BLUE DIAMONDS LIMITED
v.
AMSTERDAM – ROTTERDAM BANK M. V. AND ANOTHER (AMRO BANK CASE)

SUPREME COURT.
BANDARANAYAKE, J.,
FERNANDO, J. AND
DHEERARATNE, J.
S.C. APPEAL NO. 17/91.
C.A. NO. 352/87(F).
D.C. COLOMBO NO. 86745/M.
JUNE 17 AND 19, JULY 10 AND 11, 1991.
FEBRUARY 4, 20, 21, 24, 25 AND 26, 1992.

Sale – Contract for sale of diamonds – Place where contract sought to be enforced was made – Place where contract was made and cause of action arose – Residence of branch of company – Jurisdiction – Traversing jurisdiction in the answer.

Arrangements were made primarily though the Blue Diamonds Limited's (appellants) bankers the Bank of Ceylon, Colombo with the Amsterdam – Rotterdam Bank (Amro) of Amsterdam, the defendant for delivery of a parcel of diamonds by Amro to B. Schatz B. V. upon certain terms as to payment. Alleging that Amro did not comply with the agreed terms and conditions the appellant instituted an action for damages against Amro.

The documents relevant to the sale were :

(a) An export invoice dated 19.9.80 issued by the appellant describing Amro as the consignee (account of B. Schatz B. V.) stipulating as terms. " To be issued against a trust receipt for 180 days for the full c.i.f. value signed by an authorized officer of Schatz B. V. The diamonds were 139.01 carats in weight, having a c.i.f. value of US $ 50,742/95 (Rs. 863,645).

(b) Airway bill for carriage of parcel.

(c) A " cover schedule " issued by Bank of Ceylon to Amro describing appellant as drawer and Schatz as drawee with notes and instructions. This was a collection order issued by the Bank of Ceylon on behalf of its principal, the appellant.

(d) A bill of exchange drawn by the appellant on Schatz for payment of US $ 50,742.95, 180 days after sight in favour of Amro.

The parcel of diamonds together with documents was duly carried to Amsterdam and delivered to Amro who delivered the parcel to Schatz without however obtaining from Schatz a trust receipt and without presenting the bill of exchange to Schatz for acceptance despite being aware of these terms.

By this time another two parcels of diamonds having invoice value of US $ 45,826/55 and US $ 62,878/49 had been delivered to Schatz.

The original contracts of sale were varied by the substitution of agreed revised sale prices – the revised price for the first parcel being reduced from US $ 50,742/95 to US $ 41,892/71 and for the 2nd and 3 parcels US $ 33, 729/15 and US $ 58, 870/53. By 10.10.80 Amro had remitted a total of US $ 135,492/39 (exactly US $ 1000 more than the total amount due on the revised rates).

Held :

1. As there appeared to be a new agreement between the buyer and the seller whereby the latter had agreed to a reduced price payable immediately, Amro remitted such lower price. Thereupon bills of exchange and trust receipts seemed not merely inappropriate but improper. Where the buyer has paid the agreed price he cannot be required to execute instruments obliging him to pay the price again.

2. The contract sued upon was not a contract (whether of agency or otherwise) concluded by means of discussions directly between the appellant and Amro, but a contract evidenced by the export invoice, airway bill, cover schedule and bill of exchange, constituted by the acts of the Bank of Ceylon and Amro. Acceptance was not by telephonic communication to the appellant but by intimation to the Bank of Ceylon and by performance. The contract had been entered into in Amsterdam.

3. (a) Section 45, of the CPC requires a statement of the facts setting out the jurisdiction of the court to try and determine the claim. The necessary averments must appear in the body of the plaint in the form of distinct averments. The plea as to residence in the plaint was ambiguous. Section 9, CPC confers jurisdiction on the District Court, within whose jurisdiction the defendant resides. "Resides" in the case of a natural person refers to place where he has his family establishment and home. In the case of corporation in India the corporation is deemed to carry on business at the sole or principle office. But our Civil Procedure Code does not have a similar explanation. The plea based on residence in the plaint is insufficient as there is no unequivocal assertion that Amro resides within jurisdiction. The use of the word 'deemed' in the plaint to describe residence suggests that Amro did not in fact reside within the jurisdiction.

(b) In traversing jurisdiction the answer must in terms of section 76 CPC do so by a separate and distinct plea expressly traversing such averment. The general denial is insufficient. Even a specific denial of the paragraph in the plaint averring jurisdiction would generally be insufficient if it could not indicate whether the defendant –

(i) was denying that a contract had been entered into and even if there had been such a contract, it had not been entered into at Colombo ; or

(ii) was denying such a contract, but was conceding that if such a contract was proved, it had been entered into at Colombo ; or

(iii) while admitting that a contract has been entered into, was denying that it had been entered into at Colombo.

What section 76 requires is a specific denial of jurisdiction. No particular formula is required. A plea which ex facie and unambiguously involves a denial of jurisdiction would suffice.

(c)(i) Although the answer did not deny jurisdiction on the ground of residence this does not amount to an admission of jurisdiction, because the plaint was defective in that respect.

(ii) The answer contained an adequate denial of jurisdiction on the basis of the place of contract because it denies any agreement entered into at Colombo within the jurisdiction of the court.

(iii) In regard to jurisdiction based on the accrual of a cause of action, the answer did not adequately traverse jurisdiction because it contained only a denial of the accrual of such cause of action and was silent as to jurisdiction. That the District Court of Colombo had jurisdiction, on the basis that the alleged cause of action arose within its limits was not denied and had therefore to be treated as admitted by Amro.

4. Where jurisdiction is admitted or deemed to be admitted no question arises as to the burden of proof on the framing of issues. Section 150, explanation makes it clear that the plaintiff must establish so much of the material part of his case as is not admitted by the defendant. Although the contract had been entered into at Amsterdam, the District Court of Colombo had jurisdiction on the basis of the accrual of the cause of action.

5. The fact that Amro, as a banker, obtained immediate payment from the buyer and remitted it to the seller cannot per se be regarded as a breach. The condition that delivery to schatz should only be upon obtaining a trust receipt for 180 days and upon acceptance of a bill of exchange payable 180 days after sight was intended to give effect to a commercial transaction between buyer and seller. Receiving the price 180 days before it was due is favourable to the seller.

Adjustments, variations, negotiations and compromises are an inevitable and continuing part of business transactions. The instructions originally given were varied and Amro substantially complied with them and the appellant ratified Amros' conduct. The appellant failed to establish a cause of action.

Cases referred to :

01. *N. Y. Life Insurance Co. v. Public Trustee* (1924) 2 Ch. 101.
02. *De Beers Consolidated Mines Ltd. v. Howe* (1906) AC 455.
03. *Cesena Sulphur Co. Ltd. v. Nicholson* (1876) 1 Exch. D. 428.
04. *Union Corporation Ltd. v. I.R.C.* (1952) 1 All E.R. 646.
05. *Bisset v. Loftus* (1884) 6 S.C.C. 152.
06. *Sulaiman v. Ibrahim* (1890) 9 S.C.C. 131.
07. *Mendis v. Perera* (1908) 13 N.L.R. 41.
08. *Chetty v. Saibo* (1891) 2 Cey. L.R. 37.
09. *Marimuttu v. Commissioner for Registration of I. & P. Residents* (1956) 57 N.L.R. 307, 309.
10. *Newby v. Von Oppen* (1872) 7 Q. B. 293.
11. *Dunlop Company v. Actien–Gesellschaft etc. Vorm. Cudell and Company* (1902) 1 K.B. 342.
12. *Saccharin Corporation Ltd. v. Chemische Febrik von Heyden Aktiengesellschaft* (1911) 2 K.B. 516.
13. *The Theodohos* (1977) 21 Q.B. 428.
14. *Le Mesurier v. Le Mesurier* (1893) 3 S.C.R. 12, 19, 20.
15. *Le Mesurier v. Le Mesurier* (1898) 1 N.L.R. 160.
16. *Harris v. Taylor* (1951) 1 K.B. 580.
17. *Dulles v. Vidler* 1 Ch. 842.
18. *Henry v. Geoprosco* (1975) 3 W.L.R. 620.
19. *Arnaldo da Brescia,* (1922) 23 N.L.R. 391.
20. *Gunawardene v. Jayawardene* (1971) 74 N.L.R. 248.
21. *Perera v. Chelliah* (1970) 74 N.L.R. 61.
22. *Rayner & Co. Ltd. v. Hambro's Bank Ltd.* (1943) 1 K.B. 37.
23. *Bank Melle Iran v. Barclays Bank* (1951) 2 Lloyd's Rep. 367.
24. *Midland Bank v. Seymour* (1955) 2 Lloyd's Rep. 147.
25. *Edward Owen Ltd. v. Barclays Bank Ltd.* (1977) 3 W.L.R. 764.
26. *Richardson Scale Co. Ltd. v. Polimex-Cekop* (1978) 1 Lloyd Rep. 161.
27. *Siporex Trade v. Banque Indosuez* (1986) 2 Lloyd's Rep. 146.
28. *United City v. Royal Bank* (1982) 2 Lloyd's Rep. 1.

APPEAL from judgment of the Court of Appeal.

Laksman Kadirgamar, P.C. with *S. L. Gunasekera, Miss. Lalitha Seneviratne, Shanaka de Silva, Maithri Gunaratne* and *Miss. S. M. Divulwewa* for appellant.

Eric Amerasinghe, P.C. with *Harsha Soza* for the respondent.

Cur. adv.vult.

September 23, 1992.

FERNANDO, J.

The plaintiff-Appellant company ("the Appellant") carries on the business of cutting and polishing uncut, or rough, diamonds ; it purchases uncut diamonds from foreign suppliers, and sells the finished product to foreign dealers. The present appeal involves one such transaction connected with the sale of 139.01 carats of cut and polished diamonds by the Appellant to B. Schatz BV of Amsterdam ("Schatz") ; certain arrangements were made primarily through the Appellant's bankers, the Bank of Ceylon in Colombo, with the Amsterdam–Rotterdam Bank ("Amro") of Amsterdam, the Defendant-Respondent, for delivery of the diamonds by Amro to Schatz, upon certain terms as to payment. Alleging that Amro did not comply with some of the agreed terms and conditions, the Appellant instituted an action for damages against Amro ; this was dismissed ; an appeal to the Court of Appeal was also dismissed. Several questions of law being involved, special leave to appeal was granted.

1. THE FACTS

Previous sales of diamonds by the Appellant to Schatz, had not given rise to any disputes. Having obtained all necessary approvals and certificates, the Appellant shipped the parcel in dispute in September 1980, and the rights and obligations of the various parties involved have to be ascertained from the following documents :

(a) An export invoice (P12) dated 19.9.80 issued by the Appellant, describing Amro as consignee ("Account of B. Schatz B.V."), containing a printed note at the foot thereof " Through Bank of Ceylon, Colombo ", and stipulating :

> " TERMS : To be issued against a trust receipt for 180 days for the full C.I.F. value signed by an authorised officer of Schatz B. V. Weesperplein 4, Amsterdam."

The diamonds were 139.01 carats, in weight, having a c.i.f. value of US $ 50,742/95 (Rs. 863,645/00).

(b) An airway bill (P1) dated 22.9.80 whereby the Appellant contracted with Swissair for the carriage of the parcel valued at Rs. 855,008/72 from Colombo to Amsterdam, the consignee being Amro on account of Schatz.

(c) A " cover schedule " (P2) dated 25.9.80 issued by the Bank of Ceylon to Amro describing the Appellant as " Drawer " and Schatz as "Drawee", and containing the following notes and instructions :

> " Kindly acknowledge receipt of documents and follow instructions, inclusive of general instructions overleaf, under advice to us."
>
> " On maturity, please remit proceeds to Morgan Guaranty Trust Co. of New York, 23, Wall Street, New York 15, U.S.A., for credit of our account, under advice to us by *authenticated cable* "

DRAWER	DRAWEE	TENOR	AMOUNT
Blue Peacock Diamonds Ltd., P. O. Box 439, Colombo	B. Schatz B. V., Weesperplein 4, 1018 X A, Amsterdam, Holland.	180 Days D/A	US$ 50,742/95

Some of the general instructions on the reverse of the cover schedule were :

"1. Please present all bills and/or documents for acceptance or payment immediately on receipt and advise result and/or date of maturity without delay.

2. Reason for dishonour should always be indicated when advising non-payment or non-acceptance.

3. If dishonoured, store goods on arrival in bonded warehouse (notify insurance agents in the event of damage) ; insure against fire theft & S.R. & C.C. for invoice value plus 10% and advise drawee. Any duty, landing, clearing and warehousing charges must be collected from the consignee before delivery."

This " cover schedule " was thus a collection order issued by the Bank of Ceylon on behalf of its principal, the Appellant.

(d) The cover schedule also confirmed the text of a tested telex sent to Amro on 26.9.80 :

> " Tested as on twentysixth September 1980 for USDLRS 50742-95 test..... Our customer Blue Peacock Diamonds Ltd., has consigned to you a parcel of gems on account of B. Schatz B. V. Weesperplein 4, 1018 X A, Amsterdam, under Swissair airway bill No 085-5420 6736 STOP Please release parcel to drawees on a trust receipt for 180 days for USDLRS 50742-95 signed by an authorised officer of B. Schatz B. V. Weesperlein 4, 1018 X A, Amsterdam, Holland pending receipt of the relevant shipping documents under our ref. FBC 43/713 STOP Remit proceeds to Morgan Bank New York for the credit of our account and request them to advise us by another authenticated cable on receipt of proceeds STOP "

(e) A bill of exchange (P3) dated 24.9.80 drawn by the Appellant on Schatz, for payment of US $ 50,742.95, 180 days after sight in favour of Amro.

The parcel of diamonds, together with a copy of the airway bill, invoice and other documents, was duly carried to Amsterdam, and delivered to Amro. The cover schedule, together with a copy of the airway bill, invoice and other documents, as well as the bill of exchange, was sent by the Bank of Ceylon to Amro by registered airmail, and was received on 1.10.80. There is no evidence as to when Amro (a) received the parcel from Swissair, and (b) delivered it to Schatz, but it is common ground that Amro did deliver the parcel to Schatz without obtaining from Schatz a trust receipt, and did not present the bill of exchange to Schatz for acceptance. In the absence of any assertion by Amro to the contrary, it must be assumed that the telex sent on 26.9.80 was received the same day ; in any event its text became known when the cover schedule was received on 1.10.80. Amro did not claim in regard to the delivery of the parcel that it had acted independently of the instructions of the Bank of Ceylon given in the aforesaid telex and cover schedule, or that it had refused to act on such instructions. Hence the factual position is that Amro delivered the parcel to Schatz with full knowledge and

acceptance of the instructions set out (i) in the invoice, telex and cover schedule, to obtain a trust receipt, and (ii) in the cover schedule, to obtain acceptance of the bill of exchange.

By this time another two parcels of diamonds, having invoice values of US $ 45,826/55, and US $ 62,878/48, had been duly delivered to Schatz. By a telex dated 9.10.80 (P14) Schatz referred to " revised prices " in respect of all three parcels ; this telex made detailed reference to each item of the corresponding invoice, specifying the item number, weight in carats. " original price " (old rate per carat), and " revised price " (new rate per carat) ; it then set out the total weight in carats, the " original value " and the "revised value." Reference was made throughout – seven times in all – to " revised " price and " revised " value, and not to revised " profit ", "commission" or otherwise. That telex further stated :

> " We agreed melle (sic) prices foll. market conditions. You would send them to me for a 6 percent less. Keep in mind prices where for 10 P.C. All your makes are lighter, will still pay yr pr but reserve the right to lower a little bit later, if not saleable.....(Details of the revised invoices were set out).....Total of revised invoices : USD 134.492, 39 USD 65.000 (payments made by us) to be paid by us USD 69.492,39. After receipt of yr revised invoices by telex we will make this additional payment to you ....."

The Appellant respondend by a telex dated 10.10.80 (P13) ; protesting faintly, but nevertheless confirming, the " revised " prices. Learned President's Counsel for the Appellant, told us that " melle " meant a reduction. Detailed reference was made to each item of each invoice, and this telex thus constituted what P14 had requested, " yr revised invoices by telex ":

> " I will confirm by yr prices but I feel that the prices we agreed for ds/sc/am/3/80 and written on yr copy/my copy of the invoice in Colombo should be paid..... I give below the agreed revised invoice prices as per yr tix..... total of revised invoices : US dollars 134, 492.39. Pre-payments advised by you US dollars 65,000 to be paid US dollars 69,492.39. Please remit by t.t. preferably to American Express International Banking Corporation, Colombo 1 Sri Lanka.....or to Bank of Ceylon – for Blue Peacock Diamonds Ltd. P1 ensure that Amro Bank

sends..... a tested telex to Bank of Ceylon confirming that they paid US dollars 45,000 on yr behalf for Blue Peacock Diamonds....."

The position in regard to payments at this point of time (i.e. immediately before 10.10.80) was as follows :

Invoice No.	Original Amount	"Revised Price"	Payments	
3/80	45,826/55	33,729/15	15,000	(11.9.80)
4/80	50,742/95	41,892/71	45,000	(29.9.80)
5/80	62,878/48	58,870/53	5,000	(3.10.80)
	TOTAL	134,492/39	65,000	
	BALANCE DUE	69,492/39		

Thus, as stated in the telex (P14), the total due on the three invoices (revised prices) was US $ 134,492/39, of which US $ 65,000 had been paid, and the balance due was US $ 70,492/39. A sum of US $ 70,492/39 (exactly US $ 1000 more than the balance then due) was remitted on 10.10.80. Amro then informed the Appellant, by telex dated 14.10.80 (P4), that :

" Re your telex dated Okt, 10, 1980 to .....Schatz herewith we inform you that on Okt. 13, 1980 we sent directly to Branch of Ceylon, Colombo a telex, in which we confirm the payment order of USDLRS 45,000 – in your favour. We also request you to instruct the Bank of Ceylon to inform us by tested cable that the drafts in our possession to the amounts of USDLRS 45.826,55 USDLRS 50742,95 and USDLRS 62.878,48 can be cancelled when you have received the payments of USDLRS 15.000, – USDLRS 45.000, – USDLRS 5.000 – and USDLRS 70492, 39."

Prima facie, the original contracts of sale were varied by the substitution of agreed revised sale prices. Although P13 and P14 were communications between the Appellant and Schatz, both parties expected Amro to be informed, for the agreed balance ($6,492/39) was to be remitted by Amro ; the last sentence of P13 demonstrates the Appellant's awareness that Amro was kept informed of previous payments as well. Although instructions for the several payments were given earlier, the Appellant appears to have received

confirmation from the Bank of Ceylon of the receipt of each such payment about a week or two later : thus the receipt of US $ 45,000 and US $ 5,000 remitted on 29.9.80 and 3.10.80 respectively, were confirmed on 14.10.80 and 9.10.80 respectively. The final payment of US $ 70,492/39 made on 10.10.80, was confirmed on 28.10.80. It is however clear from the correspondence that by 10.10.80 Amro had remitted a total of US $ 135,492/39.

The Appellant appears to have sent another telex dated 15.10.80 to Schatz, but this has not been produced. It is clear from P4 that all three contracts required Amro to obtain from Schatz acceptance of bills of exchange, and presumably also trust receipts. The purpose of these instruments was to obtain not immediate payment, but payment within 180 days or out of the proceeds of re–sale, whichever was earlier : if payment was obtained, within the 180–day period, under the trust receipt, obviously payment could not have been again demanded under the corresponding bill. Faced with what seemed to be a new agreement between the buyer and the seller whereby the latter agreed to a reduced price, payable immediately, Amro remitted such lower price. Thereupon bills of exchange and trust receipts seemed not merely inappropriate but improper : where the buyer has paid the agreed price how can he be required to execute instruments obliging him to pay the price again ? Not unnaturally, by P4 Amro asked for instructions – although probably regarded as purely formal – for the cancellation of the inchoate bills, thus making perfectly clear the basis on which it was acting. There is nothing to suggest that at that stage the Appellant disputed the correctness of Amro's belief or conduct. It was only 18 months later that the Appellant for the first time took up the position that a sum of US $ 50,742/95 was outstanding on that contract. The contents of P4 establish that Amro did not represent to the Appellant that a trust receipt had been obtained and that the bill had been accepted. Two further matters need to be mentioned. Even if the revised prices are ignored, and the payments made by Amro are treated as if they had not been appropriated to any particular contract, there is no explanation as to how the Appellant appropriated these payments to satisfy the first and the third in full, and not to the second before the third. In whichever way these were appropriated there would have been a surplus of almost US $ 27,000, and the Appellant failed to explain why credit was not given in this sum as against the claim of US $ 50,742/95 : inexplicably, the Appellant did not produce the

relevant books of account, and this made the contention that the accounts were complicated all the more untenable. However, the documents show that Amro did apportion the payments among the three contracts on the basis of the revised invoice prices, so that US $ 41,892 had been paid in respect of the contract in suit, reducing the balance due on that contract (i.e. had there been no price reduction) to less than US $ 9,000 paid in respect of the Contract in suit.

2. FINDINGS OF THE COURTS BELOW

The District Court held that (prior to the transactions in question) there had been discussions between representatives of the Appellant and Amro, in order to obtain the assistance of the latter in regard to the export of diamonds by the former to Schatz ; that the Bank of Ceylon had acted as the Appellant's agent in the export of the parcels of diamonds, and that Amro had acted as the Appellant's agent in delivering the diamonds to Schatz. As to whether there was a contract between the Appellant and Amro in regard to this particular sale of diamonds to Schatz, it was held that the Appellant had made an offer to Amro, which had been accepted in Amsterdam. That contract had therefore been entered into in Amsterdam ; the alleged breach, namely the failure to obtain a trust receipt and to present the bill of exchange to Schatz for acceptance, had also occurred in Amsterdam ; thus the District Court of Colombo lacked jurisdiction by reference to the place where the contract had been entered into, and where the breach occurred. Both at the time of that contract, and the breach, Amro had no branch in Sri Lanka ; a branch had been established and the business of banking was being carried in Colombo at the time the action was instituted ; this was held not to confer jurisdiction ; the fact that Amro filed proxy and answer, did not amount to a submission to jurisdiction, as jurisdiction was traversed in the answer. On the merits of the claim for damages, the Court held that although Amro had acted in breach of instructions (by failing to obtain a trust receipt and acceptance of the bill of exchange), the Appellant had not suffered any loss and damage thereby, for the Appellant had agreed with Schatz to accept a reduced price, and this had been remitted by Amro. The action was dismissed but, considering Amro's breach of instructions, without costs.

These findings were upheld by the Court of Appeal, which dismissed the Appellant's appeal with costs. The only question which was considered at some length was whether the District Court had jurisdiction on the basis of residence. It was held that a corporation which was carrying on business in several countries could be held to be resident in more than one country ; but such a finding ought not to be made unless the control of the general affairs of the corporation is not centred in one country but is divided and distributed among two or more countries ; one factor to be looked for is the existence, in the place claimed as being a residence, of some part of the superior and directing authority by means of which the affairs of the corporation are controlled. *N. Y. Life Insurance Co. v. Public Trustee* [1], Ch. 101, *De Beers Consolidated Mines Ltd. v. Howe* [2], *Cesena Sulphur Co. Ltd. v. Nicholson* [3], and *Union Corporation Ltd. v. I. R. C.* [4], were cited. Amro could not be considered as resident in Colombo merely because it had established a branch in Colombo, and there was evidence that " the Colombo branch did not know anything about the said transaction in diamonds."

3. THE APPELLANT'S CONTENTIONS

All these findings were strenuously contested by Mr. Lakshman Kadirgamar, P.C., on behalf of the Appellant. His contentions in this Court be summarized as follows :

1. As to Jurisdiction :

(a) The District Court of Colombo had jurisdiction on one or more of the three grounds pleaded – i.e. that the defendant resided, the contract was entered into, and the cause of action arose, in Colombo – because none of these averments had been duly denied in the answer, and jurisdiction had therefore been admitted ;

(b) Assuming without conceding that jurisdiction had been duly traversed in the answer, Amro had participated in the trial, adduced evidence, and invited the Court to decide on the merits ; and had thereby waived its objections to jurisdiction, and had submitted to jurisdiction ; and

(c) In any event, all three grounds had been proved. Having a place of business at the time action was instituted, constituted " residence ". The contract sued upon had been concluded by means of an offer made by the Appellant ; Amro's acceptance had been communicated from Amsterdam by telephone to the Appellant at Colombo, and had taken effect in Colombo. Some obligations under the contract had to be performed in Colombo and, upon breach, a cause of action had arisen in Colombo.

2. As to the merits :

(a) Amro's admitted breach of instructions, particularly the failure to present the bill of exchange for acceptance, resulted in the Appellant being deprived of a valuable security worth US $ 50,742/95 ; as a banker, Amro was not entitled to look into any question of settlement or payment as between buyer and seller, and should have carried out the Appellant's instructions strictly ; and the Appellant was therefore necessarily entitled to judgment in that sum ;

(b) In any event, the Appellant was entitled to nominal damages for that breach ;

(c) Although certain payments had been made by Amro, there had been numerous transactions over a long period of time, and it was not possible to identify any of these payments as having been made on account of the transaction in suit ; the burden was on Amro to prove its claim that Schatz had paid the Appellant the amount due on the relevant sale, and since this had not been established, the Appellant was entitled to the full amount claimed ; and

(d) The telexes P13 and P14 referred not to the several contracts of sale between the Appellant and Schatz, but to another distinct contract between them whereby Schatz had agreed to re-sell each parcel of diamonds and to share the profits arising on such re-sale ; the agreement contained in those telexes was for a revision not of the original sale prices as set out in the relevant invoices, but of the agreed re-sale prices.

4. THE CONTRACT SUED UPON

It is necessary at this stage to determine what exactly was the contract sued upon. Mr. Kadirgamar submitted that there had been discussions in Amsterdam between a director of the Appellant and an officer of Amro, followed by telephone conversations between Colombo and Amsterdam ; Amro's acceptance of the Appellant's offer had been communicated by telephone from Amsterdam to the Appellant's director in Colombo ; the contract was therefore concluded in Colombo, upon the acceptance reaching the Appellant's director. It was his contention that by this contract Amro became the agent of the Appellant, and undertook the obligation to deliver parcels of diamonds to Schatz from time to time, obtaining from Schatz the stipulated documents. The evidence as to the existence of any such contract, its formation and its terms and conditions, was quite vague and indefinite. In particular, as to the place of contract, there was no evidence as to whether the alleged telephone conversations constituted a straight forward acceptance by Amro of an offer made by the Appellant, or whether, instead, counter–proposals by Amro were accepted by the Appellant – in which event, Mr. Kadirgamar's submission as to the place of contract becomes untenable. He sought to overcome all these difficulties by pointing to Amro's failure to lead any evidence from Amsterdam to rebut the Appellant's evidence. Mr. Eric Amarasinghe, P.C., on behalf of Amro replied that the absence of such evidence was entirely because the first reference to any such discussion and contract was made after the trial commenced, and that there was neither pleading nor issue upon that matter. He contended that the contract sued upon, as pleaded and put in issue, was not a contract (whether of agency or otherwise) concluded by means of discussions directly between the Appellant and Amro, but a contract evidenced by the documents referred to at the commencement of this judgment, constituted by the acts of the Bank of Ceylon and Amro ; it was further pleaded that these acts took place between 25.9.80 and 1.10.80 – long after the discussions referred to by Mr. Kadirgamar and that acceptance was (not by telephonic communication to the Appellant), but by intimation to the Bank of Ceylon and by performance. This submission is undoubtedly entitled to succeed in view of the pleadings and issues. It was averred in the plaint that on or about 25.9.80 the Appellant consigned a parcel of diamonds by air to Amro, for delivery to Schatz, in accordance with the Appellant's instructions, and that ;

(a) On or about 25.9.80 Amro accepted a collection order issued by the Bank of Ceylon, and undertook for valuable consideration to act as agent of the Appellant and the Bank of Ceylon ; to have custody of the parcel of diamonds until delivery to Schatz, and to deliver the parcel and shipping documents ; and to present the relative bill of exchange for acceptance and/or payment to Schatz, in accordance with the instructions of the Appellant and the Bank of Ceylon ; and to notify the Appellant in regard to delivery, honour or dishonour of the bill, and payment or failure of payment by Schatz ; and

(b) Amro agreed to, undertook and accepted the performance of those obligations by intimating at Colombo *to the Bank of Ceylon* its acceptance, and by performance of the aforesaid instructions.

5. JURISDICTION

The Appellant pleaded that :

" 2. The Defendant is a corporate body duly incorporated and carrying on business in Sri Lanka.

3. The Defendant is a company incorporated in Holland and is a Banking Company.

4. The Defendant has its established place of business in Sri Lanka at No. 90, Chatham Street, Colombo 1.

5. The Defendant has a registered office in Sri Lanka at No. 90, Chatham Street, Colombo 1.

6. The Defendant carries on a business of banking in Colombo and is deemed to be resident in Colombo within the jurisdiction of this Court.

7. The cause of action hereinafter set out arose at Colombo within the jurisdiction of this Court.

8. The contract herein sought to be enforced was made at Colombo within the jurisdiction of this Court.

Amro answered these averments thus :

" 1. This defendant denies all and singular the several averments contained in the plaint save and except such as are hereinafter admitted.

2. Answering paragraphs 2, 3, 4, 5 and 6 of the plaint, this defendant states that it is a Bank duly incorporated in Holland and presently carrying on business *inter alia* in Sri Lanka at its registered branch office at No. 90, Chatham Street, Colombo 1. The said branch office commenced business in Sri Lanka on 3rd December 1981 and was not functioning as on the date and time set out in the plaint.

3. Answering paragraph 7 and 8 of the plaint, this defendant denies that a cause of action has accrued to the plaintiff to sue this defendant, and further denies that there was any agreement enforceable by the plaintiff against this defendant entered into at Colombo within the jurisdiction of this Court or another.

Sufficiency of pleas of jurisdiction

Section 45, C.P.C, requires a statement of the facts setting out the jurisdiction of the court to try and determine the claim ; the necessary averments must appear in the body of the plaint in the form of distinct averments (*Bisset v. Loftus* [5], *Sulaiman v. Ibrahim* [6]. Here jurisdiction based on cause of action and contract has been duly pleaded. It is neither necessary nor customary to add a further averment to the effect that accordingly the Court has jurisdiction to entertain, hear and determine the action. However, the plea as to residence in paragraph 6 is ambiguous. Section 9, C.P.C., confers jurisdiction on the District Court within whose jurisdiction the defendant " resides " ; the Code does not define or specify circumstances in which a defendant who does not actually " reside " is nevertheless " deemed " to reside. " Resides " has been interpreted in the case of a natural person, to refer to the place where he has his family establishment and home (*Mendis v. Perera* [7]),and as not including the place where he carries on business (*Chetty v. Saibo* [8]). If the same restricted meaning is given in relation to artificial persons, section 9 will be imperative in those cases. In the case of corporate bodies, the Code elsewhere refers to a " registered office " (section 471) ; it provides for service of summons at a " place

of business " (section 64 and 65). But section 9 does not include either of these expressions. In India, section 17 of the 1882 Code, and section 20 of the 1908 Code, provided that the place where a defendant was carrying on business would determine jurisdiction, and explained that a corporation shall be deemed to carry on business at the *sole* or *principal* office. The Civil Courts Commission recommended that a similar explanation be enacted (Sessional Paper No. XXIV of 1955, Draft Code section 3 (1) (a)), but this has not been done despite numerous subsequent amendments to the Code.

Assuming that section 9 can be liberally interpreted to achieve a similar result, the further question is whether a corporate body " resides " at every one of its places of business – so that if a resident of Colombo enters into a contract at the head office of a corporation in Colombo, performance being due in Colombo, a District Court 150 miles away will also have jurisdiction if that corporation has a place of business there. That problem becomes even more acute in the case of a foreign corporation, which establishes a place of business in Sri Lanka (and complies with the requirements of registration under Part XIII of the Companies Act, No. 17 of 1982) : does the fact that summons can validly be served at the address registered under Part XIII mean also that the corporation " resides " at that address for the purposes of section 9, C.P.C.? If so, can a corporation be served in this country in respect of a contract which had no connection whatsoever with Sri Lanka ? Or only if some part of its superior or directing authority is in Sri Lanka ? Section 9 appears to need legislative clarification. It is unneccessary for me to decide these questions, since I hold that the plea based on residence was insufficient. Paragraph 6 does not amount to an unequivocal assertion that Amro " resides " within jurisdiction ; the use of the word " deemed " suggests that Amro did not in fact reside within the jurisdiction (cf. *Marimuttu v. Commissioner for Registration of I & P Residents* [9]. That averment did not even state that Amro was deemed to be so resident *for the purposes of section 9.* Mr. Kadirgamar cited English decisions (*Newby v. Von Oppen* [10], *Dunlop Company v. Actien–Gesellschaft (etc.) Vorm. Cudell and Company* [11], *Saccharin Corporation Ltd. v Chemische Fabrik von Heyden Aktiengesellschaft* [12] The " *Theodohos* " [13] holding that in actions against foreign corporations, summons can validly be served at a place of business, or on a principal officer, even temporarily within the jurisdiction. The fact that such service of

summons is proper does not mean that the test of jurisdiction set out in section 9 is satisfied.

Traversing Jurisdiction

I have next to consider whether the answer complies with the requirements of section 76, C.P.C. : " if the defendant intends to dispute the averments in the plaint as to jurisdiction of the court, he must do so by a separate and distinct plea, expressly traversing such averment." The general denial contained in paragraph 1 is insufficient ; it is not " a separate and distinct " plea, nor does it expressly deny jurisdiction. A proper plea of jurisdiction commonly involves two assertions of fact : as to the place of residence, contract etc, and also that such place is within the local limits of the jurisdiction of the court. A general denial does not usually make it clear that both assertions are being denied : it may indicate, for example, that although the defendant denies that he resides at the place specified, he does not deny that place is in fact within the jurisdiction of the court. The parties, and the court, must be able upon a reading of the pleadings to ascertain, without ambiguity, whether the jurisdiction of the court is disputed. Thus even a specific denial – e.g. " the defendant denies the averments in paragraph 8 of the plaint " – would generally be insufficient, if this plea could not indicate whether the defendant –

(1) was denying that a contract had been entered into, and asserting that even if there had been such a contract, it had not been entered into at Colombo ; or

(2) was denying such a contract, but was conceding that if such a contract was proved, it had been entered into at Colombo : or

(3) While admitting that a contract has been entered into, was denying that it had been entered into at Colombo.

Section 76 requires a plea which could makes it plain from the inception what the defendant's case actually was, so that the plaintiff would know what he was called upon to prove. In (1) above, the plaintiff would have to prove the contract, and that it had been entered into at Colombo ; in (2) he would only have to prove the contract, and not the place ; in (3) proof would be necessary, not of the contract,

but only of the place of contract. In my view, what section 76 requires by a plea traversing the averment of jurisdiction, is a specific denial of jurisdiction ; by a plea which, however construed, necessarily involves a denial of jurisdiction. Odgers on Pleadings and Practice (Principles of Pleading and Practice 19th ed, p. 128) defines a " traverse " as –

> " the express contradiction of an allegation of fact in an opponent's pleadings ; it is generally a contradiction in the very terms of the allegation. It is as a rule, framed in the negative because the fact which it denies is, as a rule, alleged in the affirmative."

Thus to deny that a cause of action has arisen, is not a traverse of jurisdiction ; but to deny that a cause of action has accrued at Colombo within the jurisdiction of the court, is a sufficient traverse of jurisdiction, for that involves a denial of the accrual of a cause of action, and also of accrual within jurisdiction.

Mr. Kadirgamar cited the dictum in *Le Mesurier v. Le Mesurier*[14].

> " I would express my doubts as to whether the mere inclusion of such objections [to jurisdiction], though in separate paragraphs, in what is called the answer of the defendant is a fulfilment of the requirements of [section 76], that it must be done by a separate distinct plea. In itself the objection may often be one which it is all-essential to prefer and maintain, without any semblance of waiver, to the end, so that even the act of appointment of the proctor for the defence ought to be limited to this purpose lest an authorisation to do aught else should be construed as an acknowledgement of jurisdiction, and he be concluded by section 73 of the Courts Ordinance. That section 76 does not direct or leave the dispute of the averment of the jurisdiction to be made in one of the duly numbered paragraphs of the answer which are directed by section 75 (d), but in a 'plea' that is to be separate and distinct, which would fall to be first tried under section 147."

He did not submit that a traverse of jurisdiction must be by a plea which is –

(a) separately numbered, and/or
(b) isolated from other averments.

As far as I am aware, that has not been the practice, and the principle underlying section 76 does not require such a technical rule. It is clear that any such contention is not tenable, for even in the case he relied, on the Privy Council upheld the objection to jurisdiction, despite this alleged infirmity in pleading to jurisdiction *Le Mesurier v. Le Mesurier* [15], Mr. Kadirgamar submitted that a proper " traverse " requires an express averment to the effect that the court has no jurisdiction to entertain the action. When it was pointed out to him that section 45 imposes no duty on the plaintiff to make a positive averment as to jurisdiction, and that, correspondingly, section 76 ought not to be interpreted to cast a heavier burden on a defendant, his reply was that a plaintiff's plea of jurisdiction involves an implied assertion that the court has jurisdiction, which the defendant must expressly deny ; and that there could be no implied denial of this implied assertion. Having regard to the purpose of sections 45 and 76, and the meaning of " traverse ", I must unhesitatingly reject this contention ; no particular formula is required, and a plea which *ex facie* and unambiguously involves a denial of jurisdiction would suffice.

I therefore hold that the plaint adequately pleaded jurisdiction on the basis of contract and cause of action, but not of residence. Although the answer did not adequately deny jurisdiction on the ground of residence, this does not amount to an admission of jurisdiction, because the plaint was defective in that respect. The answer contained an adequate denial of jurisdiction on the basis of the place of contract, because it denies any agreement " entered into at Colombo within the jurisdiction of this court." In regard to jurisdiction based on the accrual of a cause of action, the answer did not adequately traverse jurisdiction, because it contained only a denial of the accrual of such cause of action, and was silent as to jurisdiction ; the phrase " within the jurisdiction of this court " paragraph 4 of the answer, qualifies only the second limb of that paragraph, and not the first limb. That the District Court of Colombo had jurisdiction, on the basis that the alleged cause of action arose within its limits, was not denied, and had therefore to be treated as admitted by Amro. I cannot accede to Mr. Amarasinghe's contention – or, rather, plea – that declining standards and lax practices in regard

to pleadings should induce this Court to give a more " lenient " interpretation to section 76. Condoning such laxity results in obscuring the real issues for determination, and adds to the cost and delays in litigation, and this is amply illustrated by this very case. Since the jurisdiction of the court (based on place of accrual of the cause of action) was admitted, it was unnecessary to consider whether the District Court of Colombo had jurisdiction on the basis of residence or place of contract. However, despite the absence of issues as to jurisdiction on those grounds, three courts have spent an inordinate amount of time in hearing arguments and determining questions involving jurisdiction and submission to jurisdiction.

Submission to jurisdiction

The requirements of section 76 are reinforced by section 39 of the Judicature Act, No 2 of 1978:

> " Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter."

It is settled that if the defendant fails to plead a latent want of jurisdiction, at the first opportunity, he will not be permitted to take that plea later. However, Mr. Kadirgamar made a more far–reaching submission : if having taken that plea, the defendant participates in the trial on the merits, or on other issues besides jurisdiction, then there is a waiver of the objection to jurisdiction, or a submission to jurisdiction. He cited *Harris v. Taylor* [16], *Dulles v. Vidler* [17], *Henry v. Geoproso* [18]. For this reason too he contended that the courts below could not have decided the question of jurisdiction against the Appellant. Since by its pleadings Amro must be taken to have admitted that the cause of action arose within the jurisdiction, it is not strictly necessary to consider this submission. However as it was argued at length, I will shortly state my views thereon. The decisions cited deal with situations where a judgement obtained in one country was sought to be enforced in another. It may well be that the principle contended for by Mr. Kadirgamar does apply in that situation. We are faced with a situation without that foreign element. The rules of procedure for the trial of civil actions are inconsistent with any

such principle. Section 147, C.P.C., does not permit an issue of jurisdiction to be tried as a preliminary issue, unless two conditions are satisfied : it must be an issue of law (and not of fact, or mixed fact and law), of such nature that the entire case may be disposed of on that issue only ; here the place of contract and of breach had to be determined on evidence. Further if Mr. Kadirgamar's contention is upheld, it would mean that a defendant who objects to jurisdiction must stand or fall by that issue ; in order to get the court to decide that issue, he must refrain from contesting the merits ; if ultimately he fails on jurisdiction he will lose on the merits, without a contest. Litigation is already costly and protacted enough, without making it a gamble as well. That contention has therefore to be rejected as being totally inconsistent with practice as well as precedent. Thus in *Le Mesurier,* an objection to jurisdiction was upheld, after a trial which was contested on the merits without the faintest suggestion of a submission to jurisdiction. In *Arnaldo da Brescia,* (1922) 23 N.L.R. 391, a similar submission was rejected.

Burden of proof of jurisdiction and issues

Where jurisdiction is admitted, or deemed to be admitted, no question arises as to the burden of proof on the framing of issues. Where the defendant duly traverses jurisdiction, if the plaintiff fails to prove jurisdiction, his action will have to be dismissed ; section 150, explanation 2, C.P.C. makes it clear that the plaintiff must establish so much of the material part of his case as is not admitted by the defendant. Accordingly it is for the plaintiff to ensure that an appropriate issue is framed, so that he would be entitled to lead evidence. Where, however, the defendant while conceding jurisdiction in terms of section 9, pleads other matters depriving the court of jurisdiction (e.g. that the Conciliation Board Act was in operation in an area, precluding the institution of action without the certificate of the Board) : *Gunawardene v. Jayawardane* [10], the burden is on the defendant to raise the necessary issue and to prove the relevant facts. In the present case, residence was not duly pleaded as the basis of jurisdiction ; there was in any event no proper traverse ; and there was no issue. Hence neither of the courts below could properly have considered that question. Jurisdiction on the basis of the accrual of the cause of action was admitted ; there was no issue on that question ; neither court should have embarked on an inquiry into that matter ; in view of the admission and the absence of an

issue, the court was not deprived of jurisdiction even though it subsequently transpired that the alleged cause of action arose in Amsterdam. Although the burden on the issue of jurisdiction based on the place of contract lay on the Appellant, that issue was raised by Amro, the defendant ; it was correctly held that the contract had been entered into in Amsterdam, and hence not within the jurisdiction of the District Court of Colombo, yet that did not deprive that court of jurisdiction, because it had jurisdiction on another basis – namely, the accrual of the cause of action. A similar situation arose in *Perera v. Chelliah* [21]. Since jurisdiction on one basis was admitted, challenging jurisdiction of a different basis was a futile exercise.

6. THE MERITS

Mr. Kadirgamar cited a long series of decisions, of high authority, for the proposition that Amro was obliged to carry out its instructions strictly, and was not entitled to look into questions of adjustment, settlement, or payment, as between buyer and seller : *Rayner & Co., Ltd. v. Hambro's Bank, Ltd.,* [22] *Bank Melle Iran v. Barclays Bank* [23], *Midland Bank v. Seymour* [24], *Edward Owen Ltd. v. Barclays Bank Ltd.* [25], *Richardson Scale Co. Ltd. v. Polimex Cekop* [26], *Siporex Trade v. Banque Indosuez* [27], *United City v. Royal Bank* [28].

Undoubtedly the Appellants instructions to Amro were that the parcel of diamonds should be delivered to Schatz, only upon obtaining a trust receipt for 180 days, and upon acceptance of a bill of exchange payable 180 days after sight. This was not part of some theoretical or academic exercise to test the precision with which a banker conformed to instructions, but rather to give effect to a commercial transaction between seller and buyer – where a seller desired an effective assurance of payment, subject to agreed credit terms, before the goods were delivered to the buyer. The Appellant seeks to treat two matters as constituting breaches of instructions : that a reduced price had been accepted from the buyer, and that the specified documents had not been obtained. The fact that Amro, as a banker, obtained immediate payment from the buyer and remitted it to the seller cannot *per se* be regarded as a breach. Receiving the purchase price 180 days before it was due, without any discount, was favourable to the seller. No businessman or exporter would complain. A court which held that this was a breach would be acting contrary to the

interests of the parties. Indeed the evidence of the Appellant's director was that the agreement with Amro was to send diamonds through Amro and for them to obtain payment or the documents, failing which the diamonds should be returned. Hence the only question is whether Amro had acted correctly in accepting US $ 41,892/71 instead of US $ 50,742/95. I am unable to treat the instructions given in the course of a business transaction as being necessarily unalterable; adjustments, variations, negotiations and compromises are an inevitable and continuing part of business transactions. Here the documentary evidence establishes that the parties agreed to new terms : reduced price and immediate payment. Immediate payment necessitated the cancellation of the prior instructions regarding the trust receipt and the bill of exchange ; the Appellant's telex P14 required Schatz to communicate the new instructions to Amro, and Amro's telex P4 to the Appellant confirmed such communication ; the need to cancel the inchoate bills of exchange was referred to ; the conduct of the Appellant is consistent with acquiescence if not acceptance. Thus the instructions originally given were effectively varied. Amro substantially complied with the new instructions. The Appellant's telex P14 indicates that the revision of prices was being considered prior to 9.10.80, and some adjustment had been agreed to and recorded on the invoice relating to the previous contract. There is no evidence as to the date of delivery of the parcel ; if delivery was after the instructions had been varied Amro was clearly not in breach. If delivery was before, Amro was technically in breach, but not only did this cause no loss, but the Appellant ratified and adopted Amro's conduct, by agreeing to accept immediate payment without the documents, with knowledge (from the telex P4) that Amro had not presented the bill of exchange for acceptance.

The documents do not support the existence of any agreement regarding the sharing of profits on re-sale of the various parcels of diamonds. Exchange Control authorisation for such transactions have not been produced. There was some oral evidence to the effect that the telexes were in a business code, and that " revised " values " invoice prices " and " prices " referred to amended re-sale prices, but particulars of the code were not disclosed. Everything in the telexes, other than the word " melle ' is perfectly plain and simple ; it stretches one's credulity to assume a code the effect of which was only to substitute " re–sale prices " in place of the several

expressions actually used. A court cannot be called upon to depart from the plain meaning of a document upon an assertion that it meant something else in an undisclosed secret code. There are other reasons why this story of a profit-sharing arguement cannot be accepted. If there had been such an agreement to which the telexes P13 and P14 applied, the telex P4 should have evoked a prompt response not to cancel the drafts, as the drafts related to the sale, and not the resale ; there was no need to inform Amro, because Amro was not involved in that transaction ; and it is most unlikely that payments would have been made, both prior to P13 and P14 and immediatly thereafter, in respect of re-sale profits, without first paying the purchases price. I have no hesitation in rejecting the re-sale profit version.

Mr. Kadirgamar submitted that the Appellant was at least entitled to nominal damages for breach. The Appellant refrained from producing its books of accounts, but there is nothing to support the submission that the various amounts due and the payments made could not be properly indentified. The documents produced (particularly the telexes) clearly show the original and the revised prices, and the payments made, and it is obvious that the Appellant suffered no loss whatsoever ; in fact it received US $ 1,000 more than it was entitled to. It would be a travesty of justice to award the Appellant any damages whatsoever.

For these reasons, I hold that the District Court of Colombo had jurisdiction, but the Appellant has failed to establish any cause of action. I dismiss the appeal with costs in a sum of Rs. 10,000.

BANDARANAYAKE, J. – I agree.

DHEERARATNE, J. – I agree.

appeal dismissed.