JUDGEMENTS TO BE CITED

REF; 01/4-6/2018

1.Hettige Don Tudor
2.Hettige Lakshman Sandasiri
3.Hettige Dona Seetha Padmini Sandasiri
-vs-
Hettige Don Ananda Chandrasiri and others

SC No: 134/16
SC/HC/CALA 435/2015
WP/HCCA/KAL 132/2010(F)
DC Panadura 429/P

Before: S. Eva Wanasudera PC, Acting CJ, Priyantha Jayawardena PCJ. and H.N.J Perera J

Partition Law – After the preliminary survey is done, any further commissions under section 16(2) of the Partition law should be issued to the same surveyor who carried out the original commission under section 16(1) – A partition action cannot have two preliminary plans.

FACTS

Plaintiffs filed action on 25.05.1992 to partition the land in the second schedule to the plaint and claimed, said land is a portion of the land described in the first schedule to the Plaint. Defendants on the other hand filing their statements of objections, claimed Plaintiffs have wrongfully included their land in to the corpus of the second schedule to the Plaint. Defendants further contended establishing their title to the said corpus and prayed for a dismissal of the action filed by Plaintiffs and/or for a commission to identify the corpus and carve out their land and exclude the same from the corpus.

At the very outset, a commission was issued under section 16 to the licensed surveyor, H.A.G Jayawickrama who returned the commission with a preliminary plan. Thereafter, Plaintiffs being dissatisfied with the aforesaid preliminary plan had made another application to court to issue a commission on another surveyor named Gamini Malwenna which was allowed by court. The Plaintiffs further contended, the licensed surveyor who made the second plan was agreed upon by both parties and cited the case of Sumanasena V Premaratne (CA 1336 & 1337/F – Court of Appeal Minute dated 06.03.2014 – Salam J and Rajapaksha J) in which a preliminary plan made by the commissioner was disregarded with the consent of the parties to the action.

Thereafter, Learned District Judge, accepting the second preliminary plan tendered the decision in favor of Plaintiffs at the end of the trial and granted only compensation for improvements by 11th and 12th Defendants. Defendants thereafter appealed to Civil Appellate High Court and the appeal was allowed and held, Learned District Judge had erred in not identifying the corpus properly, by having gone against the Section 16 of the Partition Law No. 21 of 1977.

The Civil Appellate High Court entered judgement for the Defendants and Plaintiffs then appealed to the Supreme Court.

JUDGEMENT

The Supreme Court held, an action for partition of land is an action in rem. When the decree in a partition is entered, it is a decree in rem which binds the whole world and not only the parties to the partition action. That is the vital point and the basis for the Partition Law being enacted. It was erroneous to accept the second plan done by a different surveyor by the Learned District Judge. The provisions of the Partition Law are mandatory and should be followed in every step of the way in any Partition action before the District Court.

The provisions under Section 16 does not recognize any second plan in a partition action. In any single partition action, there should be only one preliminary plan that is made by the Court Commissioner. Where a party claims that such survey is necessary for the adjudication of that action, such commission can be issued to the same commissioner who made the preliminary plan. It cannot be issued to another surveyor. Hence, issuing another commission to another second surveyor other than the commissioner who did the preliminary plan is contrary to the Partition law and is erroneous.

According to Sections 18(1) and 18(2), it is obvious that after the first Commission on the first surveyor's survey, he should file the report and the Preliminary plan in court and then if the parties are dissatisfied on the plan and the report, they can get the court to summon the said Court Commissioner Surveyor and examine his findings orally on any matter arising out of such report and the plan. There is no provision to allow another surveyor being appointed at the instance of the Plaintiff or any other party.

However, section 18(3) grants a solution when any party or the Court feels that the Court Commissioner has failed to do a perfect job of surveying the land and provides a fresh plan to be made by the Surveyor General or by any officer of his department authorized by him in that behalf, and may for that purpose issue a commission to the Surveyor General.

Accordingly, it is seen that the Partition Law has provided for an occasion what to do when the Plaintiff or any other party or court is dissatisfied with the Preliminary Plan and Report done by the Commissioner surveyor. The court should issue a commission on the surveyor General. The surveyor General will do the needful as provided for in the other sub sections of Section 18(3) (b) to (g).

It is abundantly clear that the court cannot issue another Commission to any second surveyor other than to the Surveyor General. Furthermore, The judgement by Supreme Court corroborated the fact that the consent of parties cannot confer any power or authority or jurisdiction to Court to deviate from the substantial law which includes an imperative procedural step.

REF; 02/4-6/2018

Guneshi Mallika Gomes [nee Gunawardena]
-vs-
Jammagalage Ravindra Ratnasiri Gomes

S.C Appeal No. 123/14
S.C. HC. CA. LA No: 215/14
HC Appeal No.
WP/HCCA/MT/134/10/F
D.C Mount Lavinia
Case No: 3600/2002/D

Before: Priyasath Dep PC, CJ, H.N.J Perera J, Prasanna Jayawardena PC, J

Divorce - What constitutes the matrimonial offence of Constructive Malicious Desertion - Cohabitation

FACTS

The Plaintiff instituted action against the Defendant in the District Court of Mt. Lavinia praying for a decree of divorce a *"vincula matrimonii"* on the ground that the Defendant was guilty of **constructive malicious desertion.** At the time the action is instituted, Plaintiff continued to live at her matrimonial house with the Defendant and children.

The Plaintiff averred in the Plaint that from April 1995 onwards, there were several disagreements between the parties and that the Defendant and his mother harassed the Plaintiff. The Plaintiff claimed that the Defendant frequently abused, ill-treated and hit the Plaintiff and the children and that he often instructed the Plaintiff to leave the matrimonial home.

The Plaintiff referring to an incident on 07.07.2001 alleged that the Defendant without any reasonable or justifiable cause assaulted the Plaintiff in an inhuman and ruthless manner and ordered the Plaintiff to leave the matrimonial home and threatened to pour kerosene and burn her unless she does so. The Plaintiff specifically averred that as a result she was compelled from 07.07.2001 onwards to terminate all marital relations and connections with the Plaintiff and she and the Defendants ceased to cohabit with each other and live entirely separately from each other but under the same roof at the matrimonial home. It was the position of the Plaintiff that the defendant engaged in the aforesaid conduct with the intention of ending the marriage and that the Defendant is guilty of the matrimonial fault of Constructive Malicious Desertion.

The Defendant on the other hand denied the allegations made against him and took up the position that the Plaintiff has made these false allegations in her efforts to obtain a divorce from the Defendant. He further averred that though there were minor disputes between the spouses he bore those difficulties in the interest of the children.

The Learned District Judge who heard the case observed that The learned Judge observed that, despite the plaintiff's claims that the alleged incident was a grave one, she and the defendant had gone together to the Police Station on 08th July 2001 and returned together to the matrimonial home and that, the plaintiff has not asked the police to take any action in pursuance of her allegations of threats, assault and an attempt to set her on fire. In the light of these facts, the learned District Judge held that, the plaintiff had not proved the occurrence of the alleged incident on 07th July 2001, which is pleaded in the plaint.

With regard to the plaintiff's claim that the plaintiff and the defendant had lived entirely separately after 07th July 2001, the learned District Judge held that, the evidence showed that, after that day, the defendant had his meals in the matrimonial home and that these meals were prepared by the plaintiff, the defendant met some of the expenses of the children and continued to contribute towards a part of the domestic expenses and utilities bills of the household and regularly supplied the household with rice and liquid petroleum gas. The learned judge concluded that this evidence showed that a degree of matrimonial relationship between the spouses had continued after 07th July 2001.

The District Judge having held that the Plaintiff failed to establish that the Defendant was guilty of Malicious Desertion dismissed the Plaint. In Appeal the Provincial High Court of Civil Appeal Holden in Mount Lavinia affirmed the Judgement of the District Court and dismissed the Appeal.

The Plaintiff Appealed to the Supreme Court.

JUDGEMENT

The Marriage Registration Ordinance does not define the term "malicious desertion" used in Section 19(2) as a ground of Divorce one has to look at the decisions of the Courts to ascertain what amounts to "malicious desertion." The decisions of our Courts on this subject frequently refer to decisions of the English Courts which have influenced the development of our Law in this area.

Simple malicious desertion or, it is sometimes called, actual malicious desertion is where the spouse who is alleged to be guilty of malicious desertion physically separates from the matrimonial home or terminates matrimonial consortium, with the composite incidents of a marital relationship. In the case of **GROBBELAAR VS HAVENGA** [1964 S SALR (N) 522 at p.525] it was held that the companionship, love, affection, comfort, mutual services, sexual intercourse - all belong to the married state taken together, makes up the matrimonial consortium.

Constructive malicious desertion is where the conduct or speech of the spouse who is alleged to be guilty of malicious desertion gives his or her spouse no reasonable alternative other than to depart from the matrimonial home or to cease matrimonial consortium. The comment by the Gorrel Barnes J in the early and often cited case of **SICKERT vs. SICKERT** [1899 Probate 278 at p.282], which states that *"In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him."* describes the offence. This judgment led Lord Merriman to observe in **LANE vs. LANE** [1951 P 284 at p.286] that *"Desertion is proved if the husband leaves the home, or drives the wife away from the home, with intent to bring the home to an end and without her consent or fault. It does not matter, therefore, on which side of the front door, so to speak, the spouses are found when they part."*

Malicious desertion, whether it be simple desertion or constructive desertion, takes place when the following elements come together: the factum [fact] of physical separation when the spouse who is alleged to be guilty of malicious desertion deserts the matrimonial home or matrimonial consortium; coupled with animus deserendi [intention of deserting] on the part of that spouse.

Simple desertion or malicious desertion takes place when the **factum [fact]** of physical separation where the spouse who is alleged to be guilty of malicious desertion deserts the matrimonial home or matrimonial consortium; coupled with **animus deserendi [intention of deserting]** on the part of that spouse.

In our law, the two elements were identified in the case of ***Attanayake v Attanayake*** [16 Cey L.R. 206 at P.207] in which Poyser J cited the statement by Gorrel Barnes J in **SICKERT vs. SICKERT** that, *"In order to constitute desertion, there must be cessation of cohabitation and an intention on the part of the accused party to desert the other."*. The term "cohabitation" used by Gorrel Barnes J means much the same thing as the term "consortium" mentioned earlier. In **PERERA vs. GAJAWEERA** [2005 1 SLR 103 at p.107], Wimalachandra J observed that establishing malicious desertion requires proving *"….. not only the factum of desertion but also the required animus to repudiate the marital relationship ….."*. held that the spouse who is accused of having committed malicious desertion, should have committed the acts or said the words which are said to constitute simple or constructive malicious desertion, against the wishes of his/her spouse. As Basnayake CJ stated in ***Rajeswararanee v Sunthararasa*** [64 NLR 366 at p. 369] the desertion must be "against the desire" of the deserted spouse.

Separations by consent or by compulsion caused by an unavoidable requirement such as, for example, a spouse being deployed elsewhere by the armed forces, having to relocate for compelling business purposes or having to live apart for medical reasons would, usually, negative a charge of malicious desertion. However, it also has to be noted that, such consensual or compelled separation may later turn into malicious desertion if it is established that, at some point in time, one of the spouses changed the character of the arrangement and deserted the other.

A desertion may end if, before the deserted spouse commences an action praying for a divorce on the ground of malicious desertion, the deserting spouse reconciles and returns to the matrimonial home or resumes cohabitation or makes a bona fide offer to do so. Further, an unreasonable refusal of such an offer by the erstwhile deserted spouse may, in some circumstances, turn the tables and make the erstwhile deserted spouse a deserting spouse.

In cases of constructive malicious desertion, the question that the

Court is called upon to determine is whether the conduct or speech of the deserting spouse was of a nature which the deserted spouse, who is to be judged on the standard of a reasonable spouse who is in the marital relationship which existed in that particular case, could not be reasonably expected to tolerate and live with, in the light of the facts, circumstances and relationships of that particular case. The type of conduct or speech which will justify a charge of constructive malicious desertion is limited to conduct or speech which can be reasonably regarded as being expulsive in the facts, circumstances and relationships of that particular case; and, therefore, excludes trivial or even annoying behavior which a reasonable spouse in the facts, circumstances and relationships of that particular case, would be reasonably expected to tolerate and live with. Thus, Asquith LJ, as he then was, observed in **BUCHLER vs. BUCHLER** [at p.326] that conduct or speech which will be regarded as being expulsive and constituting constructive malicious desertion *"..... must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other `for better for worse'. The ordinary wear and tear of conjugal life does not in itself suffice."*. On similar lines, Diplock LJ observed, in **HALL vs. HALL** [at p,526], that, *"The undue sensibility or eccentric phobias of the complaining spouse will not convert behaviour which a reasonable spouse would endure, albeit unhappily, as part of the wear and tear of married life into conduct amounting to constructive malicious desertion"*.

The second requirement of the animus deserendi the spouse who is accused of malicious desertion, whether it be simple or constructive, should have acted with the deliberate intention of finally terminating and repudiating the marriage and with no intention of resuming the marriage on some future date.

In this regard the position in the English Law is that: a spouse who is charged with constructive malicious desertion is presumed to have intended the natural and probable consequences of his or her conduct or speech which made the other spouse leave the matrimonial home, even if he or she did not, in fact, intend to end the marriage. The natural and probable consequences of the impugned conduct or speech are to be judged on the standard of a reasonable spouse who is in the marital relationship which existed in that particular case and in the light of the facts, circumstances and relationships of that particular case. The aforesaid approach which is now used in England, recommends itself as a rational and equitable approach. I take this view because this approach, which may term as being dualist in nature, succeeds in: objectively holding a spouse responsible for the natural and probable consequences of his or her conduct or speech; but, realistically, also takes into account the fact that, since the marital relationship is a very personal one, such behaviour should be subjectively assessed in the light of the relationship between the spouses.

A spouse who is charged with malicious desertion may counter such charge by: in the case of a charge of simple malicious desertion, establishing that, he or she was justified in leaving the marital home or ceasing cohabitation because he or she was given sufficient cause to do so by the other spouse; and, in the case of constructive malicious desertion, establishing that, the other spouse gave sufficient cause which justified the conduct or speech which is alleged to constitute constructive malicious desertion.

REF; 03/4-6/2018

Chistobel Matilda Joshua and John Sylvester Horatio Joshua (Substituted Plaintiff)
-vs-
Seylan Bank PLC

SC CHC Appeal 52/2012
Commercial High Court No:
HC (Civil) 744/2010/MR
Before: S Eva Wanasundara PCJ,
Prasanna Jayawardena PCJ and
Murdu Fernando PCJ

Trasfer of the matter from the District Court to the Commercial High Court for want of jurisdiction - amendment of the plaint - the day first fixed for trial - Section 93 of the Civil Procedure Code.

FACTS

The original Plaintiff, Christobel Matilda Joshua instituted action against the Defendant Seylan Bank in the District Court of Colombo seeking a declaration that Defendant bank had breached the contract with the Plaintiff by not having properly maintained the account of the Plaintiff and having issued a debit card to the Plaintiff which failed to perform while the Plaintiff was travelling to Malaysia and thus resulting in damages caused to the goodwill of business interest of the Plaintiff. The Plaintiff claimed damages in a sum of Rs.10,000,000/-

Defendant filed it's Answer and disputed the jurisdiction of the District Court where the case was filed on the basis that the transaction under reference is a commercial transaction over Three Million Rupees and contended that the case should have been filed in the Commercial High Court. Defendant having denied that it issued an International Debit card to the Plaintiff sought a dismissal of the action with costs and claimed damages in a sum of Rs. 25,000,000/- on the basis that the Plaintiff was maliciously claiming damages from the Defendant. Thereafter, the matter was called in the District Court on 30.07.2010 to fix for Trial and the District Judge fixed the matter for Trial on 14.10.2010.

Subsequently, on application made by the parties on 10.11.2010 the Learned District Judge transferred the case to the Commercial High Court. When the case was called before the Court, it was informed that Plaintiff has passed away on 03.02.2011. Under such circumstances, Plaintiff's widower made application for substitute her in place of the deceased Plaintiff and the same was allowed and the case was then fixed for Trial for 21.02.2012.

When the matter came up for Trial before the Commercial High Court, on 21.02.2012 the Counsel for the substituted Plaintiff having discovered that the number of the International Debit card given in the Plaint had only three set of numbers instead of four sets of numbers moved Court for a date to amend the Plaint. Thereafter on 05.03.2012 the substituted Plaintiff filed a motion with the proposed amended Plaint seeking to amend the number of the debit card in six places in the Plaint. The Defendant objected to the application for amendment of the Plaint and filed its Objections and prayed for the dismissal of the application to amend the Plaint and also the Plaint itself. The Commercial High Court after inquiry dismissed the action with costs. Then the substituted Plaintiff Appealed to the Supreme Court.

The leave to appeal was granted by Supreme Court.

JUDGEMENT

Though the matter has been fixed for Trial in the District Court on 14.10.2010 which is the date first fixed for Trial, the District Court did not have Jurisdiction to hear and determine the matter under reference. Once the case is transferred to the Commercial High Court the original Plaintiff was already dead. The substitution was effected only on 10.10.2011 that is 10 months after the date the matter was first called in the Commercial High Court which is the Court that had Jurisdiction over the matter. It is thereafter the matter was fixed for Trial before the Court which had Jurisdiction that is 21.02.2012. It was on this date being the very first date of Trial before the High Court the substituted Plaintiff made the application to amend the Plaint. In the circumstances the High Court was in error in deciding the date first fixed for Trial in the District Court which had no Jurisdiction to hear and determine the matter as the day first fixed for Trial in terms Section 93 of the Civil Procedure Code.

On the other hand the Defendant Bank though denied that the card with the specific number mentioned in the Plaint was issued to the Plaintiff, did not deny totally that it issued any Debit Card to the Plaintiff. It is seen that the Defendant placed just a denial of issuing a debit card mentioned with a missing set of numbers in the Plaint.

By this the Defendant Bank did not act sincerely but acted taking advantage of the fact that one set of numbers missing in the places where the Debit Card number was mentioned in the Plaint. Although the Supreme Court was not inclined to blame the Defendant Bank on the basis that it had filed a wrong Answer a grave and irremediable injustice would be caused to the Plaintiff if the amendments sought is not allowed. Missing out certain digits from the correct Debit Card Number is a technical error. The Supreme Court is a Court of Law which should not be trampled by technical Objections. On the other hand by allowing the amendment no prejudice would be caused to the Defendant Bank.

The Defendant only sought for a disallowance of the amendment but never asked for a dismissal of the whole action. The Judge of the Commercial High Court made an Order dismissing the Plaintiff's action surmising that the whole case will fail once the amendment is not allowed. No Judge has a right to go beyond any relief that is prayed for in any application, stretching his hand too far and granting relief that is not prayed for at all. Such conjecture is unnecessary and uncalled for. No order should be based on surmising and guess work, it is unlawful and unreasonable.

In the circumstances the Appeal is allowed and the case is restored with the permission to amend the Plaint.

REF; 04/4-6/2018

Yasoma Champa Nilmini Abeygunawardena
-vs-
Sunil Gotabaya Lambadasuriya

SC Appeal No: 169/2011
SC/HCCA/LA No: 169/2011
WP/HCCA/ Mt Lavinia No: 170/07(F)
D.C Mt Lavinia Case No: 734/03/RE
Before: Sisira J De Abrew J,
Priyantha Jayawardena, PC, J
Prasanna Jayawardena PC, J

Rent and Ejectment – The applicability of the Section 2 (4) (c) of the Rent Act No. 07 of 1972 –The Owner occupying the premises on 01.01.1980.

FACTS

The Plaintiff instituted action against the Defendant seeking to have the Defendant ejected from the premises in suit and for the recovery of damages for the period during which the Defendant has remained in possession of the premises after being given due Notice to Quit.
As per the Plaint the Plaintiffs position is that the premises in suit is a residential premises that was occupied by the "Owner" on 1st January 1980 hence, the provisions of the Rent Act No. 07 of 1972 has no application. The Plaintiff states that in the circumstances the Defendant's possession of the premises become unlawful after the date mentioned in the Notice to Quit that was served on the Defendant. The Defendant admitted having entered into a Lease Agreement with the Plaintiff and also admitted the receipt of the Notice to Quit. However, the Defendant having denied that "the owner" occupied the premises in suit on 1st January 1980 contended that the premises in governed by the Rent Act NO. 07 1972. In the circumstances it was the position of the Defendant that the Plaintiff did not have a right to terminate the tenancy, hence the Plaintiff's action must necessarily fail. The District Court held with the Plaintiff. The Appeal of the Defendant was dismissed by the Provincial High Court of Appeal on the basis that the premises which is a residential premises is not governed by the Rent Act as it is "the Owner" who had been in occupation of the subject premises as at 01.01.1980 and let on or after that date.

In all circumstances, the only question that came up for determination by the Supreme Court was whether "the owner" occupied the premises in suit on 01.01.1980 or not.

JUDGEMENT

In terms of Section 2(4)(c) of the Rent Act a residential premises that was occupied by the Owner on 01.01.1980 and was let on or after that date would not be governed by the Rent Act. In this matter the parties have admitted that the Premises in suit is a residential premises within the meaning of the rent Act and was let for the first time after 01.01.1980. Thus, the only dispute is whether the premises was "occupied" by "the owner" on 01.01.1980 as stipulated in Section 2(4)(c).

As per the evidence led before the District Court the Plaintiff acquired title to the premises only in 1996 and it was the Plaintiff's Predecessors in title who owned the premises on 01.01.1980. The plain reading of Section 2(4)(c) makes it clear that the only requirement stipulated therein is for the "owner" to be in occupation in the premises as at 01.01.1980 and any subsequent transfer of title by the Owner who in fact was in occupation of the premises as at 01.01.1980 does not affect the fact that the premises is exempted from the provisions of the Rent Act.

It was contended by the Learned Presents Counsel for the Defendant that the life interest holder who was in occupation as at 01.01.1980 cannot be regarded as an "owner" had been in occupation for the purpose of Section2(4)(c) of the Rent Act since the Legislature had not expressly stated so. He further contended that consideration of the life interest holder as an "owner" for the purpose of Section2(4)(c) would involve unduly stretching the word "owner" and resulting moving out of the realm of Judicial interpretation of the statute and amount to and exercise in what he describes as "Judicial Legislation"

Conversely, the Learned Presidents Counsel submits that since the life interest holder is entitled to possess the property as its owner until his/her death the life interest holder should be regarded as the "owner' for the purpose of Section2(4)(c) of the Rent Act.

The concept of ownership has evolved over time and that the entire array of the classical Law attributes of ownership may not be present, all instances of forms or types of ownership in the modern context. The Connotation of the word "owner" may sometimes have to be decided in the context of the circumstances in which it is used. In determining the meaning of the word "owner" used in Section 2(4)(C) its hardly needs to be said that the Rent Act applies to and governs for the contract of letting and hiring of premises . Such contracts deal with a significantly different bundle of rights which are the subject matter of Rei Vindicatio. In the circumstances nature of ownership required for the purpose of maintaining an action Rei Vindicatio is not required. In a Rent and Ejectment action.

In all circumstances, a life interest holder who occupied the premises on 01.1.1980 should be regarded as an owner for the purpose of Section 2(4) (c) of the Rent Act.

REF; 05/4-6/2018

Telecommunication Consultants India Limited
-Vs-
Pan Asia Bank Limited

SC CHC 36/2006
HC (Civil) 42/2002
Before: S. Eva Wanasundera PCJ,
K.T Chitrasiri J and
Vijith K. Malalgoda PCJ

When the clause, "pay on demand" is included in an advance payment guarantee, a bank should honor the payment if there is no fraud envisaged.

FACTS

The Defendant had issued an advance payment guarantee on 24.07.1997 to the Plaintiff. A local company by the name of "Nipuna Teleconstructions (PVT) Limited" (hereinafter referred to as "Nipuna")

was the sub-contractor in the work undertaken by Plaintiff regarding some telecommunication civil work at the villages in Sri Lanka. Plaintiff would pay an advance of Rs. 8,964,428.24 to Nipuna to commence and perform the work under a contract entered between Plaintiff and Nipuna. If Nipuna fails to comply with the terms and conditions of the contract, on the said guarantee, money advanced to Nipuna would be paid to Plaintiff by the Defendant bank on demand. The bank had issued the said guarantee as requested by Nipuna to receive the advance payment from the Plaintiff.

Nipuna was required to submit an advance payment guarantee for the value of 30% of the full contract value, which amounted to Rs. 8,964,428.24 which is equivalent to the advance payment made to Nipuna by the Plaintiff, in order to commence work. As such, pursuant to the request made by Nipuna, Plaintiff had advanced the aforesaid amount to Nipuna against the advance payment guarantee which was issued by the bank on behalf of Nipuna.

However, Plaintiff terminated the contract with Nipuna due to the unsatisfactory nature of performance and made a claim on the advance payment guarantee bond from the bank. Plaintiff sent a letter of demand to the Defendant and Defendant bank failed to honor and returned the same to Plaintiff containing the endorsement "payment enjoined by order of court in DC Colombo Case No: 5061/SPL"

The aforesaid DC case has been filed by Nipuna against the Defendant bank seeking an enjoining order preventing the bank from making any payment to the Plaintiff. The enjoining order extended from time to time and after two and a half years enjoining order was lapsed. Thereafter, on 24.10.2001 Nipuna moved to withdraw the District Court case on the ground that delay in the case has caused damages to the Plaintiff Nipuna. Then the action was dismissed on 24.10.2001.

The position took up by the Plaintiff in the Commercial High Court case was that the Defendant bank deliberately failed to make payment as demanded which the bank was obliged to do as soon as the payment was demanded, according to the provisions made specifically to that effect, under the advance payment guarantee bond. Plaintiff subsequently demanded money from the defendant bank and Defendant bank took up the position that the claim of the Plaintiff was a fraud done in connivance with Nipuna in order to defraud the Defendant Bank.

The trial commenced before Commercial High Court and at the conclusion of the trail, Learned Commercial High Court Judge, delivered judgement in favor of the Plaintiff. Being aggrieved by the said judgement, Defendant bank appealed to Supreme Court.

JUDGEMENT

The Supreme Court in the Judgement delivered by Justice S. Eva Wanasundera (with the other two judges agreeing) took up the position that, it was quite unlawful, unjust and unreasonable for the bank not to have paid on demand as and when the demand was made for payment on 29.01.1998. Further held, even after District Court case has been concluded, there seems to be no reason why the bank should not honor the Advance Guarantee Bond. However, the bank failed to pay on the basis that there was fraud in the claim.

As the trial Judge in the Commercial High Court has analyzed the evidence before Court and had reached the conclusion that there is no fraud involved and no fraud has been proved by the Defendant bank who alleged that there was fraud. On the totality of the evidence led, it was held that, the bank should pay the guaranteed money to the Plaintiff on demand as agreed in law according to the conditions in the Advance Payment Guarantee Bond.

The Supreme Court agreed with the position took up in the case of Edward Owen Engineering Ltd v Barclays Bank International Ltd 1978 1 Lloyds Law Reports 166; 1 QB 159 where it was held, the bank must pay according to its guarantee on demand if so stipulated, without proof of conditions. The only exception is when there is a clear fraud of which the bank had notice.

In the instant case, there is no clear fraud. The Defendant bank had failed to demonstrate by any evidence that there is any clear fraud. In such instance, there is no way that the bank can be without payment in a guarantee bond. Supreme Court further cited the case, R.D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd 1978 QB 146, Kerr J in which observed, "Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts". The above position was followed in the case of Intertec Contracting A/S v Ceylinco Seylan Development Ltd and another 2002, 02 SLR 246. The Supreme Court further cited the case, Hemas Marketing Pvt LTD v Chandrasiri and Others 1994 2 SLR 181 in which it was held, "A mere plea of fraud put in for the purpose of bringing the case within the exception and which rests on the uncorroborated statements of the applicant will not suffice."

I am of the opinion that the Defendant bank has done exactly that for the purpose of not wanting to honor the demand, the bank has merely pleaded that there exists fraud and has stayed without paying the demand as legally obliged to pay to the Plaintiff from 29.01.1998 up to date. The court further harped on the clause "pay on demand" and stated, when the aforesaid clause is included, the Defendant bank should have paid without a question being posed to the person to whom the guarantee is given by the bank. The word demand attracts urgency. It means that the payment should not be delayed on whatever account. Therefore, the delay was willful, illegal and contrary to law.

Therefore, the Judgement was entered in favor of the Plaintiff and affirmed the Judgement of the Commercial High Court. Hence, the Defendant Bank was ordered to honor the Advance payment guarantee bond and pay the amount demanded on the bond.

NOTICE

TO ALL MEMBERS
INCREASE OF MEMBERSHIP FEE OF BAR ASSOCIATION OF SRI LANKA

The Executive Committee at it's meeting held on 11th November 2017 approved to increase the membership fees and the same was ratified by the Bar Council at it's meeting held on 18th November 2017 as follow with effecting from 1st January 2018.

The revised fees are as follows:

1. Life Membership Fee - Rs. 15,000/-
2. Ordinary Membership Fee - Rs. 1,500/- Annually
3. Bar Council Delegate Fee - Rs. 2,000/-

All other rates and charges remain the same

Membership Fee with effect from 1st January 2018

	MEMBERSHIP CHARGES - Rs.	ID CHARGES Rs.	ID RENEWAL CHARGES - Rs.
LIFE MEMBER	15,000/-	2,500/-	2,500/- Every 10 years
ORDINARY MEMBERS	1,500/- (Annual)	1,500/-	1,500/-

Secretary
Bar Association of Sri Lanka