

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

Jinapala Mapalagama

No.536, Siyambalagastenna Road,
Kandy.

C.A. Case No.837/1999 (F)

D.C. Panadura Case No. 784/M

Presently at

No.91/3, Sri Jinaruwan Mawatha,
Illukwatta,
Pilimatalawa.

DEFENDANT-APPELLANT

-Vs-

Kalapugamage Don Diamond Weerasekera

No.21, Grace Peiris Mawatha,
Pananadura.

PLAINTIFF-RESPONDENT

BEFORE

:

A.H.M.D. Nawaz, J.

COUNSEL

:

**Ronald Perera, PC with Anslam Kaluarachchi, for
the Defendant-Appellant**

**Ranjan C. Gooneratne for the Plaintiff-
Respondent**

Decided on

:

08.11.2018

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted this action against the Defendant-Appellant (hereinafter sometimes referred to as "the Defendant") for the recovery of a sum of Rs.289,415.03 and legal interest thereon from 01.10.1990. The sum of Rs.289, 415.03 is a cumulative sum of several claims made by the Plaintiff in the plaint dated 05.10.1990.

The Plaintiff recited the following to found a cause of action against the Defendant:

1. he was engaged in the business of supplying timber to the timber co-operation;
2. on 17.02.1987 the Plaintiff entered into an oral contract employing the Defendant as his manager/agent for his business within the jurisdiction of *Panadura*.

In addition, the plaint recites several instances of wrongdoing by the Defendant namely:

- a) he sold timber at reduced prices or gave timber free to third parties;
- b) he has failed to account for the expenditure of certain sum of money;
- c) he has appropriated certain sum of money;
- d) he has deposited money in his bank account which had been given to him to meet recurring expenditure;
- e) he has not recovered the money due on timber given on credit to a customer called Leslie.

Thus, the Plaintiff-Respondent averred several sums of money that had been allegedly misappropriated by the Defendant-Appellant and prayed cumulatively for Rs.289,415.03 to be awarded to him, along with legal interest.

The answer filed by the Defendant-Appellant raised two defences in the main namely:

- a) The District Court of *Panadura* did not have jurisdiction to hear and determine this case.
- b) The Plaintiff was not the party who had undertaken to supply timber to timber co-operation but it was an entity known as Devapriya Enterprises. The Plaintiff

was only a sub-contractor and the implicit assertion in this averment was that the Plaintiff could not be the proper Plaintiff in the case.

The answer also contained an averment to the effect that the work of the Defendant was confined to felling trees in areas such as *Medirigiriya* and *Dehiattakandiya* and this was possibly put forward for the purpose of showing that the cause of action did not arise within *Panadura*. It has to be noted that the plaint asserted that the contract was entered into and the cause of action arose within the jurisdiction of the District Court of *Panadura*.

When the trial was taken up on 26.08.1992, an admission was recorded that felling of trees took place in *Medirigiriya* and *Dehiattakandiya*.

On behalf of the Plaintiff, 22 issues were raised, whereas on behalf of the Defendant Issues No.23 to 53 were formulated

It is a notable feature of this trial that though, in a protracted trial that lasted for 5 years, only the Plaintiff gave evidence on behalf of the Plaintiff, the Defendant who was represented at the trial neither gave evidence nor did he call any witnesses.

The learned District Judge of *Panadura* delivered his judgment on 11.06.1999 declaring that the Plaintiff was entitled to the sum of Rs.289,415.03 that had been claimed in the plaint. It is against this judgment that this appeal was preferred by the Defendant-Appellant and two pivotal objections that figured in the trial have been put forward by the learned President's Counsel for the Defendant-Appellant in support of the argument that the District Court of *Panadura* had no jurisdiction to hear and determine this case. The Plaintiff had no *locus standi* to institute this action against the Defendant.

This Court would now assess the arguments put forward on the two frontal pleas of jurisdiction of court and *locus standi*.

If one goes through the averments in the plaint, it is a recitation of a long narrative about the failure on the part of the Defendant to perform obligations to pay money. Let me trawl through the averments in the pleadings to bring this fact out.

The 3rd paragraph of the plaint pleads that the Plaintiff suffered a loss of Rs.15,680/- as the Defendant had disposed of the timber referred to in the paragraph. In other words the allegation is that this money should have been collected from the vendee of the timber and paid to the Plaintiff. In paragraph 04 of the plaint, the Plaintiff pleads that the Defendant has not accounted for a sum of Rs.20,800/- he had received. In paragraph 05, it is pleaded that the Defendant had misappropriated a sum of Rs.25,000/- and a sum of Rs.32,000/- he received for the timber that has been felled at *Medirigiriya, Maduru Oya* and *Dehiattakandiya*.

All these paragraphs bespeak a case of failure to pay money that was due to the Plaintiff though the term misappropriation has been used to denote the mode in which the money due to the Plaintiff was taken away.

So the facts that emerged at the trial reveal the following in a nutshell. P (the Plaintiff) alleges that he employed D (the Defendant) to work for him in places such as *Medirigiriya* and *Polonnaruwa*. P resides in *Panadura* and D resides in *Kandy*.

D traverses in his answer that the felling of trees took place outside of *Panadura* and therefore the suit would not lie in the District Court of *Panadura*.

In order to resolve this issue let me bring forth that all too familiar definition of what a cause of action is all about. Section 5 of the Civil Procedure Code defines it as the wrong for the prevention or redress of which an action maybe brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty, and the infliction of an affirmative injury.

So it is a denial of a right or failure to perform an obligation. What is the jural relation between the parties that imposes an obligation on the Defendant or bestows a right on the Plaintiff? In my view it is the oral agreement that both the Plaintiff and Defendant reached.

The question arises as to the place where the contract was entered into. If there is a breach of this contract, oral or otherwise, yet the court which is competent to try the breach would be the court that is set out in Section 9 of the Civil Procedure Code.

Section 9 states the familiar refrain. Subject to the pecuniary or other limitation prescribed by any law, action shall be instituted in the court within the local limits of whose jurisdiction:

- a) a party defendant resides; *or*
- b) the land in respect of which the action is brought lies or is situate in whole or in part; *or*
- c) the cause of action arises; *or*
- d) the contract sought to be enforced was made.

It is either head (c) or (d) which would confer jurisdiction having regard to the particular facts and circumstances of this case. Do the facts as alleged in the plaint, issues and evidence enable the case to be filed in the District Court of *Panadura*?

Having pleaded that the Defendant misappropriated the above sums of money, the Plaintiff also pleaded that his cause of action arose within *Panadura* and the contract was also entered into within the local jurisdiction of *Panadura*. No doubt it is the contract that imposed reciprocal obligations on the parties. Upon a perusal of the evidence and the pleadings it is quite clear that it was an oral contract to employ the Defendant as an agent for the business of the Plaintiff to supply timber. The question arises *though* where the contract was entered into.

One finds numerous items of evidence from the testimony of the Plaintiff to show that the contract was entered into at *Panadura*.

In the letter sent by the Defendant to the Plaintiff on 10.02.1987 marked as P1 (page 201 of the brief), the Defendant says "I am *badly in need of a job just to support my family.....I am informed that my mother is not well and I shall go to see her in the next few days, shall try to meet you on my way back*". Then the Plaintiff says he met the Defendant on 16.02.1987. On that day, the

Plaintiff said "I will take you as a manager, presently at salary of Rs.2500". Thereafter, he gave him an exercise book, marked P2 (pages 71-27 of the brief). In that book it is recorded "gave DW Rs.1000". The Plaintiff says the entries in this book were made by the Defendant, and the money was given to the Defendant, and he was employed at *Panadura* (page 72/197 of the brief). The Plaintiff goes on to say "this job was given to the defendant, as his employee and not as an employee of Devapriya Enterprises" (page 102/227 of the brief). The Plaintiff also says that Devapriya Enterprises had given him instructions to employ any person he likes at whatever salary he determines (page 103/228 of the brief). He paid the salary to the Defendant with his money.

This uncontroverted testimony establishes the fact that the contract of employment took place in *Panadura* and not in *Kandy* as the Defendant alleged in his answer. In the circumstances I take the view that the contract was entered into in *Panadura* and the District Court of *Panadura* had the competence and jurisdiction to hear and determine this action. This would simply dispose of the jurisdictional question. But I find that even under the head that founds jurisdiction based on the place where the cause of action arose, the District Court of *Panadura* would have jurisdiction.

Contract of Agency

The contract between the Plaintiff and Defendant that was entered into in *Panadura* was a contract of agency, albeit oral. No doubt this contract imposes implied duties on the agent.

In a contract of agency there arise a number of duties and obligations between the principal and agent. Such duties and obligations are usually spelt out in an agency agreement but in a situation such as we encounter in this case, they can be implied into the agency agreement. A disregard or breach of the agent's obligations can lead to the agent's liability to the principal for the agent's liability for damages for breach of contract and for negligence.

English law of agency applicable in Sri Lanka

It is apt to bear in mind that the law governing agency in Sri Lanka is the law applicable in England. This is made clear by Section 3 of the Civil Law Ordinance No.5 of 1852 which states that: "*in all questions or issues which have to be decided in Sri Lanka with respect to the law of principal and agent, the law to be administered shall be the same as would be administered in England in the like case*". Accordingly, English cases on agency disputes will apply in Sri Lanka.

Bearing the above in mind, I next pose the question as to what breaches the plaintiff alleged against the Defendant.

The learned President's Counsel for the Defendant-Appellant submitted that the Plaintiff was engaged in the felling of trees and selling in the name of Devapriya Enterprises. Even if it is so, it does not entitle an employee of the Plaintiff to misappropriate monies received by the Defendant for and behalf of the Plaintiff. All the averments in the plaint refer to monies paid to the Defendant for and behalf of the Plaintiff and not for and on behalf of Devapriya Enterprises.

In Stroud's law Dictionary a contractor is defined as "*a person who, in pursuit of an independent business undertakes to do specific jobs of work for other persons, without submitting himself to their control in respect to the details of work*".

Thus the very fact that the Plaintiff was a contractor establishes that he was not subject to the control of Devapriya Enterprises. Thus the persons employed by him are directly responsible to him. Therefore, the obligations entered into by the employees have to be performed by the employees to the satisfaction of the Plaintiff.

Evidence shows that the entire operation of felling timber was carried out by the Plaintiff, at his expense. The Plaintiff paid the Defendant a salary, his travelling and other expenses. The Defendant acted on Plaintiff's instructions. The statement of accounts was sent by the Defendant to the Plaintiff. All these facts come through evidence which remain unassailed.

The learned Counsel for the Defendant-Appellant relied on the affirmative answer given to Issue No.23 to submit that the Plaintiff-Respondent has no *locus standi* to maintain this action. In Issues No.23 and 24, the Defendant-Respondent formulated the following questions.

Did Devapriya Enterprises obtain the contract to sell the trees in the forest at *Medirigiriya* (Issue No.23) and *Dehiattakandiya* (Issue No.24)? Only Issue No.23 has been answered in the affirmative. The *Dehiattakandiya* contract was given to the Plaintiff. Defendant took the contract in his name.

It was submitted that in view of the said testimony that the Devapriya Enterprises was in supervision, control and felling, loading and delivering same to Timber Corporation;

The very answers elicited in cross-examination referred to above completely demolish this submission. It is the Plaintiff's evidence that he spent money to operate this contract. The lorry, tractors, and the men engaged in the felling of trees were his men, subject to his control, and paid for with the personal funds of the Plaintiff, not with the money received for the felling of trees. The case of the Defendant that employees were paid for by Devapriya Enterprises was denied by the Plaintiff. The Plaintiff obtained permission from Devapriya Enterprises for the Defendant to sign for the vouchers. If he did not obtain such permission, the Plaintiff as the contractor of Devapriya Enterprises had to sign for the vouchers. Therefore, the evidence establishes that the vouchers were signed by the Defendant, not for and behalf of Devapriya Enterprises, but for and on behalf of the Plaintiff. Further, the *Dehiattakandiya* contract was given to Weerasekera Enterprises, but the contract was signed, without the Plaintiff's knowledge by the Defendant.

These items of evidence establish that the Plaintiff was in total control, and supervision of the felling of trees. The men who were engaged in the felling of trees were the Plaintiff's employees, and paid for by the Plaintiff. The answerer elicited in cross-examination clearly establish that the felling of trees was under the supervision, control and direction of the Plaintiff. Devapriya Enterprises had no role to play in the felling of

trees at *Medirigiriya*, even though they had obtained the contract from the Timber Corporation, the evidence reveals that they had assigned their rights under the contract to the Plaintiff.

I am fortified in my view that it is the Plaintiff who suffered the loss. Therefore I take the view that he could institute this action for the loss he suffered due to the wrongful acts of the Defendant. In any event Devapriya Enterprises cannot institute action against the Defendant either in delict or in contract.

If one were to pose the question whether the Defendant was an employee of the Plaintiff-Respondent or the Devapriya Enterprises, evidence shows that he was the employee of the of the Plaintiff. None of the answers elicited in cross-examination establish that the Defendant was an employee of Devapriya Enterprises. In fact, the Defendant by reserving the right to claim EPF and gratuity from the Plaintiff, concedes that his relationship was with the Plaintiff and the Defendant. Therefore assuming without conceding that (1) the expenses in respect of the felling of trees and transport were paid to Devapriya Enterprises by the State Corporation, (2) Plaintiff was engaged in the felling of trees in the name of Devapriya Enterprises, (3) felling of trees in the *Medirigiriya* forest to Devapriya Enterprises (this is conceded by the Plaintiff (4) Devapriya Enterprises was in supervision, control and direction of felling trees), it will not absolve the Defendant from any liability to the Plaintiff, for the simple reason that the Plaintiff was the employer of the Defendant, and the oral contract was entered into with the Plaintiff and not with Devapriya Enterprises. The letters sent by the Defendant to the Plaintiff establish the relationship in sharp relief.

In the circumstances I take the view that the Plaintiff had *locus standi* to institute this action and the District Court of *Panadura* had jurisdiction to embark upon the adjudication into this matter.

As an agent the Defendant owed the Plaintiff fiduciary duties. The essence of the duties owed by a fiduciary has been expressed in the following statement:-

"A person will be a fiduciary on his relationships with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of their several interests.-see Finn, in *Commercial Aspects of Trusts and Fiduciary Obligations*." (McKendrick ed., 1992) p.99.

In a leading case, *Bristol and West Building Society v. Mothew* (1998) Ch. 1 Millett LJ stated:-

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter or circumstances which give rise to a relationship of trust and confidence."

Millett LJ went on to say:-

"The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty on his fiduciary. This core liability has several facts. A fiduciary must act in good faith; he must not make a profit out his trust; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

There has been a clear breach of contractual as well as delictual duties on the part of the Defendant and since some of the contractual duties such as payment of money due to the Plaintiff had not been performed in *Panadura*, the cause of action arose in *Panadura*. In *Haniffa v. Ocean Accident and Guarantee Corporation* 35 N.L.R 215 Garvin, J. said:-

"The place where the cause of action arises must be ascertained with reference to the rule that, in the absence of a special agreement, an obligation must be performed at the place at which the contract was entered into."

In *Somasiri v. Ceylon Petroleum Corporation* (1992) 1 Sri L.R 39, Ananda Coomaraswamy, J. held:-

"The true definition of a cause of action was an act on the part of the Defendant which gives rise to a cause of action."

This case also added a rider namely "*the place of business of the Defendant was necessary to determine the residence of the Defendant.*" Be that as it may, in this case the Plaintiff did not rely on the Defendant's residence to vest court with jurisdiction.

So I would conclude that the contract between the Plaintiff and Defendant was entered into and the cause of action arose in *Panadura*.

From the foregoing analysis I conclude that the learned District Judge of *Panadura* arrived at the right decision and I see no reason to depart from these findings. As such I affirm the judgment dated 11.09.1999 and proceed to dismiss the appeal.

JUDGE OF THE COURT OF APPEAL