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

SC.CHC.APPEAL.NO.49/2012

CHC Case No. HC(Civil) 559-2010(MR)

ESTEEL (Private) Limited
Spur Road II
Industrial Processing Zone (IPZ)
Katunayake

PLAINTIFF

- VS -

East Link Engineering Company (Private)
No. 241/31, Kirula Road
Colombo 5

DEFENDANT

AND NOW BETWEEN

East Link Engineering Company (Private)
No. 241/31, Kirula Road
Colombo 5

DEFENDANT – APPELLANT

- VS -

ESTEEL (Private) Limited
Spur Road II

Industrial Processing Zone (IPZ)
Katunayake

PLAINTIFF – RESPONDENT

Before : E. A. G. R. Amarasekara, J.
A.H.M.D. Nawaz, J.
A.L. Shiran Gooneratne, J.

Counsel : Harith de Mel with Ms. Hasini Rupasinghe instructed by Shiranthi Gunawardena Associates for the Defendant – Appellant

Chandana Liyanapatabendi, PC, with Heshan Thambimuttu instructed by H. Chandrakumar de Silva for the Plaintiff – Respondent.

Argued on : 30.10.2024

Decided on : 16.06.2025

E. A. G. R. Amarasekara, J.

This Appeal is made by the Defendant – Appellant, East Link Engineering Company (Private), [Hereinafter referred to as the "Defendant" or "Appellant"] against the Judgement of the Commercial High Court of Colombo under CHC Case No. HC (Civil) 559-2010 (MR) that decided to grant the relief prayed for in the Plaint dated 24.06.2008 filed by the Plaintiff – Respondent Company, ESTEEL (Private) Limited [Hereinafter referred to as the "Plaintiff" or "Respondent"].

The Respondent instituted this action against the Appellant in the Commercial High Court of Colombo under CHC Case No. HC (Civil) 559-2010 (MR) on 24.06.2008 to recover Euros

25,756.56 or its equivalent in Sri Lankan Rupees with legal interest. In the Plaint dated 24.06.2008, among other things, the Respondent stated the following:

- Both the Appellant and the Respondent are companies duly incorporated in Sri Lanka.

- There was a contractual relationship between the Parties whereby the Appellant purchased goods from the Respondent and the Respondent supplied goods on credit basis.

- The Appellant ordered goods manufactured by the Respondent by way of purchase orders annexed to the Plaint.

- The Respondent raised the invoices annexed to the Plaint in respect of the goods so ordered by the Appellant and some invoices were raised to recover cost of tax paid by the Respondent for exporting the goods in question.

- The Respondent, thereafter, delivered the goods so ordered to the Appellant as evinced through the Advices of Dispatch annexed to the Plaint. Some goods were delivered to the Appellant on 18.10.2007 and some were delivered to the Appellant on 21.09.2007.

- As at 02.06.2008, the Respondent had sold and delivered to the Appellant on credit and the Appellant accepted the goods to the value of 25,759.56 Euros as set out in the document marked X2 and annexed to the Plaint.

- The Appellant, even though was obliged to pay, failed and neglected to pay the aforesaid sum of 25,759.56 Euros when demanded to pay.

The Plaint also contains averments to indicate that the Appellant admitted its indebtedness towards the Respondents where the Appellant undertook to settle the outstanding balance. In this regard, the Respondent, in its Plaint, had referred to certain email communications between Parties. The Plaint had further referred to the letter of demand dated 10.03.2008 sent by the Respondent's lawyer and to the reply dated 14.03.2008 received in that regard where, while denying the claim, it was stated in reply that '**goods sold and supplied by the Respondent**' were of inferior quality and highly priced. The reply of the Respondent through its lawyer to

the said reply to the letter of demand also had been tendered with the Plaint which denied the said allegation of inferior quality and high pricing.

Based on the above, the Respondent had prayed for a Judgement for the recovery of the said Euros 25,759.56 or its equivalent in Sri Lanka Rupee, together with legal interest from the date of the Plaint till the date of the decree and, thereafter, on the aggregate amount till the payment in full.

The Appellant by its Answer dated 20.11.2008 (Copy filed in English is dated 16.02.2009), among other things, took up the position that;

- The Appellant and Respondent are duly registered companies as stated in the Plaint.

- The Commercial High Court has the jurisdiction to adjudicate the matter.

- The Appellant was the agent for sales and distribution in Sri Lanka of the Respondent from 1998 for selling and distributing of 19" Electronic steel Cabinets manufactured by the Respondent.

- The contract or agreement between the Appellant and the Respondent contained the following conditions;
    - In the event of termination of the sales and distributorship Agency given to the Appellant for whatever reason, the goods which were not yet sold and possessed by the Appellant at the time will be taken back by the Respondent and pay its value.
    - A grace period was available to pay the purchased value of the goods of the Respondent to enable the Appellant to sell and recover monies from its customers.
    - The Appellant was allowed to pay the Respondent's money after collecting from its customer from the inception.
    - The Appellant could not order the required number of spare parts in some items for its customers' requirement, but the minimum amount was determined by the Respondent at its discretion.

- The expenses of advertising and promoting the good of the Respondent to be borne by the Appellant.
- No VAT or any other tax was charged by the Respondent for the goods purchase on credit by the Appellant.

- Contrary to the agreement or contract, the Respondent had added 15% VAT in the invoices annexed to the Plaint and amounts stated in those invoices are incorrect and therefore illegal and, in any event, the Respondent was not entitled to charge VAT; further the Appellant had not received these invoices of the Respondent.

- On 13.10.2007, the Appellant had paid to the Sri Lanka Customs a sum of Rs. 1,370,909 being custom's duty and VAT on behalf of the Respondent. The said amounts have to be reduced from the money to be paid for the goods.

- On or about 17.01.2008, the Respondent, without a valid reason, unreasonably illegally and contrary to the Agreement stopped issuing goods to the Appellant on credit whereby opportunities of selling the available goods were prevented by the Respondent.

- The Appellant had sold goods to its customers on credit and has to recover more than 10,000 Euros from them. The Respondent was aware of the above fact.

- As at the date of the Answer, the Appellant was in possession of the goods of the Respondent to the value of 10842/02 Euros and the Appellant is ready and willing to hand over the unsold goods to the Respondent at any moment.

- In the said backdrop, the Respondent is not entitled to claim the monies of the invoices annexed to the Plaint and no cause of action has accrued to the Respondent to sue the Appellant.

- In light of the above, the Appellant denied its liability but, has admitted that it had issued the purchase orders marked X3A2 and X3A3 annexed to the Plaint. The Appellant has further admitted that the sending of the email letter and reply letter marked X4 and X8 respectively annexed to the Plaint, but denied that the Appellant had accepted to pay monies to the Respondent.

Hence, the Appellant prayed for the Respondent's action to be dismissed.

The trial commenced on 9 admissions and 22 issues as decided on 24.06.2009. During the trial, the Respondent called 2 witnesses, the Marketing Manager and Warf Clerk, and produced documents marked P1 – P12. Objections to P2, P3 and P5 appear to have been reiterated at the close of the Plaintiff's case but P5 had not been objected when it was first marked (vide page 183 of the brief); there is no document marked such as P3 what has been originally objected were P3B1 to P3B5 and P3C1 to P3C3 (vide page 183 of the brief). There are other markings such as P3A1 to P3A3. Thus, reiteration of objections to P3 does not clearly indicate any document marked at the trial. P5 is a prepared account sheet. The amount contained in that can be ascertained by other documents. The Appellant called 1 witness, the Goods and Supplies Officer, and tendered documents marked V1 – V27.

Among the admissions made, *inter alia*, the incorporation of the Parties as limited liability companies, the jurisdiction of the Court, purchase orders marked X3(A1), X3(A2) and X3(A4) [P3A1-P3A3 at the trial], X4 email (P4 at the trial), receipt of X7, the letter of Demand (P7A at the trial), Sending of X8, reply of the Appellant's Attorney (P8 at the trial), Receipt of X9(a) in reply to X8 (P9A at the trial), and issuance of X1, X2 and publishing of X3 which are annexed to the Answer are found.

The learned Judge of the Commercial High Court of Colombo delivered his Judgement, dated 09.02.2012, holding that the Respondent is entitled to the reliefs prayed for in the prayer to the Plaint.

The following paragraphs quoted from the Judgment reveals why the learned High Court Judge held in favour of the Respondent's claim for money recovery based on goods sold and delivered and rejected the claim of the Appellant of sole distributorship and purported terms of that distributorship agreement.

(quote)

'[*The*] *defendant company does not deny delivery of goods. Nor does the defendant company states that it made the payments. As seen from email correspondence marked P4 and P5, when the plaintiff company stated in detail with invoice numbers and the amount due totaling Euros 25,759.56 in relation to the goods sold, the defendant company has not disputed them, but*

promised payment later and moreover requested the plaintiff company to supply the balance goods ordered by them. In business matters, it amounts to an admission of the liability. Since payments were not forthcoming, the plaintiff company has sent a formal letter of demand (P7A) to the defendant company, and in reply (P8), the defendant company for the first time taken up the position that the goods sold and supplied by the plaintiff company were of "inferior quality and highly priced" and therefore the same could not be sold. This standpoint is obviously not tenable.

Conversely, the defendant company in the answer has taken up the position that it is the sole distributor of the plaintiff company's products in Sri Lanka, and in terms of that Agreement which has now been terminated by the plaintiff company, the plaintiff company allowed the defendant company to collect money from the customers to pay the plaintiff company the price of goods, and no VAT was charged by the plaintiff company for the goods delivered to the defendant company, and there are goods in the possession of the defendant company worth of Euros 10,840.02 and the plaintiff company has failed to take them back.

It is interesting note that, even though the defendant company now speaks of sole distributorship agreement, no such Agreement was produced at the trial. It is not the position of the defendant company that the said Agreement is misplaced or destroyed or could not be listed and therefore could not be produced in evidence. Simply, there is no such written Agreement. Needless to emphasize that when the plaintiff and the defendant are two companies, i.e., juristic persons and not natural persons, unless there is a written Agreement, how can such an Agreement be given effect to? Where are those conditions which the defendant company now speaks of such as nonpayment of VAT by the defendant company, return of unsold goods etc? In fact, as seen from V19 and V20, the defendant company has paid certain taxes. More importantly, if the defendant company was the sole distributor, what is the benefit or commission which it gets? The submission of the defendant company that the plaintiff did not claim VAT from the defendant company in lieu of commission as the distributor is not proved to the satisfaction of the court notwithstanding that in some invoices (vide V4-V18) issued during a certain period not relevant to this case marked by the defendant company during the course of the cross examination of the plaintiff's witness VAT has not been added.

Even in the reply marked P8 to the letter of demand of the plaintiff company, the defendant company does not speak about a Distributorship Agreement or Principal-Agent relationship.

If I may repeat, in that reply sent by a firm of lawyers on behalf of the defendant company, what has been stated is "the goods sold and supplied by you were of inferior quality and highly priced and our client was not able to sell the goods as it has been the practice to sell the goods and to settle you." *Here, "the goods sold and supplied by you" is of particular importance. This is contrary to the position the defendant company has taken up at the trial*. *Reference in V1-V3 that the defendant company is the distributor is not sufficient to establish Distributorship Agreement between the parties which would govern the transaction under consideration in this case. Court is unaware under which circumstances V1-V3 have been issued.'* (unquote)

What is quoted above clearly show that the learned High Court Judge observed the purchase orders and invoices raised on them and the correspondence between the Parties referring to them and the acceptance of the indebtedness by the Appellant. The learned High Court Judge had further observed that even in the reply to the letter demand, even though the Appellant had taken a new stance that the goods were of poor quality and highly priced, it refers to goods sold and supplied. It is observed that there was no reference to any existing authorized distributor agreement or Principal and Agent relationship up to the moment of replying the said letter of demand. It is also observed that in one of the emails marked P6, it is stated on behalf of the Appellant: "*We will pay only for what we buy now. Other we will pay later*." All these facts indicate that there was sufficient material before the learned High Court Judge to establish the position of the Respondent.

With regard to the new position taken up in the Answer stating that the relationship was a Principal and Agent relationship or an Agreement of Distributorship containing the terms and conditions referred to in the Answer, the learned High Court Judge correctly has observed that there is no written agreement in that regard. In fact, an agreement of such nature may come into existence after a verbal discussion or through trade practices. However, as per the evidence, one party being a BOI approved investment, where there may be restrictions on local dealings, it is highly unlikely that there will be oral agreements. The evidence indicates that there was a limit of 10% for selling of products locally. Nonetheless, if it is considered that there is a possibility of having verbal agreements between such parties, there is no acceptable evidence to establish an offer and acceptance relating to the terms and conditions referred to as part of the said distributorship agreement by the Appellant. One who gave evidence on behalf of the Appellant was a goods and supplies officer, not the CEO or a member of the Board of Director, not even the General Manager. He does not reveal that he took part in any discussion

where such agreement was reached. His evidence does not reveal that by conduct the decision-making bodies or any person with such authority of both companies came to such an agreement with the conditions that the Appellant asserts. Thus, the said distributorship agreement seems to be mere afterthought that came into existence at the time of filing Answer. It is true that in V1-V3 there is a reference to the Appellant as a distributor but that does not establish that there was a distributorship agreement containing the terms and conditions relied by the Appellant in its Answer. Those might have even been issued or made for some other commercial purpose for such as commercial promotions. Those do not establish the terms and conditions relied upon by the Appellants in the alleged distributorship agreement against its own admissions shown through communications between parties.

The witness for the Respondent, in his evidence, has explained why in certain invoices, amount of tax is not mentioned - vide pages 210 and 211 of the brief. It must also be noted that the Appellant's witness who spoke about the distributorship agreement gave his evidence before the High Court Judge who wrote the Judgment.

In **Alwis v Piyasena Fernando (1993) 1 Sri L R 119**, it was stated: "*It is well established that findings of primary facts by a trial Judge who hears and sees witness are not to be lightly disturbed on appeal."*

In **Mahawithana v. Commissioner of Inland Revenue (1962) 64 NLR 217,** it was indicated when should a Court with Appellate powers reconsider the correctness of inferences made by a forum below by stating: "*It would seem following these dicta, with which I most respectfully agree, that it is open to this court to reconsider the correctness of the inference drawn by the Board of Review as to the assessee's intention, only- (as) if that inference has been drawn on a consideration of inadmissible evidence, or after excluding admissible and relevant evidence, (b) if the inference was a conclusion of fact drawn by the Board but unsupported by legal evidence, or (c) if the conclusion drawn from relevant facts is not rationally possible, and is perverse and should therefore be set aside."*

Hence, this Court does not see sufficient material to see the decision of the learned High Court Judge as perverse or not rationally possible or not supported by legal evidence or one made considering irrelevant matters or not considering relevant matters.

This is a direct appeal made from the Judgment of the Commercial High Court. This Court cannot hold that the learned High Court Judge erred or misdirected himself in deciding in favour of the Respondent. Hence this Appeal is Dismissed with costs.

Appeal Dismissed.

……

Judge of the Supreme Court

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

I agree.

……

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

……

Judge of the Supreme Court