

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

In the matter of an appeal in terms of Section 5 of
the High Court of the Provinces (Special Provisions)
Act, No. 10 of 1996

SC (CHC) Appeal No: 104/2018

High Court No: HC (Civil) 105/2006 (1)

1. S.C.B. Jayasinghe
2. S.T.B. Jayasinghe
3. M.V. Jayasinghe

Carrying on business in partnership under the
name and style of C.A & Co.,
134, Havelock Road, Colombo 5.

PLAINTIFFS

Vs.

1. Kajima Corporation,
2-7, Motoakasaka 1 – Chome,
Minato – ku,
Tokyo, 107-8388, Japan.
2. Kumagai Gumi Co Ltd,
2-1, Tsukodo-cho,
Shinjuku-ku,
Tokyo, 162-8557, Japan.
3. Hazama Corporation,
5-8, Kita-aoyama 2 – Chome,
Minato – ku,
Tokyo, 107-8658, Japan.

Carrying on business in partnership under the
name and style of Kajima Kumagai Hazama
Joint Venture,
77A, Ward Place, Colombo 7.

4. Ceylon Electricity Board,
Chittampalam A Gardiner Mawatha,
Colombo 2.

DEFENDANTS

And now between

1. S.C.B. Jayasinghe
2. S.T.B. Jayasinghe
3. M.V. Jayasinghe

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4. Ceylon Electricity Board,
Chittampalam A Gardiner Mawatha,
Colombo 2.

DEFENDANTS – RESPONDENTS

Before: **Yasantha Kodagoda, PC, J**
Arjuna Obeyesekere, J
Sobhitha Rajakaruna, J

Counsel: Dr. Harsha Cabral, PC with Nishan Premathiratne and Manith Dasanayake for the Plaintiffs – Appellants

Chandaka Jayasundera, PC with Rajinda Jayasinghe, Harith Gunasekera and Praveen Wijayaweera for the Defendants – Respondents

Fazly Razik, Deputy Solicitor General for the 4th Defendant – Respondent

Argued on: 1st September 2025

Written Submissions: Tendered on behalf of the Plaintiffs – Appellants on 15th October 2025
Tendered on behalf of the Defendants – Respondents on 7th August 2025 and 13th October 2025

Decided on: 19th November 2025

Obeyesekere, J

- 1) There are two issues that arise for determination in this appeal. The first is whether the Plaintiffs – Appellants [the Plaintiffs] have proved that a sum of Rs. 68m they claim was due to them from the 4th Defendant – Respondent [the 4th Defendant] has been remitted by the 4th Defendant to the 1st – 3rd Defendants – Respondents [the Defendants/KKH]. The second is, if so, whether the Defendants have been unjustly enriched by their refusal to pay the Plaintiffs a sum of Rs. 55m out of the said sum of money.

Background to the appeal

- 2) The Plaintiffs filed action in the High Court of the Western Province held in Colombo exercising commercial jurisdiction [the Commercial High Court/the High Court] on 6th June 2006 against the Defendants under eight causes of action and an alternative 8th cause of action. The Ceylon Electricity Board had been named as the 4th Defendant only for the purpose of notice and no relief had been claimed against the 4th Defendant.

- 3) Pursuant to the answer of the Defendants being filed, an objection had been taken with regard to the maintainability of the 1st and 2nd causes of action on the basis that the parties had agreed in terms of the contracts that existed between them to refer any disputes that may arise in terms of such contracts for resolution by arbitration. The Plaintiffs did not resist this objection and had informed the High Court that it will not be pursuing the 1st and 2nd causes of action.
- 4) The Defendants had also raised an objection that the 3rd, 4th and 5th causes of action are prescribed. Having heard the parties, this objection had been upheld by the High Court by its order delivered on 4th March 2009 and those three causes of action had been dismissed.
- 5) The case proceeded to trial thereafter with only the 6th, 7th and 8th causes of action [together with the alternative 8th cause of action] remaining to be decided. While the 2nd Plaintiff gave evidence on behalf of the Plaintiffs, the Defendants did not lead any evidence. By its judgment delivered on 3rd August 2018, the High Court held that the 6th and 7th causes of action too are prescribed, and that the Plaintiffs have failed to establish the 8th cause of action and the alternative 8th cause of action.
- 6) Aggrieved by the said judgment, the Plaintiffs filed this appeal. At the hearing, the learned President's Counsel for the Plaintiffs submitted that he would be limiting his submissions to the rejection of the 8th cause of action that alleged that the Defendants had been unjustly enriched in a sum of Rs. 55m, and the alternative 8th cause of action.

The parties and their contractual relationship

- 7) The Plaintiffs are carrying on business in partnership under the name, style and firm of CA & Company, primarily as civil engineering contractors and hirers of earth moving vehicles. The Plaintiffs also provide manpower, raw materials, construction machinery etc., to foreign companies that are engaged in construction projects in Sri Lanka.

- 8) The Defendants are public companies incorporated in Japan and are engaged in the business of civil engineering and construction projects. The Defendants had formed a joint venture partnership under the name and style of Kajima Kumagai Hazama [KKH] in order to bid for and engage in large scale civil engineering projects in Sri Lanka.
- 9) In 1999, the Government of Sri Lanka had approved the construction of a hydro power station at Kukule Ganga. Pursuant to the calling of tenders, the 4th Defendant had awarded to KKH the contract for the construction of the dam. KKH had selected the Plaintiffs as a sub-contractor for the supply of aggregates and quarry sand, earth works on the head pond areas and excavation and other preliminary works, and entered into three contracts with the Plaintiffs in August 1999 for the provision of the above services. These contracts provided that any dispute among the parties arising under the said contracts shall be resolved by arbitration. The aforementioned 1st and 2nd causes of action had arisen under these contracts.
- 10) The Plaintiffs state that at the request of KKH, it provided price quotations for services which were outside the above contracts and which included services such as the supplying of earthmoving equipment for civil works and manpower. Pursuant to its quotations being accepted, the Plaintiffs had supplied the said equipment and manpower that was required for KKH to fulfil its contractual obligations under the contract with the 4th Defendant. The Plaintiffs state further that their relationship with KKH improved over time and that they provided further services to KKH, in respect of which the parties did not execute any written contracts. The claims that arose out of the performance of such work were the subject matter of the 3rd – 7th causes of action and are no longer in issue in this appeal.
- 11) The services of the Plaintiffs had however been temporarily suspended in June 2000 due to the detection of a rock formation on the right bank of Kukule Ganga. The Plaintiffs state that work resumed much later and in spite of the tight timelines, they were able to complete the work undertaken by them within the required time period.

Construction of Weir – Adit II Access Road – the Works

- 12) The issue that is the subject matter of this appeal arises from the construction of the Weir – Adit II Access Road [the Works].
- 13) In their plaint, the Plaintiffs have stated the following with regard to the Works:
 - (a) In November 2002, the 4th Defendant had called for and received a quotation from KKH to carry out the Works;
 - (b) The 4th Defendant had found the quotation of KKH to be excessive;
 - (c) The 4th Defendant thereafter had direct negotiations with the Plaintiffs in relation to the construction of the Works, which culminated in an oral agreement between the Plaintiffs and the 4th Defendant for the construction of the Works for a sum of Rs. 68 million;
 - (d) The 4th Defendant awarded the contract for the execution of the Works to the Plaintiffs through KKH for a contract price of Rs. 68m;
 - (e) The 4th Defendant appointed KKH as the supervisor for the Works, as borne out by letter dated 14th March 2003 [P4], by which KKH had informed the Plaintiffs *inter alia* as follows:

"First of all we would like to inform you that the Contract for the construction of access road from Weir site to Adit II was negotiated by you directly with the Ceylon Electricity Board and our involvement in this work is merely to facilitate the payments through the project funds, progress monitoring, facilitate quality control (carrying out laboratory testing), official communication with CEB/JV on behalf of CA & Co. and invoicing."
 - (f) The Plaintiffs successfully completed the construction of the Works in January 2004;
 - (g) The 4th Defendant had disbursed the full contract value of Rs. 68m to KKH to be paid to the Plaintiffs for the execution of the Works;

- (h) The Plaintiffs became aware of that fact only when "*the 4th Defendant intimated the said fact to the Plaintiff in or about May 2005.*";
 - (i) In spite of the Plaintiffs having concluded the Works and the 4th Defendant having paid KKH the said sum of Rs. 68m, KKH have only paid the Plaintiffs a sum of Rs. 13m and there is now due and owing to the Plaintiffs from KKH the balance sum of Rs. 55m;
 - (j) Having received the said sum of Rs. 68m but by only paying a sum of Rs. 13m to the Plaintiffs and retaining the balance sum due and owing to the Plaintiffs, KKH have been unjustly enriched in a sum of Rs. 55m.
- 14) There are two matters that I must mention at this stage. The first is that the Plaintiffs did not submit with the plaint any document/s in support of the above matters. The second is that it was admitted by the 2nd Plaintiff during cross examination that "*both the 8th cause of action and the alternate cause of action are based on the same set of facts*" which I have summarised above. While the basis for the 8th cause of action was founded upon unjust enrichment, the basis for the alternative 8th cause of action was that the Defendants have dishonestly misappropriated the said sum of Rs. 55m and defrauded the Plaintiffs. Thus, all findings with regard to the 8th cause of action would apply to the alternative cause of action, as well.

8th cause of action – answer and issues

- 15) This being the position of the Plaintiffs, I wish to advert to the following two matters.
- 16) The first is that while the answer of the 1st Defendant was a complete denial of the factual averments of the plaint, the 2nd and 3rd Defendants specifically denied in their answer the fact that any money was due on the 6th – 8th causes of action or on the alternative cause of action. It was correctly pointed out by the learned President's Counsel for the Plaintiffs that the answers filed by the Defendants are not in conformity with the provisions of Section 75(d) of the Civil Procedure Code which requires an answer not only to contain a statement denying or admitting the several averments of the plaint, but for it to set out in detail plainly and concisely the matters of fact and law and the circumstances upon which the defendant means to rely for

his defence. In view of the said denial of the averments in the plaint, the only admissions that were recorded were with regard to the status of the parties and the fact that KKH have entered into several contracts with the 4th Defendant.

- 17) The second matter that I wish to advert to is that with no admissions forthcoming from the Defendants with regard to the Works except perhaps the letter P4, the burden of establishing the 8th cause of action had fallen fairly and squarely on the Plaintiffs. This is in conformity with the provisions of Sections 101 and 102 of the Evidence Ordinance which provides as follows:

Section 101 – “*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

Section 102 – “*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”*

- 18) The Plaintiffs had accordingly raised the following issues relating to the 8th cause of action:
 - (a) Did the Plaintiffs successfully complete the construction of the said Weir – Adit II access road in or around January 2004? [Issue No. 16]
 - (b) Has the 4th Defendant disbursed the full contract value of Rs. 68m to KKH to be paid to the Plaintiffs in respect of the construction of the Weir – Adit II access road? [Issue No. 17]
 - (c) Did KKH pay only a sum of Rs. 13m to the Plaintiffs in respect of the work performed by them in the construction of the Weir – Adit II access road? [Issue No. 18]

Evidence relating to the 8th cause of action

- 19) The evidence-in-chief of the 2nd Plaintiff was tendered by way of an affidavit. The averments therein with regard to the Works were almost identical to those in the plaint to which I have already referred to. Other than the averments in the affidavit, the 2nd Plaintiff did not produce with the affidavit any documentary evidence to establish the following matters, which formed the basis of the aforementioned issues raised by the Plaintiffs:
- (a) That the Plaintiffs submitted to the 4th Defendant a quotation for a sum of Rs. 68m for the carrying out of the Works;
 - (b) That the 4th Defendant accepted the price quoted by the Plaintiffs for the carrying out of the Works in a sum of Rs. 68m;
 - (c) That the Plaintiffs completed the construction of the Works;
 - (d) That the 4th Defendant paid KKH a sum of Rs. 68m on account of the Works;
 - (e) That the sum of Rs. 13m that the Plaintiffs claim it received from KKH was in respect of the Works.
- 20) The above matters were within the knowledge of the Plaintiffs or are matters on which the Plaintiffs could have obtained confirmation from the 4th Defendant. In the absence of any documentary evidence, it was critical for the success of the Plaintiffs case for them to have led the evidence of an officer from the 4th Defendant since the entire transaction relating to the Works revolved around the 4th Defendant. Although the Project Director of the Kukule Ganga Project, an authorised officer from the 4th Defendant and the Chairman of the 4th Defendant had been listed as witnesses, and even though summons had been issued on the latter, the Plaintiffs did not lead the evidence of any officer from the 4th Defendant. Thus, the case of the Plaintiffs rested entirely on the evidence of the 2nd Plaintiff.

21) The following questions were posed to the 2nd Plaintiff during cross examination:

"Q - That Rs. 68m which you say that the CEB paid the Defendants was in respect of a contract which you entered into with the CEB?

A – Yes, verbally.

Q You say you had a verbal contract with the CEB?

A – Yes

Q – The Defendants were not a party to that contract?

A – The Defendants were aware of it.

Q – The Defendants were not a party to that contract. The party was you and the CEB?

*A – Yes. But the Defendants were asked to make the payments. **CEB paid the money to the Defendants and the Defendants had to pay the money to me.***

Q – There was an oral contract with you and the CEB?

A – Yes

Q – There is nothing in writing

A – Nothing in writing.

Q – You have not filed any document in this case to show that there was the oral contract? Have you filed a single document?

A – No

Q – So there is not an iota of evidence apart from what you say that there was an oral contract between you and the CEB?

A – Yes

Q – Now you say the CEB paid to the Defendants a sum of Rs. 68m?

A – Yes

Q – There is not an iota of evidence to support that?

A – Yes."

22) The entire case for the Plaintiffs thus rested on the unsubstantiated and uncorroborated evidence of the 2nd Plaintiff and it was therefore critical that his evidence stood the test of cross examination. Unfortunately for the Plaintiffs, that was not to be and the above answers of the 2nd Plaintiff to the last two questions posed to him made it clear that there was no evidence forthcoming from the Plaintiffs to establish the issues raised by them with regard to the 8th cause of action. This being the factual position and with no further evidence either from the Plaintiffs or the Defendants, I shall now consider the judgment of the High Court.

Judgment of the High Court

- 23) The High Court dismissed the action of the Plaintiffs on three grounds.
- 24) The first is, having carefully examined the above answers of the 2nd Plaintiff during cross examination including the answer that the 2nd Plaintiff does not have an iota of evidence to support his version that the 4th Defendant paid KKH a sum of Rs. 68m, the High Court held that apart from the oral evidence of the 2nd Plaintiff, no evidence was led to establish that the 4th Defendant disbursed a sum of Rs. 68m to the Defendants to be paid to the Plaintiffs in respect of the Works or that the Defendants paid the Plaintiffs only a sum of Rs. 13m out of the said sum of Rs. 68m.
- 25) The second is the failure to call a witness from the 4th Defendant. In this regard, the High Court has held that, "*the Plaintiffs had every opportunity to call a witness from the Ceylon Electricity Board to prove that the Ceylon Electricity Board paid a sum of Rs. 68m to the Defendants to be paid to the Plaintiffs. The Plaintiffs failed to produce such evidence.*"
- 26) The third ground is with regard to the effect of P4 and whether it assists the case of the Plaintiffs. In this regard, the High Court has concluded that, "*there is no reference whatsoever in the document marked P4 that the Defendants had agreed to pay the Plaintiffs a sum of Rs. 68m or that the CEB had disbursed a sum of Rs. 68m to the Defendants to be paid to the Plaintiffs. It appears therefore that the document marked P4 does not establish that the Defendants had agreed to pay a sum of Rs. 68m or any part thereof on behalf of the CEB or that the CEB had paid a sum of Rs. 68m to the Defendants to be paid to the Plaintiffs.*"

- 27) With the High Court having arrived at the above conclusions, I shall now consider the submissions of the learned President's Counsel for the Plaintiffs in order to determine if the High Court erred when it dismissed the action of the Plaintiffs.

Submissions on behalf of the Plaintiffs

- 28) The principal submission of the learned President's Counsel for the Plaintiffs was that the evidence of the 2nd Plaintiff with regard to the 8th cause of action was sufficient in establishing a *prima facie* case for the Plaintiffs in the first instance. He submitted that the 2nd Plaintiff had stated unequivocally in his oral evidence that the 4th Defendant paid the Defendants a sum of Rs. 68m for the Works which were carried out by the Plaintiffs and that the Defendants only paid a sum of Rs. 13m and fraudulently retained the rest, resulting in the unjust enrichment of the Defendants. He submitted further that the entire transaction is captured in P4 and that KKH cannot deny that it is not liable to the Plaintiffs in respect of the said sum of money.
- 29) The learned President's Counsel for the Plaintiffs, relying on the judgment of this Court in **Rodrigo and others v St Anthony's Hardware Stores Limited** [(1995) 1 Sri LR 7] submitted further that in the absence of any evidence by the Defendants, Court is entitled to draw a presumption that had the Defendants given evidence, such evidence would have been unfavourable to the case of the Defendants, as provided for in illustration (f) of Section 114 of the Evidence Ordinance, which reads as follows:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.

Illustration (f) – that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it;"

- 30) As pointed out in **Law of Evidence** by Coomaraswamy [Volume II Book 1; page 397], the principle underlying the above presumption “arises from withholding evidence and from the spoliation or fabrication or suppression of evidence. The conduct of the person withholding the evidence can be attributed to a supposed consciousness that the evidence, if produced, would operate against him.” Coomaraswamy goes on to state that, “In order to entitle the court to draw an inference unfavourable to the person withholding the evidence, **the opposite party must satisfy the Court that such evidence is in existence and could be produced, but has been withheld.** What can give rise to the presumption is not the failure to obtain the evidence but the withholding of it. When no such evidence has been obtained, it cannot be said what the evidence would have been, and therefore no question of presumption that it would have been unfavourable can arise.”
- 31) While a Court may draw an adverse inference in an appropriate case arising from the failure of a party to lead evidence that is available to it, one must bear in mind that in Rodrigo, there was sufficient evidence led at the trial to conclude that during all times material to the transaction the 1st defendant in that case had held himself out as the agent of the other defendants and that the other defendants by their own conduct had held out that the 1st defendant was their sole spokesperson in relation to the transaction so as to induce a belief in the plaintiff and its lawyers that the 1st defendant was a sufficient medium through which notice could reach the other defendants. It is in that context that Dheeraratne, J observed [at page 12] that, “*The 1st defendant's failure to give evidence in these circumstances is quite significant and court is entitled to draw the presumption that, had the 1st defendant given evidence on this matter, such evidence would have been unfavourable to the case of the defendants. (See section 114 illustration [f] of the Evidence Ordinance)*”.
- 32) The position that has arisen in this appeal is not comparable with the above view expressed by Dheeraratne, J in that the Plaintiffs have failed to demonstrate the evidence that is said to be in existence which the Defendants are withholding.
- 33) To the contrary, the Plaintiffs did not produce an iota of evidence that demonstrated that they in fact carried out the Works for the 4th Defendant, and/or that the Works were completed to the satisfaction of the 4th Defendant. Nor have the Plaintiffs tendered any documents to substantiate their claim that the 4th Defendant agreed

to pay the Plaintiffs the said sum of Rs. 68m for carrying out the Works or the terms and conditions subject to which the Plaintiffs were required to carry out the Works for the 4th Defendant, nor did the Plaintiffs produce any written correspondence that it may have had either with the 4th Defendant or KKH, in respect of the Works. That none was available is evident when one examines the list of documents filed by the Plaintiffs.

- 34) I must reiterate that the above matters were within the knowledge of the Plaintiffs and were critical to the success of the case for the Plaintiffs but which the Plaintiffs did not produce. The lack of evidence on the part of the Plaintiffs was aggravated by the evidence of the 2nd Plaintiff when he stated that he does not have an iota of evidence to say that the 4th Defendant paid KKH Rs. 68m, thus demolishing the primary pillar on which the 8th cause of action was founded upon.
- 35) Taking the case of the Plaintiffs on the 8th cause of action at its best, what remained was only P4, by which KKH had stated that the contract for the Works was negotiated by the Plaintiffs directly with the 4th Defendant, with the involvement of KKH being merely to facilitate the payments through the project funds, monitor its progress, facilitate quality control, engage in official communication with the 4th Defendant on behalf of the Plaintiffs, and invoicing.
- 36) While I am satisfied on the strength of P4 that the 4th Defendant and the Plaintiffs had an arrangement with regard to the Works, even P4 was silent with regard to the following:
 - (a) The terms and conditions subject to which the Plaintiffs were to carry out the Works;
 - (b) The price that the Plaintiffs claimed it had quoted the 4th Defendant;
 - (c) The price that the 4th Defendant is said to have agreed to pay the Plaintiffs for the execution of the Works;
 - (d) The modalities of making payment to the Plaintiffs for the execution of the Works;
 - (e) That the 4th Defendant had paid Rs. 68m to KKH on account of the Works.

- 37) In these circumstances, I am of the view that (a) the Plaintiffs have failed to establish on a balance of probability the 8th cause of action, (b) the Plaintiffs have not satisfied the requirements that must be established in order to invoke the provisions of illustration (f) of Section 114 of the Evidence Ordinance, and (c) the findings of the High Court are supported by the evidence that was before it. I am therefore in agreement with the reasoning and the conclusions reached by the High Court, and I see no basis to vary the findings of the High Court.
- 38) There is one matter that I must perhaps advert to, prior to concluding. During the hearing of this appeal, in response to a question raised by Court as a matter of interest, the learned Deputy Solicitor General stated that "*the 4th Defendant had made payments to KKH on account of the Plaintiffs*". While no further details were provided, I am mindful that the findings that are reached by this Court must be based on and be limited to the matters that arose during the trial before the High Court.

Conclusion

- 39) The judgment of the High Court is accordingly affirmed and this appeal is dismissed, without costs.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J

I agree

JUDGE OF THE SUPREME COURT

Sobhitha Rajakaruna, J

I agree.

JUDGE OF THE SUPREME COURT