

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

K.P.C. Builders (Pvt) Ltd.,
No.142,
Eththukala,
Negombo.

Presently:

Malro International (Private)
Limited of Lake Garden,
Eththukala,
Negombo.

Plaintiff-Petitioner

CASE NO: CA/RI/136/2014

DC COLOMBO CASE NO: 10794/MR

Vs.

1. Colombo Municipal Council,
Town Hall.
Colombo 7.
2. Bank of Ceylon.
Tower Building,
Bank of Ceylon Mawatha,
Colombo 1.

1st and 2nd Defendant-

Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Athula Perera for the 1st Plaintiff-Petitioner.
Jacob Joseph for the 1st Defendant-
Respondent.
M.K. Muthukumar for the 2nd Defendant-
Respondent.

Argued on: 31.10.2019

Decided on: 04.12.2019

Mahinda Samayawardhena, J.

The Plaintiff filed this action against the two Defendants in the District Court of Colombo in 1991, seeking to recover a sum of Rs. 2,352,978/80 with legal interest from the 1st Defendant, arising out of an Agreement entered into between the Plaintiff and the 1st Defendant. The Plaintiff also sought a declaration that the 1st Defendant is not entitled to make a demand on the Performance Bond submitted by the Plaintiff to the 1st Defendant, issued by the 2nd Defendant Bank.

The 1st Defendant filed the answer seeking dismissal of the Plaintiff's action. The 1st Defendant sought to dissolve the interim injunction issued, preventing the 2nd Defendant from paying monies to the 1st Defendant on the said Performance Bond. The 1st Defendant also made a claim in reconvention to

recover a sum of Rs. 1,626,616/05 from the Plaintiff, arising out of the same Agreement, as damages.

After trial, the learned District Judge entered Judgment for the Plaintiff granting all the reliefs sought, and the claims of the 1st Defendant were rejected.

Being dissatisfied with the said Judgment of the District Court, the 1st Defendant has preferred an appeal to this Court. After the argument, and written submissions being filed by all parties, this Court, by Judgment dated 29.04.2008, has partly allowed the appeal.¹ The conclusion of the said Judgment reads as follows:

“In the result, therefore I shall partly allow the appeal. The decision of the learned District Judge is varied only with regard to the claim on the Bank Guarantee. Therefore the issues No.13 and 17 should be answered in the affirmative. I award no costs.”

The effect of answering issue Nos. 13 and 17 is the 1st Defendant becoming entitled to receive a sum of Rs.876,616/05 with legal interest from the 2nd Defendant on the said Performance Bond and/or from the Plaintiff.²

Neither the Plaintiff nor the 2nd Defendant has sought special leave to appeal from the Supreme Court against this Judgment.

However, as the appeal was only partly allowed, the 1st Defendant has sought special leave to appeal against this Judgment from the Supreme Court. After hearing counsel for the 1st Defendant and the Plaintiff, the Supreme Court by order

¹ Vide the Judgment at pages 17-24 of the brief.

² For issue Nos.13 and 17 vide pages 460-461 of the brief.

dated 20.01.2009 has refused to grant special leave to appeal.³ In the same order, the Supreme Court has stated that, upon the Judgment delivered by the Court of Appeal, the interim order made staying the payment on the Performance Bond would lapse automatically. This means the 1st Defendant can make the claim on the Performance Bond from the 2nd Defendant.

Thereafter, the Plaintiff, by way of a motion dated 19.05.2009, has sought clarification from the Supreme Court on the basis that, in view of the Final Bill submitted by the Plaintiff to the 1st Defendant, the 1st Defendant has no right to claim any sum under the Performance Bond, as the Plaintiff had given due credit to the total amount in the Performance Bond to the 1st Defendant.⁴

But, the Supreme Court by order dated 27.07.2009 has stated that no clarification is necessary, and with the refusal of special leave, the Judgment of the Court of Appeal would be operative.⁵ Then, there cannot be any doubt that the 1st Defendant can make the claim on the Performance Bond from the 2nd Defendant.

Nearly five years after the last Supreme Court order, the Plaintiff has filed this *restitutio in integrum*/revision application seeking to revise the Judgment of this Court delivered on 29.04.2008, by answering issue Nos. 13 and 17 in the negative (as the District Judge had done), because the conclusion of the Judgment of this Court is inconsistent with the body of the Judgment.

³ Vide pages 15-16 of the brief.

⁴ Vide paragraph 20 of the petition dated 09.05.2014 tendered to this Court.

⁵ Vide pages 25-26 of the brief.

I do not think I need to give any more reasons to refuse that relief. The Plaintiff wants the present Bench to overturn the Judgment of a previous Bench. Answering issue Nos.13 and 17 in the affirmative, which had been answered by the District Judge in the negative, was the only substantive decision made by this Court in the Judgment dated 29.04.2008. By that decision, the appeal of the 1st Defendant was partly allowed.

If the Plaintiff was dissatisfied with that Judgment of this Court, he would have gone before the Supreme Court. But he did not. Conversely, the 1st Defendant went before the Supreme Court for not allowing his appeal in full, but the Supreme Court declined to interfere with the Judgment of this Court.

Thereafter, the Plaintiff has gone before the Supreme Court, in my view, to get the Judgment of this Court revised, in the guise of seeking clarification, but the Supreme Court has declined it.

I think the matter shall end there.

As Chief Justice Sansoni stated in *Cassim v. Government Agent, Batticaloa*, “*There must be finality in litigation, even if incorrect orders have to go unreversed.*”⁶

The 2nd Defendant cannot refuse to honour the unconditional and on demand Performance Bond for the reasons stated in the Judgment of the Court of Appeal. The 2nd Defendant has no right to interpret the said Judgment of this Court or to get involved in the dispute between the Plaintiff and the 1st Defendant. The Performance Bond is a separate Agreement only between the Plaintiff and the 2nd Defendant Bank.

⁶ (1966) 69 NLR 403 at 404. This was cited by Rajaratnam J. in *Wickremasekera v. Ganegoda* (President, Labour Tribunal) (1973) 76 NLR 452 at 454.

The order of the District Court dated 05.02.2014 is affirmed⁷ and the amended decree dated 09.01.2013 signed by the District Judge shall be executed.⁸

The application of the petitioner is dismissed with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal

⁷ Vide pages 1095-1099 of the brief.

⁸ Vide pages 1195-1196 of the brief.