted the said action against the Defendant Respondent (hereinafter referred to as the Respondent) in the District Court of Colombo seeking to recover a sum of Singapore \$ 42,500 or its equivalent in Sri Lanka Rupees at the current rate of the exchange prevailing at the date of judgment and a further sum of Rs. 88,200/- as damages together with the legal interest thereon.

The Respondent filed an answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. The case proceeded to trial on 13 issues. After trial the learned Additional District Judge has dismissed the Appellant's action. Being aggrieved by the said judgment dated 19.09.2000 the Appellant has appealed to this court.

At the trial the Appellant has led the evidence of the Appellant and Mohamed Thowfeek Ameer Farook and has produced the documents marked P 1 to P 23. The Respondent has closed his case without leading any evidence.

The Appellant's evidence was that a package containing 2500 wrist watches had arrived in Sri Lanka by flight No UT 567 and had been kept in the custody of the Respondent at its bonded warehouse upon its arrival. Said package had been shipped by Ryly Private Ltd. Singapore and the weight of the said package was 62 kg. Upon the completion of the delivery procedure of the said package the Respondent had sent the 'Freight Arrival Notice/Gate Pass' dated 08.05.1988 to the Appellant. In proof of the said facts the Appellant has produced the documents marked P 6 P 7 and P 8.

The learned counsel for the Respondent submitted that the Appellant could not have and maintain the action, in that;

- a. There was no evidence whatsoever that the package when handed over to UTA contained 2500 wrist watchers,
- b. There was not an iota of evidence that the package when arrived in Sri Lanka contained 2500 wrist watchers,
- c. In any event the package was consigned to the Indian Overseas Bank and not to the Appellant,
- d. In any event the package was handed over to the UTA and if damage is claimed it has to be claimed from the UTA,
- e. The person who had the contract with the UTA was the seller of the watchers and not the Appellant and thus the seller should have filed action.
- f. P 6, P 7 and P 8 which had been produced subject to proof have not been proved.

I now advert to the said submissions. P 6 was the Air Waybill bearing No 142-9172 9455. According to the said Air Waybill a package which weighed 62 kg has been sent to Colombo by Aerospeed Pte. Ltd by Flight No UT 567. With regard to the nature and quantity of goods contained in the said package the said Air Waybill has referred to a House Air Waybill No AS 001661 which has been produced marked P 7. According to P 7 nature and quantity of goods contained in the said package were 500 citizen watchers, 1000 QQ watchers and 1000 Casio watchers. The Indian Overseas Bank, Air Lanka Customs and Air Lanka Limited Cargo Trading have put their official seal upon P 7. The Respondent has admitted the endorsements made by Indian Overseas Bank on P 6, P 7, P 8 and P 9. P 8 has been sent by the Respondent. He has not denied the despatching of the said document. P 8 has been sent upon the receipt of the said package. It has referred to Air Waybill 142 9172 9455 (P 6). P 6 has referred to P 7. Hence P 6, P 7 and P 8 could be safely admitted as evidence of the case.

It is apparent from the endorsement made by the Indian Overseas Bank that the said package was to be delivered to S.J. Enterprises. It is also clear from the endorsement made by the Airlanka Limited Cargo Trading that they have located the said package. It is also apparent from the endorsement made by the Customs that they have given approval to release the consignment and to notify the party. Accordingly the Airlanka Limited has sent 'freight arrival notice/gate pass' (P 8) informing the Appellant to be present for delivery procedure. According to P 8 goods were related to Air Waybill No 142 9172 9455 which weighed 62 kg and flight No was UT 567. Air Lanka Customs has made an endorsement on P 8 to release cargo as per House Air Waybill No AS 001661 (P 7) which described the goods as 500 citizen watchers, 1000 QQ watchers and 1000 Casio watchers.

It was common ground that P 8 had been sent by the Respondent. The Respondent had admitted the endorsement made on P 6, P 7 and P 8 by the Indian Overseas Bank. According to the endorsement made by the Indian Overseas Bank on P 7 the goods contained therein was to be delivered to S.J. Enterprises (the Appellant). P 7 (House Air Waybill No AS 001661) has clearly described the goods contained in the said package. The Respondent in P 8 has not indicated any uncertainty about the goods contained in the said package. It also must be noted that the Respondent has not made any remark in P 8 with regard to any damage caused to the said package. Apart from that even at the trial the Respondent has not led any evidence to show that the said package was delivered broken. In the circumstances I am of the view that there was ample evidence that the package when arrived in Sri Lanka contained 500 citizen watchers, 1000 QQ watchers and 1000 Casio watchers as per House Air Waybill No AS 001661.

It is seen from P 8 that the Respondent has taken charge of the said package from UT 567 as per Air Waybill No 142 9172 9455 which weighed 62 kg and it has been kept in the Respondent's custody. Upon the receipt of P 8 the Appellant has taken necessary steps to get the said package released. But the Appellant has subsequently become aware that the said package has gone missing while it was in the Respondent's custody.

Thereafter the Respondent by letter dated 02.09.1998 has informed the Appellant that the package under the reference of Air Waybill No 142-9172-9455 which had arrived Sri Lanka by UTA 567/08.05.1998 was lying in Respondent's bond for clearance. Thereafter when the Appellant visited the bonded warehouse of the Respondent for clearance of the said package upon inspection he has observed that the package which was shown to him was a

package without logo and had been opened. He has further observed that it contained photocopying papers. The Respondent has not challenged the said evidence and also has not led any evidence to explain that how he identified such a package which was without logo as the package described in P 8. It was also seen from P 8 that there was no remarks made on P 8 to the effect that at the time of delivery the package had been kept opened.

Upon the aforesaid circumstances can the Respondent contend that the package was handed over to the UTA and if damage is claimed it has to be claimed from the UTA, and the person who had the contract with the UTA was the seller of the watchers and not the Appellant and thus the seller should have filed action? I am not inclining to agree with the said submissions of the Respondent. Lord Clarke in giving the judgment of the Supreme Court in *RTS flexible Systems Ltd vs. Molkerei Alois Muller GmbH & Co (UK Production)* [2010] UKSC 14; [2010] 1 WLR 753 when he stated that “Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.

Privy Council in *NZ Shipping Co Ltd vs. AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 in which the stevedores were held to be entitled to take the benefit of the exclusion clause contained in the contract between the consignors. The solution adopted by the Privy Council proceeded in the following stages. First they held that when the consignors signed the bill of lading they made

an offer to the entire world that anyone who unloaded their goods at the port of discharge would be entitled to the benefit of the exclusion clause. Secondly, they held that this offer was accepted by the stevedores unloading the goods at the port of discharge and at that moment a binding contract came in to existence. The consideration supplied by the stevedores was the performance of their contractual duty owed by the carriers. Performance of a contractual duty owed to a third party is a good consideration for a promise given by the claimant.

The Appellant has requested the Respondent to issue a certificate of non-delivery of the said package enabling them to make a claim under the insurance policy covering the said package. But the Respondent has turned down the request informing them to refer the claim to UTA French Airlines. In proof of these facts the Appellant has produced the documents marked P 12, P 13, P 14, P 15, P 16, P 17 and 18. In the light of the said evidence can the Respondent evade liability cast upon them over the said consignment which was under their custody after the delivery of it by UTA French Airlines?

When I consider the said evidence I am of the view that the correspondence exchanged between the Appellant and the Respondent were ample evidence that lead objectively to a conclusion that they intended to create legal relations and has agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Also the Respondent has unloaded the package in order to perform their contractual duty owed by the carriers. At that moment a binding contract has come in to existence between the Respondent and the Appellant. Hence the said circumstances negate the contention of the Respondent that there was no contract between the Appellant and the Respondent.

Therefore I hold that there was a binding contract between the Appellant and the Respondent and the Respondent has violated the said contract. Hence I set aside the judgement of the learned Additional District Judge dated 19.09.2000 and enter judgment as prayed for in the plaint. The appeal of the Appellant is allowed with costs.

*Appeal allowed.*



Judge of the Court of Appeal