

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

A. B. A. Jayasekera
Liquidator – Sun Cornel Ltd (Wound up in D. C.
Colombo Case No. 2576/SPL)
No. 14A, 02nd Floor,
16th Lane, Kollupitiya, Colombo 03.

Plaintiff

**Case No. C. A. 627/2000(F)
D. C. Negombo Case No. 5139/L**

Vs.

L. M. Apparels (Private) Limited
No. 36, 02nd Cross Street, Colombo 11.

Defendant

AND

A. B. A. Jayasekera
Liquidator – Sun Cornel Ltd (Wound up in D. C.
Colombo Case No. 2576/SPL)
No. 14A, 02nd Floor,
16th Lane, Kollupitiya, Colombo 03.

Plaintiff-Appellant

Vs.

L. M. Apparels (Private) Limited
No. 36, 02nd Cross Street, Colombo 11.

Defendant-Respondent

AND NOW BY AND BETWEEN

A. B. A. Jayasekera
Liquidator – Sun Cornel Ltd (Wound up in D. C.
Colombo Case No. 2576/SPL)
No. 14A, 02nd Floor,
16th Lane, Kollupitiya, Colombo 03.

Plaintiff-Appellant

Gatawa Kandage Sudath Kumar
No. 142, Yathama Building,
Galle Road, Colombo 06.

Presently at –

No. 46, Lumbini Mawatha,
Dalugama, Kelaniya.

Substituted Plaintiff-Appellant

Vs.

Brandix Apparel Solutions Limited
No. 409, 03rd Floor,
Galle Road, Colombo 03.

Defendant-Respondent

Before: Janak De Silva J.

Counsel:

M.U.M. Ali Sabry P.C. with Ruwantha Cooray for Substituted Plaintiff-Appellant

Sanjeeva Jayawardena P.C. with Rajeev Amarasuriya and P. Galappaththi for Defendant-Respondent

Argued on: 15.03.2019

Written Submissions tendered on:

Substituted Plaintiff-Appellant on 27.05.2013, 30.06.2014, 12.03.2019 and 29.05.2019

Defendant-Respondent on 10.07.2014, 13.03.2019 and 11.07.2019

Decided on: 02.10.2019

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Negombo dated 01.06.2000.

The Plaintiff–Appellant (Plaintiff) instituted the above styled action in his capacity as a liquidator under Section 276 of the Companies Act No. 17 of 1982 in the District Court of Negombo seeking inter alia a declaration of title to the allotments of land more fully described in the schedule to the plaint dated 10.10.1995 [Page 35 of the Appeal Brief].

The Defendant–Respondent (Defendant) filed answer dated 16.05.1997 and claimed that the said property was mortgaged by the Plaintiff to the People’s Bank under 3 mortgage bonds and due to the default of payment of the Plaintiff, the People’s Bank sold the property in a public auction to a nominee (as there were no bidders) who later transferred the property to the Defendant (by endorsing the certificate of sale issued to the nominee), who then became the owner of the said property.

Further, it was claimed that there has already been a lawsuit (D. C. Colombo Case No. 2576/SPL) relating to the same matters sought to be canvassed by the above styled action, the judgment of which was appealed in C. A. Revision Application No. 584/93, Leave to Appeal Application No. L. A. 172/93 and S. C. Spl. L.A. Application No. 144/94. The Defendant took up the position that the proceedings and the judgment of the said lawsuit operate as res judicata between the parties and that the Plaintiff has not followed the procedure laid down in C. A. Revision Application No. 584/93 when instituting the above styled action.

When the matter was taken up for trial on 18.11.1998, both parties inter alia admitted that late K. Sachithananda, the former liquidator (the predecessor of the Plaintiff) and the Defendant were parties in D. C. Colombo Case No. 2576/SPL, C. A. Revision Application No. 584/93 and Leave to Appeal Application No. L. A. 172/93.

14 issues were raised on behalf of both parties and it was agreed that the following issues be tried as preliminary issues of law –

09. උත්තරයේ 13 වැනි ඡේදයේ සඳහන් ඉහත කී නඩුවල උත්තරවාද සහ තීන්දු ප්‍රකාශ මෙම නඩුවේ පාර්ශවකරුවන් අතර විනිශ්චිත කරුණක් වන්නේ ද?
10. ඉහත කී විසඳිය යුතු ප්‍රශ්නයට “ඔව්” යනුවෙන් පිළිතුරු සැපයුවහොත් පැමිණිලිකරුට මෙම නඩුව පවත්වාගෙන යා හැකි ද?
11. පැමිණිලිකරු විසින් අභියාචනාධිකරණයේ සී. ඒ. 584/93 දරණ නඩුවේ අභියාචනාධිකරණය විසින් දී ඇති තීන්දුවට අනුකූල ව මෙම නඩුව පවරා ඇත් ද?
12. එසේ නොමැති නම්, පැමිණිලිකරුට මෙම නඩුව පවත්වාගෙන යා හැකි ද?

The learned District Judge of Negombo answered issue No. 09 in the affirmative and decided that the Plaintiff cannot maintain the above styled action and hence, this appeal.

It is agreed between the parties that the principal matter to be determined is whether the order in D. C. Colombo Case No. 2576/SPL and the decision thereon of the Court of Appeal in C. A. Revision Application No. 584/93 and the confirmation thereof by the Supreme Court in S. C. Spl. L.A. Application No. 144/94 operate as res judicata between the parties.

Necessary Constituents for Res Judicata

Both parties relied on the following extract from E. R. S. R. Coomaraswamy, *Law of Evidence* (Page 528 of Vol. I, 2nd Edition) which sets out the elements that must be established in order to establish a plea of res judicata –

- (i) The former action must have been a regular action.
- (ii) The two actions must be between the same parties or their representatives in interest (privies).
- (iii) The previous judgment must be a final judgment.
- (iv) The same question or identical causes of action must have been involved in both actions.
- (v) The judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf.
- (vi) The previous decision must be what in law is deemed such.
- (vii) The particular judicial decision must have been in fact pronounced as alleged.
- (viii) The judgment should not have been obtained by fraud or collusion.
- (ix) If it is a foreign judgment, it should have been passed in accordance with the principles of natural justice.
- (x) The correctness of the decision is not a relevant consideration.

Parties were at variance on some of these elements which will now be considered.

(i) THE FORMER ACTION MUST HAVE BEEN A REGULAR ACTION

The Appellant contends that the former action is not a regular action but an interim application [Page 5 of the Written Submissions dated 27.05.2013].

The original action (Case No. 2576/SPL) instituted in the District Court of Colombo by the E. H. Cooray & Sons Limited was to wind up Sun Cornel Textiles Limited under the provisions of Companies Act No. 17 of 1982. On 13.11.1986, the court ordered the winding up of Sun Cornel Textiles Limited.

Thereafter, on 08.07.1991, an application was made by way of a petition by Cornel & Company Limited (a creditor of the Sun Cornel Textiles Limited) praying for an order declaring the sale of the property in dispute by the People's Bank to the Respondent as ineffective and null and void and to place the said property in the custody of the liquidator.

In *Subramaniam Chetty v. Soysa* (25 N.L.R. 344) the Supreme Court held that an application made to a court in the course of, and incidental to, an action in summary procedure is, regarded by the code as itself being an action.

In this context I note that the Companies Act No. 17 of 1982 did not set out the procedure which needs to be followed when making an incidental application in winding up proceedings. The only requirement is that the application must be made by way of petition.

The question to be considered here is whether the said application constitutes a regular action upon a consideration of sections 5, 6, 7 and 8 of the Civil Procedure Code.

An "action" is a proceeding for the prevention or redress of a wrong [Section 5 of the Civil Procedure Code]. Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action [Section 6 of the Civil Procedure Code]. The procedure of an action may be either "Regular" or "Summary". [Section 7 of the Civil Procedure Code].

Save and except actions in which it is by this Ordinance or any law especially provided that proceedings may be taken by way of summary procedure, every action shall commence and proceed by a course of regular procedure, as hereinafter prescribed [Section 8 of the Civil Procedure Code].

This appears prima facie to indicate that section 8 of the Civil Procedure Code provides for the application of regular procedure in two situations namely where:

- (i) The Civil Procedure Code does not provide for summary procedure
- (ii) Any other law does not provide for summary procedure

However, the learned President's Counsel for the Respondent submitted that regular procedure applies even where a law does not provide for any other procedure. He relied on the decision in *D.H.S. Jayawardene v. R.K. Obeyesekere and Others* [S.C. (CHC) Appeal 21-23/2009; S.C.M. 21.03.2011] where J.A.N. De Silva C.J. held (at page 6):

"It was then submitted that the procedure found in section 520 of the Companies Act 7 of 2007 did not fall into either category and therefore the procedure laid down in the Civil Procedure Code should not apply in respect of disputes arising out of the Companies Act.

Section 8 which was inserted into the Civil Procedure Code as an amendment in 1980 states that unless specifically provided, proceedings should be by way of "regular" procedure.

The Civil Procedure Code itself, despite the wording in section 7 paves the way for another type of proceedings i.e. found in chapter VIII to be followed in respect of liquid claims. The procedure set out therein is distinctly different to the "regular" procedure as well as the "summary" procedure already referred to.

Therefore, I think it would be unwise to contend that a procedure found in a statute alien to the forms found in the Civil Procedure Code would not attract the provisions relating to the regular procedure of the Civil Procedure Code.

The legislature may have in its wisdom adopted various procedures to be followed in relation to the diverse actions which it deems appropriate.

Yet unless the operation and the application of the Civil Procedure Code is expressly prevented, I am of the opinion that the regular procedure of the civil procedure must be applied in terms of section 8.

Section 8 states,

Save and except actions in which it is by this Ordinance or any other law specially provided that proceedings may be taken by way of summary procedure, every action shall commence and proceed by a course of regular procedure, as hereinafter prescribed.

In other words, section 8 of the Civil Procedure Code should be understood as providing for the application of regular procedure where, a) The Civil Procedure Code does not

provide for summary procedure b) Any other law does not provide for summary procedure c) Where a law does not provide for any other procedure.

I am therefore convinced that the proceedings under scrutiny was found to be an action in which, in addition to the application of the general procedure found in the Companies Act, the regular procedure found in the Civil Procedure Code must fill any procedural lacuna."

Applying the above ratio I hold that the application made on 08.07.1991 by way of a petition by Cornel & Company Limited (a creditor of the Sun Cornel Textiles Limited) praying for an order declaring the sale of the property in dispute by the People's Bank to the Respondent as ineffective and null and void and to place the said property in the custody of the liquidator is a regular action.

(ii) THE TWO ACTIONS MUST BE BETWEEN THE SAME PARTIES OR THEIR REPRESENTATIVES IN INTEREST (PRIVIES)

The contention of the Appellant is that the previous case was not between the parties to the present case but between the E. H. Cooray & Sons Limited and Cornel & Company Limited [Page 5 of the Written Submissions dated 27.05.2013]. The Appellant relied on *Dharmadasa v. Piyadasa Perera* (64 N.L.R. 249) in which it was held that a decree absolute for default that has been passed against a defendant by a District Court is one to which Section 207 of the Civil Procedure Code applies and can, therefore, operate as res judicata in a subsequent action between the same parties in respect of the same subject matter.

It was further stated that the previous application was preferred by a creditor of the company (Cornel & Company Limited) whereas the present application was instituted by the liquidator of the company [Written Submissions dated 30.06.2014].

As mentioned above, both parties inter alia admitted that late K. Sachithananda, the former liquidator (the predecessor of the Appellant) and the Respondent were parties in D. C. Colombo Case No. 2576/SPL, C. A. Revision Application No. 584/93 and Leave to Appeal Application No. L. A. 172/93 [Page 46 of the Appeal Brief].

Also, a careful perusal of the available pleadings/proceedings of the previous case (D. C. Colombo Case No. 2576/SPL) shows that even though the Respondent was not made a party to the application made by Cornel & Company Limited (a creditor of the Sun Cornel Textiles Limited) on

08.07.1991, Messrs. L. M. Apparels (Private) Limited (the predecessor of the Respondent) was later added as a Respondent to the said application [Pages 92 and 95 of the Appeal Brief].

A party is a person whose name appears on the record at the time of the decision [*Jujjuvarapu Kotamma v. Pappala Simhachalam and Ors* AIR 1969 AP 76]. Therefore, it is safe to conclude that Messrs. L. M. Apparels (Private) Limited (the predecessor of the Respondent) was a party to the previous case.

E. R. S. R. Coomaraswamy, *Law of Evidence* (Page 529 of Vol. I, 2nd Edition) states that it is immaterial that a person is plaintiff in one action and defendant in the other. But it is essential that the party must act in the same capacity or character. In other words, the party who instituted the previous action is not required to institute the subsequent action.

Hence, I see no merit in the contention of the Appellant that the previous application was preferred by a creditor of the company whereas the present application was instituted by the liquidator of the company.

Accordingly, I hold that the two actions are between the same parties and/or their representatives in interest (privies).

(iii) THE PREVIOUS JUDGMENT MUST BE A FINAL JUDGMENT

When establishing a plea of *res judicata*, another aspect to be considered is whether the previous judgment is a final judgment.

In *Siriwardena v. Air Ceylon Limited* [(1984) 1 Sri.L.R. 286] Sharvananda, J. laid down the following tests to be applied to determine whether an order has the effect of a final judgment –

1. It must be an order finally disposing of the rights of the parties.
2. The order cannot be treated as a final order, if the suit or the action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way.
3. The finality of the order must be determined in relation to the suit.
4. The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order a final one.

Accordingly, if the order has the effect of finally disposing of the rights of the parties, it has the effect of a final judgment.

The question to be considered here is whether the actual matter in dispute between the parties has been finally concluded or in other words whether the order of the Additional District Judge of Colombo dated 01.06.1993 and the decision thereon of the Court of Appeal in C. A. Revision Application No. 584/93 and the confirmation thereof by the Supreme Court (in S. C. Spl. L.A. Application No. 144/94) have the effect of finally disposing the rights of the parties.

The actual matter in dispute between the parties is the ownership of the property more fully described in the schedule to the plaint dated 10.10.1995.

The application/petition made by the Cornel & Company Limited on 08.07.1991 was to obtain an order declaring the sale of the said property by the People's Bank to the Respondent ineffective, null and void and to place the said property in the custody of the liquidator. It was further stated in the said application/petition that the said property belongs to the company under liquidation (Sun Cornel Textiles Limited).

The instant action was instituted seeking inter alia a declaration of title to the same property.

Both parties made extensive submissions on the question whether the judgment of this Court in *L.M. Apparels (Pvt) Limited v. E.H. Cooray & Sons Limited and Others* [C. A. Revision Application No. 584/93, C.A.M. 25.03.1994] and the refusal of the Supreme Court for special leave to appeal against the said judgment in *Cornel & Company Limited v. E.H. Cooray & Sons Limited and Others* [S.C. Spl. L.A. 144/94, S.C.M. 29.08.1994] amounts to a decision on the merits.

I hold that it is a final judgment and wish to quote the following extracts from the judgment of S. N. Silva, J. (President C.A. as he was then) in support:

"In this case a resolution had been validly passed for the sale of property by public auction, prior to the operative date namely the commencement of the winding up. Therefore, a question arises whether this property could be considered a property of the company that may be disposed of by the company. Further legal issue arises in relation to constituent element (3). Is the sale affected by the Bank pursuant to the resolution, a disposition which comes within the purview of this element?" (Emphasis added) [Appeal Brief Pages 154,5].

"The property in question ceased to be the property of the company, upon the certificate of sale dated 7.4.1986 (P1) being issued in terms of section 59 of the State Mortgage and Investment Bank Law, in favour of the nominee of the Bank. In the

circumstances the provisions of section 260 will apply if at all in relation to that sale.”
(Emphasis added) [Appeal Brief Pages 158,9].

The application for the grant of special leave to appeal against the said judgment was refused by the Supreme Court.

Accordingly, I hold that the actual matter in dispute between the parties is finally concluded and the decision of the Court of Appeal in C. A. Revision Application No. 584/93 has the effect of finally disposing the rights of the parties.

(iv) THE SAME QUESTION OR IDENTICAL CAUSES OF ACTION MUST HAVE BEEN INVOLVED IN BOTH ACTIONS.

The next requirement to be considered is whether the same question or identical causes of action have been involved in both actions.

The contention of the Appellant is that the cause of action of the previous case was to secure the rights of the creditor under Section 260 of the Companies Act No. 17 of 1982 whereas the subsequent action is to implement the duties of a liquidator under Section 276 of the said Act.

Section 5 of the Civil Procedure Code defines a “cause of action” as follows –

“The wrong for the prevention or redress of which an action may be 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.”

The wrong is the combination of the right and its violation [*Lowe v. Fernando et al* (16 N.L.R. 398)]. For the purpose of determining whether or not two causes of action are the same, what we have to look is not the mere form in which the action is brought, but the grounds of the plaint, and the media on which the plaintiff asks for judgment [*Dingiri Menika v. Punchi Mahatmaya et al* (13 N.L.R. 59)].

In *Allagasamy v. The Kalutara Co. Limited et al* (14 N.L.R. 262) Lascelles, C. J. (citing De Grey, C. J. in *Kitchen v. Campbell* 2 W. Bl. 827) held that a great criterion of the identity of causes of action is that the same evidence will maintain both actions.

As I observed earlier, the previous case was brought by the Cornel & Company Limited to obtain an order declaring the sale of the aforementioned property by the People’s Bank to the Respondent is ineffective, null and void and to place the said property in the custody of the

liquidator. The instant action was instituted seeking inter alia a declaration of title to the same property.

In the previous case, the Cornel & Company Limited prayed for a declaration of nullity of sale on the ground that the property belongs to the Sun Cornel Textiles Limited and the sale by the People's Bank is ineffective as the property was sold in public auction subsequent to the commencement of the winding up procedure. Hence, it is clear that the cause of action of the previous case revolves around the ownership of the said property.

I disagree with the contention of the Appellant that the cause of action of the previous case was to secure the rights of the creditor under Section 260 of the Companies Act No. 17 of 1982 whereas the subsequent action is to implement the duties of a liquidator under Section 276 of the said Act. The ultimate purpose of placing property belonging to a company to be wound up in the custody of a liquidator is to secure the rights of the creditors. At the end of the winding up proceedings, the property placed in the custody of the liquidator will be sold in order to settle the debts of the company being wound up.

I hold that the same question or identical causes of action have been involved in both actions.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Negombo dated 01.06.2000.

The appeal is dismissed with costs.

Judge of the Court of Appeal