IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Ceylon Petroleum Corporation
No.113, Galle Road
Colombo 03.

Plaintiff-Appellant

Vs.

H.M.Sugathadasa
No.85, New Town
Kataragama

Defendant-Respondent

C.A. NO.1114/98 (F)
D.C.HAMBANTOTA
CASE NO.1669/M

BEFORE	:	**K.T.CHITRASIRI, J.** **W.M.M.MALINIE GUNARATNE,J.**
COUNSEL	:	Arjuna Obeysekera, DSG for the Plaintiff-Appellant Gamini Marapane, P.C. with Navin Marapane and U.Wickremasinghe for the Defendant-Respondent
ARGUED ON	:	22.07.2014
SUBMISSIONS	:	Not filed
DECIDED ON	:	05TH SEPTEMBER 2014

CHITRASIRI, J.

Plaintiff-Appellant in its plaint dated 29.03.1988, having disclosed seven causes of action alleged to have arisen for the supply of petroleum products to the defendant, has prayed that a decree be entered to recover a sum of Rs.264,090.49 from the defendant-respondent. The respondent in his answer, except for the matters as to the jurisdiction of the Court, has merely denied the averments in the plaint without explaining the matters relevant to those seven causes of action which of course, he is entitled in law to do so.

In the answer, the respondent has made a counter claim as well. It had been made on the basis of the cancellation of the respondent's agency, had with the appellant to sell its products. Learned District Judge dismissed the said counter claim of the respondent. No appeal is preferred to challenge the dismissal of the counter claim. Hence, the decision to dismiss the counter claim of the defendant-respondent would stand as it is.

The appeal before this Court is to canvass the judgment, wherein the learned District Judge declined to grant the reliefs prayed for in the plaint filed by the plaintiff-appellant. It was submitted by the learned D.S.G that the reason for the dismissal of the plaint is basically the refusal by the trial judge, to accept the contents in the invoices marked A1 to A7 and the cheques marked B1 to B7 as admissible evidence, for the purpose of this case. He

therefore contended that the learned District Judge misdirected himself when he declined to admit in evidence, the contents of those documents marked A1 to A7 and B1 to B7.

Mr.Marapane P.C. then submitted that those documents were marked subject to proof since the person through whom those were produced in evidence was not the person who authored those documents. Accordingly, he contended that the learned District Judge is correct when he declined to accept the contents of those documents as evidence admissible since those have not been properly proved as required by law.

Learned District Judge was of the opinion that it is necessary to call the authors of the invoices and the persons who issued the cheques, if the contents of those are to become admissible evidence. Such a conclusion is evident by the reasons assigned in the impugned judgment where the learned District Judge has stated that the cheques marked B1 to B7 could not have been the cheques issued by the defendant. (vide proceedings at page 120 in the appeal brief)

Remaining reason assigned by the learned District Judge to reject the evidence in the invoices and the cheques is the failure to mark the documents A1 to A7 and B1 to B7 in evidence at the closure of the plaintiff's case. (vide proceedings at page 121 in the appeal brief) Accordingly, having relied upon the decision in **Sri Lanka Ports Authority and another Vs Jugolinija-Boat**

East, [1981 (1) Sri.L.R.18] he has decided that the contents of those documents cannot be treated as admissible evidence since those documents were not marked in evidence at the time the plaintiff closed its case.

Admittedly, at the time those documents namely, the invoices and the cheques were marked in evidence, Counsel for the defendant had insisted that those be marked subject to proof and in fact it was done so. Learned State Counsel who appeared at that stage also has kept silent without addressing his mind to the issue. Learned trial judge too, without looking at the question of admissibility of evidence in those documents, has allowed the stenographer to record the objection merely because an objection has been raised. Apparently, no reason is found as to why those documents were allowed to mark subject to proof.

Admittedly, the person who gave evidence producing those documents is not the person who issued the invoices or who signed the cheques. However, he being the officer dealing with those matters in the appellant corporation has clearly stated that those cheques have been signed by the defendant-respondent. He is a person who is familiar with the signature of the defendant and the matters pertaining to invoices. His evidence so recorded has gone into the record, unchallenged. Significantly, no questions have been put to the witness by the defendant-respondent at least denying the signature appears on those cheques. Moreover, there was no dispute at

all as to the dishonuoring of those cheques by the Bank. Therefore, the only conclusion that could have arrived at, is that the signatures in the cheques are of the defendant. Under those circumstances, what other proof is necessary to establish that those are the cheques issued by the defendant?

The said witness for the plaintiff also has stated that the defendant had been assigned with the No.1141 by the appellant Corporation to identify the respondent as one of its agents. Having said so, he has further stated that the goods referred to in those invoices had been delivered to the defendant after having perused those invoices. No questions were put to the witness by the Counsel for the defendant denying those facts. Such evidence cannot be rejected on the basis that the documents in which those matters are found were marked subject to proof at the time those were marked in evidence.

As mentioned hereinbefore, learned District Judge also has relied upon the decision in **Sri Lanka Ports Authority and another v. Jugolinija-Boat East** (supra) when he declined to accept the invoices and the cheques, as admissible in evidence. In that decision the Supreme Court has held that if the documents referred to in evidence were not marked at the time the parties closed their respective cases, then the contents of those documents cannot be treated as evidence in the case. However, the manner in which the defendant's case has commenced in this instance may have prevented the plaintiff to mark those documents at the closure of its case. In fact, nothing is

recorded to state that the plaintiff has closed its case formally. When the order was made refusing an application to call another witness by the plaintiff, the defendant was directed to commence his case preventing the plaintiff-appellant to close its case formally.

Under those circumstances, the learned District Judge should have carefully considered the circumstances that has taken place at the time the defendant was directed to commence his case and then he could have distinguished the facts of this case with that of the facts in the case of **Sri Lanka Ports Authority and another v. Jugolinija-Boat East** (supra) when he applied the law referred to therein. Furthermore, *ratio decidendi* in that case is that if no objection is raised at the closure of the plaintiff's case to mark the documents that were marked subject to proof, then those documents that were marked subject to proof will have to be admitted in evidence. In that decision Samarakoon C.J. has held thus:

> *"If no objection is taken, when at the close of a case documents are read in evidence, they are evidence"*

In this instance no such objection has been raised by the defendant. In the circumstances, it is incorrect to decide that the invoices and the cheques that were marked subject to proof were not properly proved.

Learned D.S.G. submitted that the explanation found to explain the law referred to in Section 154 of the Civil Procedure Code should have been

followed by the learned District Judge in this instance and accordingly he could have admitted the invoices and the cheques in evidence in this instance. The aforesaid explanation to Section 154 of the Civil Procedure Code states thus:

> *"upon a document being tendered, if the opposing party objects to its being admitted in evidence, then two questions arise for the Court to decide;*
> *Firstly, whether the document is authentic - in other words, is what the party tendering it represents it to be; and*
> *Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it."*

In that explanation, it is also stated that if the Court is of opinion that the testimony adduced for the purpose of authenticity, which had been developed and tested by cross-examination, makes out a prima facie case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing the party, then court should admit the document.

Manner in which the aforesaid provision in law is to be interpreted had been discussed by **Saleem Marsoof, J** in **Lateef and another Vs Mansoor and another. [S.C.Appeal No.104/05]** In that decision, it was emphasized that the authentic document is considered as evidence admissible against the opposing party.

As mentioned hereinbefore, authenticity of the documents marked A1 to A7 and B1 to B7 was not been questioned and neither was it in dispute. The witness for the plaintiff, he being the accountant in charge in the credit control division of the appellant Corporation, has clearly stated that the defendant is an agent appointed by the Corporation assigned with a unique number for the purpose of selling its petroleum products. He has identified the invoices marked A1 to A7 as the invoices by which the goods involved in this instance have been delivered to the defendant. Those documents were produced in evidence through a person who has the custody of those documents. Those have been issued in the course of duties entrusted to the officials of the appellant-Corporation. It is not disputed that the cheques were returned unrealized. Contents of which also was never been questioned either. Accordingly, authenticity of the documents that were marked subject to proof was not at all in dispute.

In the circumstances, the invoices issued by the appellant should have been considered as admissible in evidence under Section 154 of the Civil Procedure Code despite the fact that those were marked subject to proof. Under those circumstances, it is clear that the learned District Judge misdirected himself when he decided that the plaintiff has failed to prove those invoices and the cheques, as required by law.

Learned President's Counsel for the respondent referring to Section 114 of the Civil Procedure Code submitted that no document could be placed on

record unless it has been proved or admitted, in accordance with the law of evidence. Accordingly, he argued that those documents that were marked subject to proof cannot be accepted as evidence in this case. His argument is that when the Court has insisted proving of those documents according to law, then those should be considered as not proved.

As described before in this judgment, learned District Judge could not have decided that the plaintiff has not proved those documents merely because it had been marked subject to proof. It is a question of law involved in this instance. Hence, it is clear that the learned District Judge has misdirected himself as to the law particularly the law referred to in Section 154 of the Civil Procedure Code when he rejected the contents of the documents marked A1 to A7 and B1 to B7.

Accordingly, it is my opinion that the contents of those documents tendered to Court are to be considered as evidence in this case. When the evidence contained in those documents is considered, it is abundantly clear that the defendant-respondent has failed to pay the money due to the plaintiff-appellant for the goods he has purchased that are reflected in the invoices marked A1 to A7. The Cheques marked B1 to B7 show that those cheques, issued by the defendant at the time the goods were delivered to him had been dishounored. Therefore, I decide that the plaintiff is entitled to the reliefs prayed for in its plaint dated 29.03.1988.

For the reasons mentioned above, I allow this appeal and set aside the judgment dated 10.08.1998 of the learned District Judge. Learned District Judge in Hambantota is directed to enter decree accordingly. Plaintiff-appellant is entitled to the costs of this appeal as well as the costs in the court below.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

W.M.M.MALINIE GUNARATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL