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

In the matter of an application for Final Appeal to the Supreme Court from the Judgment dated 26th August 2016 of the Honourable Judge of the High Court of Western Province (exercising Civil Jurisdiction) in case No. HC/CIVIL/97/2008/MR

SC/CHC/Appeal/02/2017
CHC Case No.
HC/CIVIL/97/2008/MR

Arunesh Seelanathakuruppu
450/24 Gehan Mawatha
Koswatte, Talangama North,
Battaramulla.

PLAINTIFF

vs

1. Bartleet Asset Management (Pvt) Ltd.
2. Bartleet Religare Securities (Pvt) Ltd.

Both of -No. 65, Braybrooke Place,
Colombo 02.

DEFENDANTS

AND NOW BETWEEN

Arunesh Seelanathakuruppu
450/24 Gehan Mawatha,
Koswatte, Talangama North,

Battaramulla.

PLAINTIFF – APPELLANT

vs

1. Bartleet Asset Management (Pvt) Ltd.
2. Bartleet Religare Securities (Pvt) Ltd.

Both of -No. 65, Braybrooke Place,
Colombo 02.

DEFENDANT - RESPONDENTS

BEFORE : Kumudini Wickremasinghe, J.
Menaka Wijesundera, J &
M. Sampath K. B. Wijeratne J.

COUNSEL : Mohamed Adamaly, P.C. with Anoukshi Vidanagamage for the Plaintiff – Appellant.

Romesh de Silva, P.C. with Shanaka Cooray for the Defendant - Respondents.

ARGUED ON : 28.03.2025

DECIDED ON : 22.10.2025

M. Sampath K. B. Wijeratne J.

Introduction

The Plaintiff-Appellant (hereinafter referred to as 'Appellant') in this matter is a businessman who was involved in a business 'G. Seelanathakuruppu and Sons (Tea Export) limited' since 1990s. According to the Appellant, owing to his health

issues coupled with his age, he wanted to release himself from administering his affairs and wanted to delegate the same to a professional company. Therefore, he had approached the 1st Defendant -Respondent (hereinafter referred to as '1st Respondent') who is a professional Asset Management Company for the purpose of managing, investing and administering his funds. Accordingly, a Fund Management Agreement ('P4') has been entered into between the Appellant and the 1st Respondent on 18.08.2005.

The 1st Respondent as already stated engages in the business of portfolio investment management whereas the 2nd Defendant- Respondent (hereinafter referred to as 2st Respondent) is a licensed stock broker operating in Colombo stock Exchange who is entrusted with the management of the funds of the Appellant entrusted with the 1st Respondent Company.

Appellant originally filed this action against 1st and 2nd Respondents in the Commercial High Court of Western Province. The basis of his claim, as pleaded, is that the Appellant has suffered losses of Rs. 6,200,870 by wrongful acts and/or breach of contractual obligations and/or negligence and/or recklessness of the Respondents in managing and investing the funds of the Appellant and there was an unjust enrichment on the part of the Respondents.

In their answer, the 1st and 2nd Respondents denied the Appellant's claim and sought to dismiss the action.

After trial, the learned Commercial High Court Judges held that the Appellant have failed to prove the purported cause of action and dismissed the action with taxed cost. Being dissatisfied with the judgment of the Commercial High Court, the Appellants preferred the instant appeal before this Court seeking to set aside the judgment of the Commercial High Court and to get the relief prayed in the plaint tendered to Commercial High Court in HC(Civil) 97/2008/MR.

Breach of contract

The relationship between the Appellant and the Respondents primarily arisen out of the Fund Management Agreement ('P4') where Appellant entrusted the management of fund constituting a sum of fifteen million Rupees to the 1st Respondent, Bartleet Asset Management (Pvt) limited.

The Appellant states that the Respondents are in breach of following provisions of the said Fund Management agreement.

> Schedule 1 item 5- *The manager shall make* ***every effort*** *to make the maximum possible return to the assignor that is not below the rate of risk-free return prevailing on the commencement date. That is nine per centum per annum.*
>
> Schedule 1 item 5.1- *However the manager* ***thrives*** *to make a minimum retune of sixteen per centum per annum.* [emphasis added]

It is the submission of the Appellant that as per the said clause Appellant is guaranteed with minimum return of 9% per annum and obliges the Respondent to aspire to provide a return of 16% per annum.

When closely reading the aforesaid provisions, there is nothing in the provision that compel the Respondent to guarantee minimum return of 9% per annum as evident in the phase '*shall make effort'* which only requires the Respondents to make best possible effort to achieve such target.

Here it is noteworthy that the agreement entered into between the Appellant and the 1st Respondent is an agreement to manage and invest the funds of the Appellant in different portfolios, in essence a 'risky business' considering the fact there will always be a probability of incurring losses relative to the expected return

on the capital one put into investment irrespective of the type of the investment you undertake.

In ***BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd***[1] (SCA) Lewis JA stated the following in a unanimous judgment at para [11**],**

> **"***It is settled law that the contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract .... It is also clear that the provision must be given a commercially sensible meaning …*"

In such a context, interpreting the aforesaid provision in favour of the Appellant would not make commercially sensible meaning, but rather would impose an unfair burden on the Respondents considering the fact that there is always a risk of investment suffering a loss despite one exercising his expertise to best of his abilities.

The Appellant argues that as per the agreement marked 'P4', the Respondents are required to invest the funds in diversified portfolios instead of '*placing all the eggs in one basket'* and therefore Respondents have acted in contravention to the Fund Management Agreement entered into between the parties. To support his contention the Appellant relies on Clause 1 of the Agreement and Clause 4 of the Schedule 1 which read as follows;

> Clause 1- *The manager shall with the concurrence of the Assignor agree upon an investment plan as per schedule 1 of this agreement which shall include the guidelines on the mixture of assets, benchmarks for measurement of performance, provision for income distribution, any specific instructions of the assignor and such other matters as may be mutually agreed between the parties.*

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[1] [2010] 2 All SA 295.

Clause 4 of schedule 1- *fixed income securities of any type that would consist but not limited to Government securities, corporate debentures, promissory notes, commercial papers, scrutinize papers, unit trusts.*

Any type of equities those are listed on the Colombo Stock Exchange

Any listings that would come after the commencement date too would be considered the purpose of investing in, either upon their listings or at Initial Public offerings."

However, Clause 2 of the said agreement gives '*sole discretion over managing the funds*' to fund Manager. Accordingly fund manager has the discretion to determine the type/ types of investments to be done as per the agreement. However, the question whether Respondents are actually negligent in investing all the funds in one investment, I would be addressing in the latter part of the judgment.

Wrongful Delegation of Authority

Appellant submit that the 1st Respondent in contravention to the provisions of agreement P4 has delegated entire management of the fund to the 2nd Respondent. As per the Latin maxim '*Delegatus non potest delegare'* Which translates as '*a delegate cannot further delegate*'. Therefore, the resultant position is that an agent cannot without the authority of principal devolve upon another the obligations that he himself has undertaken to fulfill personally as observed by Thesiger LJ in **De *Bussche v. Alt.*** [2]

However, this is only a general rule and there are numerous instances where an agent can validly delegate his authority.

In **De *Bussche v. Alt*** (*supra*) Thesiger LJ went on to held that,

[2] (1878) LR8 ChD 286 310.

> "*[T]he exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed 'a sub-agent or substitute and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute*."

Therefore, a delegation will be valid in the event where principal has expressly or impliedly authorised such delegation.

In the instant case, when reading Clause 4 of the agreement with the Clause 2 it is quite evident that 1st Respondent is empowered to delegate the management of funds to a management officer.

> Clause 2- "*The manager shall have the sole discretion over managing the funds and this would not preclude by and way the manager consulting the assignor on matters that the manager deems to be necessary to do so*."

> Clause 4- "*The manager shall appoint a person to manage the portfolio (hereinafter referred to as the fund manager) who shall be responsible for the general directions and supervision of the guidelines specified in the investment plan*"

As the Appellant expressly authorises the 1st Respondent to delegate the fund management to a 'management officer' by the agreement 'P4' itself, in the evet of absence of evidence to the effect that 2nd Respondent is unqualified or unsuitable fulfilling the delegated task, the delegation would not be unlawful.

Negligence

Here the relationship that exists between the Appellant and the Respondents takes a form of agent- principal relationship. An agent is required to exercise reasonable care and skill.

The standard of care is that expected of a reasonable agent in his position. Stuart Smith LJ in ***Chaudry vs Prabhakar***[3] sums up the duty of care expected of an agent exercising any trade or profession in the following manner;

> *"'[H]e is required to exercise the degree of skill and diligence reasonably to be expected of a person exercising such trade, profession or calling, irrespective of the degree of skill he may possess"*

An agent could be liable in negligence if he fails to meet that expectation.

As a general rule, investment advisors and stock brokers owe their clients a duty to carry out client instructions with due diligence, care and in good faith. In most cases, if the investment advisors and stock brokers discharges those duties, then the advisor will not be considered negligent if the resulting investment turns out to be unprofitable.

Appellant submit that the Respondents were negligent in investing all the funds only in share market. There is a risk of any investment. Though one undertakes higher risk when investing funds in a one particular branch rather than diversifying investment, that per se does not mean that investment is reckless or irresponsible as this depended on the particular circumstances of the investor, its objectives and the context and background of the investment itself.

Appellant contends that he was under the impression that portfolio investments are equivalent to fixed deposits. However, unlike Fixed Deposits which is known for

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[3] [1989] 1 WLR 29 (CA).

their safety and guaranteed returns, stock market is highly volatile and dynamic, with prices fluctuating based on variety of factors. Stocks have the potential for higher returns compared to FDs. While FDs offer a fixed deposit interest rate, stocks can provide substantial gains if performs well. This is one of the main reasons that investors choose to invest in stock market rather than opting for fixed deposits.

Being a businessman himself, it could be assumed that the Appellant was aware of the risk and benefits associated with the investments done in stock market. As revealed by the evidence, it was not disputed before the Commercial High Court that there was a risk involve with the investment and it was within the knowledge of the Appellant as well.

Q: Your loss according to you is that you gave a certain sum of money to invest and you did not get it back?

A: Correct.

Q: That is, the nature of investment in the share market. If you invest in the market, the price of the shares can go up or the price of the shares can go down, correct?

A: Correct.

Q: Investing in any type of thing is a risk.

A: Yes.

Q: When you invested monies or you wanted monies invested, you knew there was a risk entailed.

A: That is right.

Q: That risk was entitled because when you invest in the share market, the price of the shares can go up or the price of the shares can come down?

A: Exactly.

(Proceedings before CHC dated 11.03.2013)

As Portfolio value of any investment may fluctuate according to market risks, in this context Respondents cannot be made liable for such, unless it is due to their own fault that such loss is incurred.

The Fund Management Agreement itself states as follows:

> Clause 11- *"The manager shall take all reasonable steps to prudently manage the portfolio assigned to them but shall not be responsible for losses of whatever nature unless such losses are attributable to fraud or willful negligence on the part of the manager or agent or servants occasioned by market conditions*"

Thus, I am of the view that mere loss that is incurred by investing in share market is not *prima facie* evidence to indicate that Respondents have been negligent in their dealings and to hold them accountable for such loss unless there is clear and convincing evidence to that effect.

Fraudulent Misrepresentation

The Appellant claims that Respondents have acted fraudulently by misrepresenting the facts to the Plaintiff by stating that they will '*guarantee or return the investment'* to induce the Appellant to enter into the agreement 'P4' and that the investment '*is doing well'* during the continuance of the agreement to give the assurance to the Appellant that investment was secure.

In order to find fraud on the part of the Respondents through misrepresentation, following elements needed to be proven; A false representation that was made to the client, some level of knowledge of the falsehood of the representation on the

part of the maker of such statement, such false misrepresentation has induced the client to act and such actions resulted in a loss.[4]

Here one has to consider whether misrepresentation was linked sufficiently closely or directly to the loss for legal liability to ensue. In this case there are ample of evidence to suggest that the Appellant possessed relevant knowledge at all time to make an informed decision to advise the Respondents if he was not in agreement with the decisions taken by the Respondents, though in such event, the Respondent would not be liable for any loss incurred as a consequence.

Q: The question is you were made aware of every purchase

by sending you a purchase note?

A: That is the trading of 3 days ***I used to get all the purchase notes.***

(……..)

Q: Similarly, ***when the Defendant Company sold any of your shares in your share portfolio, the whole note was sent to you****?*

A: ***Sent to me yes.***

Q: At no stage have you protested to the Defendant Company about the sale of any of those shares?

*A****: I am not supposed to do that. I didn't do it****.*

(……..)

Q: You did not protest. As a fact you met them every month and you accepted their full explanation as a fact. In that background, if the

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[4] In Brackett v. Griswold, 20 N.E. 376, 378 (N.Y. 1889) fraudulent misrepresentation is defined as follows "*false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he in good faith parted with property, or incurred the obligation which occasioned the injury of which he complains*"

shares went down in twice, that's the risk you take when you invest in the share market?

A: That's right. ***When the share price went down and when I asked them every month when I see the portfolio value, it has gone down in value, they say now it is not good time to invest, we have invested on commercial papers, government bonds and various other investment activities. As far as they take my 16 p.a. monthly, I was not worried about what they are doing.*** **[**emphasis added**]**

(Proceedings before CHC dated 11.03.2013)

Accordingly, I am of the view that as Appellant being a businessman himself and having the possession of all the relevant information including CDS statements, purchase and sales notes regarding shares and portfolio statements to make an informed decision cannot said to have misled by the Respondents.

Unjust enrichment

Though Appellant contend that the Respondents have unjustly enriched through the Appellant, he has failed to produce any positive evidence of such unjust enrichment. Moreover, the statements of the Appellant himself shows that the allegation of unjust enrichment is an assumption which he himself is not aware of, as for a fact.

Q: It's not a question what you meant. Please answer my question. You said under oath that you are not aware whether the defendants have been enriched. Now my question therefore is, it is a mistake when you say in this paragraph that the defendants have been enriched?

A: I have lost Rs. 6.2 million. ***The defendants may have taken that money.***

Court: ***You are not sure about it?***

A: ***I am not very sure.***

[emphasis added**]**

(Proceedings before CHC dated 11.03.2013)

Evaluation of evidence by learned Judges of Commercial High Court

At the trial, a number of documents were marked in evidence. After the trial, the learned judges of the Commercial High Court refused to admit documents marked 'P5(a)', 'P5(b)' and 'P (10)' as evidence which is now being challenged before this Court.

The learned Judges of the Commercial High Court refused to admit 'P5(a)', 'P5(b)' and 'P (10)' on the ground that they are mere photocopies and originals have not been tendered before the Court. Further it was held that 'P5(a)' and 'P5(b)' which are two cheque deposit slips are inadmissible as evidence as officers of the relevant bank was not called to give evidence. Similarly, no author or any officer of the issuing authority was called to prove the content of 'P10' which is a client stock valuation report issued by Colombo Stock Exchange.

It is noteworthy that under existing law of Sri Lanka four categories of evidence are recognized, namely 'oral evidence', 'documentary evidence', 'contemporaneous audio-visual recordings' and 'computer evidence'. Documentary evidence plays a significant role particularly in civil cases at the case at hand. According to section 61 of the Evidence Ordinance, the contents of documents may be proved either by primary or by secondary evidence. While section 62 describes what is primary evidence relating to a document, Section 63 elaborates on what comes within the purview of secondary evidence. As per

section 64 documents must be proved by primary evidence, except in the circumstances laid down in section 65.

In ***Stassen Exports Limited vs. Brooke Bond Group Ltd., and Two others***[5] Saleem Masoof J. expounded the rationale behind Section 64 and 65 as follows;

> "*It may be useful to pause here to explain that although according to Section 61 of the Evidence Ordinance, the contents of document may be proved either by primary or by secondary evidence, it is expressly provided in Section 64 of the Ordinance that documents must be proved by primary evidence, expect in the specific instances listed in Section 65 of the Ordinance as cases in which secondary evidence may be given. This provision embodies the so called 'Best Evidence' rule, which postulates that it is in the interests of justice to produce the best evidence as opposed to inferior evidence, which in the case of a document would mean that it is desirable to produce in court the original rather than a copy thereto*"

As noted by Yasantha Kodagoda, P.C., J. in ***Weerawarnakulasuriya Boosabaduge Shamaline Fernando vs Kusalanthi Fernando and Another***[6] since these provisions have been crafted to ensure that genuine documents are produced in judicial proceedings, and thus go into the very root of the integrity of documentary evidence, the rules relating to admissibility of documentary evidence must be strictly adhered to.

Thus, I am of the view that learned Judges of the Commercial High Court are correct in their refusal to admit documentary evidence marked 'P5(a)', 'P5(b)' and 'P (10)'.

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[5] [2010] 2 SRI L.R. 36.
[6] SC Appeal No. SC Appeal 55/2020, SCM 9.11.2023.

Conclusion

For the reasons stated above, the judgment of the Commercial High Court is affirmed. Appeal is dismissed with costs.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J.

I Agree.

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J.

I Agree.

JUDGE OF THE SUPREME COURT