

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

In the matter of an Appeal.

**CA (PHC) 91/2008**  
HC Colombo No:RA 942/05  
MC (Fort) No: 62131/S/05

Senior Manager,  
Offshore Branch,  
No: 34, Mohammed Markin  
Maker Mawatha,  
Colombo 03.

For and on behalf of the  
People's Bank having its  
registered office at No. 75,  
Chiththamplalam A. Gardiner  
Mawatha, Colombo 02,  
incorporated by Act No: 32 of  
1986 and as an approved Credit  
Agency in terms of Act 30 of  
1988.

**Complainant Petitioner**  
**Appellant**

**Vs.**

01. AshiqCader Mohamed Lafir,  
No. 136/1, Dutugamunu  
Street,  
Dehiwela.

**3<sup>rd</sup> Accused – Respondent –  
Respondent**

02. Muhammed RozanJifry,  
No. 09, Palmyra Avenue,  
Colombo 03.

**4<sup>th</sup> Accused – Respondent –  
Respondent**

03.Hon. Attorney General,  
Attorney General's  
Department,  
Hulfsdrop,  
Colombo 12.

**Respondent – Respondent**

**Before : P.R. Walgama, J**

**: L.T.B. Dehideniya, J**

**Council : Rohan Sahabandu PC for the Complainant –  
Petitioner – Appellant.**

**: Kalinga Indrathissa PC with Vindhya  
Gunawardana for the 3<sup>rd</sup> Accused – Respondent –  
Respondent.**

**: Sumuduni Ekanayake for the 4<sup>th</sup> Accused – 2<sup>nd</sup>  
Respondent – Respondent.**

**Argued on , : 16.02.2016**

**Decided on : 31.08.2016**

CASE- NO- CA (PHC)- 91 /2008- JUDGMENT – 31.08.2016

**P.R. Walgama, J**

The issue in this appeal is whether the Complainant-  
Petitioner- Appellant is entitled to recover the money  
due on Three Trust Receipts issued to the Company

viz. 'Perfect Fit International Private Limited', by instituting proceedings in the Magistrate Court.

The People's Bank of off shore Branch advanced a financial facility to the afore said Company, on three Trust Receipts mentioned herein under;

That on Trust Receipt No. 3/111 dated 19.02.2004 for a sum US\$ 94,500/ and US\$ 177,000/ and 3/222 dated 24.03.2004.

It is alleged by the Appellant that although the afore said amount is due from the afore said Company, it had failed and neglected to pay the said amount.

In order to recover the said money due to the Appellant Bank , it instituted action in terms of Section 136(1) of the Criminal Procedure Code and for committing an offence under Section 3(2), and offence punishable in terms of Section 4(1) (iv) of the Trust Receipts Ordinance No. 12 of 1947 as amended by Act No. 13 of 1990.

Pursuant to the institution of the proceedings thereon the Learned Magistrate issued notice on the Directors of the above Company, and on behalf of the Respondents a preliminary objection was raised as to the maintainability of the action in the Magistrate Court.

The thrust of the argument of the Counsel for the Respondents is that only a breach or failure to

comply with the undertakings set out in Section 3(2) of the Trust Receipt Ordinance, which is punishable under Section 4(1) (iv) an action could be instituted under the above Act.

Hence the circumstances attended there to the Learned Magistrate was of the view that there is no breach of the undertaking given in terms of Section 3(2) of the Trust Receipt Ordinance.

For convenience and brevity the Section stated above is reproduced here under;

Section 3(2)

(2) In order to comply with the provisions of this subsection, a document which is executed by any person in the circumstances mentioned in subsection (1) must contain the following undertakings on the part of that person in respect of the goods to which the document relates ;

1. an undertaking to hold those goods in trust for the agency in favour of which it is executed, to mark the goods or the packages or cases containing them in a specified manner, and to keep the goods in specified premises until the exportation thereof;

- 2 . an undertaking, upon the exportation from Sri Lanka of those goods to deliver to the agency the bills of lading and their shipping documents relating to such goods;

3. an undertaking not to sell those goods to any other person in Sri Lanka except with the consent of the agency, and in the event of any such sale with such consent to deliver the proceeds of sale from time to time as received to the agency;

4. an undertaking, in the event of those goods not being exported from Sri Lanka within a specified period, to deliver the goods to, or the order of, the agency upon demand made in writing in that behalf;

5. an undertaking to permit the agency without prior notice from time to time to enter and inspect the premises in which those goods are kept and to take stock of such of those goods as may be in the premises; AND

6. an undertaking to insure those goods until the exportation thereof, against all insurable risks to their full insurable value on a reinstatement basis in the name of the agency and in the case of loss to pay the insurance moneys to the agency in the same manner as the proceeds of the sale  
Section 3 (3)

3. Nothing in subsection (2) shall be deemed to prevent the inclusion in the document of any undertakings, conditions or stipulations in addition in the undertakings specified in that subsection.

In the event of a violation of the above conditions the Section 4 operates as the punitive section which states thus;

The person by whom the trust receipt was executed shall, if he commits a breach or fails to comply with any undertaking referred to in subsection (2) b or subsection (3) of Section (2) of section 3, as the case may be, being an undertaking contained in the trust receipt be guilty of an offence and shall be on conviction after summary trial before a Magistrate be liable to imprisonment of either description for a term not exceeding three years or to a fine not less than the amount of the money stated in the trust receipt to be due or to become payable thereunder to the agency and not exceeding three times that amount.

The fundamental bone of contention of the Appellant Bank is that the Section 4 (1) (iv) of the Trust Receipt Ordinance also deals with the Criminal liability in order to recover the loan facility advanced by the credit agency on the purported trust receipt.

Therefore it is contended by the Appellant that Section 4(1) (iv) does not operate as a punitive sanction only in respect of a breach contemplates in Section 3(2).

Besides it is alleged by the Appellant Bank that the complaint made to the Magistrate Court was not

only the non payment of the money due to the Bank on the Trust Receipt, but has made of a breach of several other undertakings, which should be dealt under Section 4 (1) (iv) of the Trust Receipt Ordinance.

Nevertheless the Appellant Bank has admitted that it has categorically stated as to the conditions that breach has occurred.

It is also contended by the Appellant that the 1<sup>st</sup> and the 2<sup>nd</sup> Accused have not denied the liability and therefore it it urged that the Court should exercised its powers to recover this money due on the Trust Receipts as the same was advanced by the State Bank which in fact is public funds.

Thus in the above setting the Appellant Bank asserts that when the facts were cogent that the Accused being the Directors of the said Company had advanced the money stated above on Trust Receipts , but not repaid the same to the Bank, the Learned Magistrate should have probe in to the transaction proper without dismissing the application of the Complainant- Petitioner- Appellant.

Being aggrieved by the said dismissal of the application by the Learned Magistrate, the Appellant Bank went in Revision to the Provincial High Court of Colombo to have the said impugned order set aside.

The Learned High Court Judge after a due analysis of the facts placed before her had arrived at the conclusion that although the Appellant had the right of appeal but without exercising the said right had invoked the Revisionary Jurisdiction of this Court, without establishing exceptional circumstances which will warrant this Court to do so.

The Learned High Court Judge, after adverting to the factual and legal matrix had dismissed the Revision application of the Appellant.

Being dissatisfied with the afore said order of the Learned High Court Judge dated 10.07.2008, the Appellant appeal to this Court to have the said order vacate or set aside.

The ground norm of the argument of the Petitioner-Appellant Bank was dealt exhaustively and I do not wish to rehearse.

The Complainant- Petitioner- Appellant fundamentally assailed the said impugned orders of the Learned High Court Judge and the Learned Magistrate on the basis that their failure to evaluate the charge sheet viz,

That an allegation of failure to pay as undertaken in clause 1 and 10 of the Trust Receipt,

AND



Breach and /or failure to comply a single, several or all the undertakings referred to in the Trust Receipt.

A cursory glance at the said charge it is abundantly clear that the Accused -Respondents had been charged not only in terms of Section 3(2) read with Section 4(1)(4) of Trust Receipt ordinance No. 12 of 1947, amended by Act No. 13 of 1990.

It is the contention of the Petitioner- Appellant that apart from the undertaking given in the Trust Receipt the parties can also include any additional undertakings and included in the document. Therefore it is asserted by the Petitioner- Appellant that Section 4(1) which is the punitive section does not only cover the breaches stated in Section 3(2) of the said Ordinance, but also in a situation where the person by whom the trust receipt was executed had failed to pay the money that was advanced and the interest thereto.

Further it is the position of the Appellant bank that they did not have the opportunity to catalogue the the undertaking that was breached, but same could be revealed during the course of the trial.

The stark point for consideration is that non of the Accused- Respondents had denied the liability, but had only taken up the said issue to be decide initially.

The argument advanced by the 3<sup>rd</sup> Accused - Respondent is that the non payment of money does not amount to a criminal act in terms of Section 3(2) of the Trust Receipts Ordinance. Therefore it is the categorical position of the 3<sup>rd</sup> Respondent that in the above situation does not amount to a criminal act and therefore the private plaint and the charge sheet filed by the Complainant -Petitioner- Appellant is bad in law.

It is salient to note that the said loan on the purported trust receipts were raised by the above said Company. Therefore the Company should have been made a party to

The Counsel for the 3<sup>rd</sup> Accused -Respondent adverted Court to the fact, that the order made by the Learned Magistrate is a final order discharging and acquitting all the Accused and as such the proper course of action against such order should be an appeal. Therefore it is contended by the 3<sup>rd</sup> Accused - Respondent, that when the Appellant had the right to appeal to this court, and should have not invoked the revisionary jurisdiction of the High Court.

In addition it is submitted by the counsel for the 3<sup>rd</sup> Respondent that, if the Appellant has chosen to invoke the revisionary jurisdiction to set aside the said impugned orders he should aver exceptional

circumstances which warrants the exercise of the said power.

It is contended by the 4<sup>th</sup> accused - 2<sup>nd</sup> Respondent that he was not a Director in the Company in issue as he has resigned from the Company in 2003, and the charges relate to a period between 19<sup>th</sup> February 2004 and 24 of March 2004.

It is also salient to note that no interpretation to the above sections were given by our Superior Court. Hence in the above setting this court is persuaded with the interpretation adduced to the afore mentioned sections by the Counsel for the accused-respondents.

For the above compelling reasons we dismiss the appeal without costs.

Accordingly the appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

L.T.B. Dehideniya, J

I agree.

**JUDGE OF THE COURT OF APPEAL**