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

In the matter of an Appeal from the Judgement of the Civil Appellate High Court of the Western Province holden in Colombo.

S.C. Appeal No.44/2016
SC(HC)LA No.40/2014
CHC No. 244/2013/MR

1. Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

2. K.D.G.S. Wijeratne.
   Managing Director,
   Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

Plaintiffs

Vs

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razeek Fareed Mawatha,
P.O. Box 856, Colombo 01.

Defendant

AND NOW BETWEEN

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razeek Fareed Mawatha,
P.O. Box 856, Colombo 01.

Defendant-Petitioner/Appellant

Vs

1. Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

2. K.D.G.S. Wijeratne.
   Managing Director,
   Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

Plaintiffs-Respondents

Before: Murdu N.B.Fernando, PC. J.,
P. Padman Surasena, J. and
E.A.G.R.Amarasekara, J.

Counsel: Shivan Coorey with Ms Sadeekah Akram for the Defendant-Appellant.
Faizar Musthapha PC with Tharaka Nanayakkara, Muneer Thoufeek, Ashan Bandara and Dananjaya Perera for the Plaintiffs-Respondents.

Argued on: 06.10.2020

Decided on: 05.10.2022

Murdu N.B. Fernando, PC. J.,

The defendant-appellant ("the appellant/ the defendant bank") came before this Court, having obtained Leave to Appeal against an Order made by the High Court of the Western Province holden in Colombo, in the exercise of its civil jurisdiction ("the High Court").

The High Court on 20th June, 2014 granted an Interim Injunction to the plaintiffs-respondents ("the respondent/ the plaintiff") restraining the defendant bank from selling the mortgaged properties under and in terms of the provisions of the Recovery of Loans by Bank (Special Provisions) Act No 4 of 1990 as amended ("Recovery of Loans Act").

This Court on 01st March, 2016 whilst granting Leave to Appeal to the defendant bank, directed that the High Court trial should proceed.

The two Questions of Law on which Leave to Appeal was granted to the defendant bank referred to in paragraph 17(b) and (d) of the Petition of Appeal is as follows:

i) The learned Judge of the Commercial High Court has erred in taking the view that the respondents have not accepted the rescheduled banking facilities when in point of fact the material before court clearly establishes that, though the respondents have not signed the letter of offer, the respondents have accepted and benefitted from these rescheduled banking facilities.

ii) The learned Judge of the Commercial High Court has erred in overlooking the fact that the respondents did not dispute that they received and benefitted from the rescheduled banking facilities even when they received several letters written by the petitioner requesting and then demanding repayment of the monies due on the said rescheduled banking facilities, which letters were filed with the said statement of objections of the petitioner and were before the learned judge?

The aforesaid two questions of law signify, that this appeal pivots around the **rescheduled banking facilities** granted by the appellant to the respondent. This Court is also mindful that by this appeal only the Interim Injunction issued by the High Court in 2014, restraining the appellant from pursuing the course of action stipulated in the Recovery of Loans Act is challenged before this Court, whilst the trial is proceeding.

The High Court granted the Interim Injunction sought by the plaintiff, solely upon the ground that the 'offer' pertaining to the rescheduled banking facility was not signed by the plaintiff and thereby coming to the conclusion that the 'offer' was not accepted by the plaintiff.

The High Court went onto hold, that in a situation where there was no consensus between the parties, the defendant bank had gone ahead and rescheduled the banking facilities on its own volition and thus prima facie there is a case in favour of the plaintiff. The High Court also held, on a balance of probability that the properties mortgaged were sufficient to recover the overdue monies and restrained the defendant bank from resorting to parate execution of the properties secured.

This Court observes that the said Order of the High Court is devoid of any reasoning. It is a mere re-statement of the stance of the plaintiff. It is bald and bare, short and skeletal and though the terms 'prima facie case' and 'balance of probability' is repeated it does not comment or refer to judicial authority vis-á-vis issuance of interim injunctions nor evaluate facts and circumstances of the matter in issue.

The impugned Order completely ignores the points of contention put forward by the defendant. It does not consider, examine or evaluate the documents marked and tendered to court pertaining to the rescheduling of the banking facilities granted to the plaintiff nor the default of the payments pursuant to the rescheduling of the banking facilities by the plaintiff.

The impugned Order is also silent on the numerous objections raised by the defendant bank in its statement of objections filed before the High Court.

Prior to considering the questions of law raised before this Court, for easier understanding of the matter in issue, I wish to briefly refer to a few material facts from the documents produced before the High Court.

01. For many decades the plaintiff [an unincorporated company and its managing director] obtained short term loans, import demand loans, overdrafts and other banking facilities from the defendant bank. Mortgage bonds were executed over several properties as security, for the repayment of the monies due upon those facilities.

02. In **December 2008**, the plaintiff requested the defendant [**R**] to discharge some of the mortgage bonds upon clearing of outstanding monies and to reschedule the remaining banking facilities upon properties already secured to the bank.

03. In **February 2009**, the defendant bank acceded to the request of the plaintiff for rescheduling of the outstanding short term loans, import demand loans and overdrafts by granting term loans [**S**] [**P4** and **P4A**]. Two new loan accounts [bearing number 500941 and 500945] were opened and requisite funds were transferred to the plaintiff's bank account and the proceeds were utilized to clear the outstanding sums on the aforesaid facilities. Seven out of the fourteen mortgage bonds were discharged and released. The balance outstanding sums reflected in the two new term loans and the remaining banking facilities were secured upon seven existing mortgage bonds. [**D1, D2, D3, D4, D5, M1** and **M2**].

04. The plaintiff failed to re-pay the defendant bank, monies due upon the rescheduled banking facilities and went in to default. The plaintiff was put on notice by the defendant with regard to the consequences that would flow in the event the facilities obtained under the Recovery of Loans Act were not adhered to by the plaintiff. [**Z1** and **Z2**].

05. In **February 2010**, Letters of Demand [**AA1** to **AA4**] were sent by the defendant bank to the plaintiff demanding the outstanding sum. The plaintiff did not dispute the outstanding dues nor settle the banking facilities obtained by making the necessary payments.

06. Thereafter in **May 2010**, the defendant bank resolved [**BB1**] [**P9, P10** and **P11**] to sell five mortgaged properties in terms of the Recovery of Loans Act and recover the sums due to the bank on some of the facilities granted to the plaintiff. In **September 2010** notice of such decision was communicated to the plaintiff [**CC1** and **CC2**]. The plaintiff did not respond nor dispute the outstanding sum.

07. In **2011** and **2012** too, the defendant bank wrote to the plaintiff [**DD, CC3** and **CC4**] indicating that if the overdue sums are not duly settled, the bank will be compelled to publish the notice of resolution in the government gazette and proceed to take follow up action. The plaintiff did not endeavor to settle nor dispute the outstanding sum even at this stage.

08. Thereafter in **December 2012**, the resolution was published in the government gazette [**FF1** to **FF6**] indicating that the properties referred to therein will be sold by public auction.

09. The auction was scheduled for 15th and 16th **August 2013** and the plaintiff was given due notice of the sale [**HH1** and **HH2**]. It was also published in the newspapers and displayed in public places [**HH3** to **HH22**].

10. Consequent to the same, the plaint dated 13-08-2013 was filed. The plaintiff instituted the instant case pleading that the plaintiff did not consent nor agree to the rescheduling of the banking facilities, that it was unilaterally done by the defendant bank, that though a request was initially made by the plaintiff for rescheduling and an offer letter and an application for rescheduling was received by the plaintiff [**P4** and **P4A**] that the plaintiff did not counter sign nor authorize such proposal and therefore, the plaintiff did not accept the rescheduling and the term loans granted to the plaintiff.

11. The plaintiff also annexed the resolution published in the newspapers [**P9, P10** and **P11**] and pleaded that the resolution was not served on the plaintiff in terms of the Recovery of Loans Act. The plaintiff thus moved for an enjoining order and an interim injunction, restraining the sale scheduled for August 2013, on the ground that if the secured properties were to be sold by public auction, that the plaintiff would be greatly prejudiced.

12. The High Court granted the enjoining order prayed for by the plaintiff restraining the defendant bank from proceeding with the sale and gave notice of interim injunction to the bank.

13. The defendant bank filed a statement of objections annexing a number of documents and pleaded that it had acted in terms of the law and moved for vacation of the enjoining order already granted and to reject the application of the plaintiff for injunctive relief.

14. The High Court inquired into the matter by way of written submissions and in June 2014 granted the interim injunction as prayed for by the plaintiff and restrained the defendant bank from proceeding with the sale. Being aggrieved by the said Order the appellant is now before this Court.

Having referred to the factual matrix, let me now move onto the questions of law raised before this Court.

For better appraisal of the two questions of law, I wish to re-phrase it as follows:

i) Did the respondent accept and benefit from the rescheduled banking facilities, although the respondent did **not** sign the letter of offer?

ii) Did the respondent **not** dispute the fact that it received and benefitted from the rescheduled banking facilities even when the appellant requested and then demanded repayment of the overdue monies?

Having referred to the questions to be determined by this Court, let me move onto examine the matter in issue.

The appellant challenged the impugned Order before this Court primarily on the ground that the plaintiff has dishonestly suppressed, concealed and misrepresented material facts from the High Court when invoking its jurisdiction and thus the plaintiff is not entitled to obtain injunctive relief. The appellant also contended that the plaintiff, having accepted the offer for rescheduling cannot thereafter take up the position that there was no express acceptance.

The respondent on the other hand maintained that a prima facie case was made against the bank before the High Court and strenuously contended that the resolution was bad in law, since it contained facilities relating to two distinct borrowers and is in respect of a sum less than the sum stipulated in the Act. The respondent also submitted that the matter in issue is in respect of a third party mortgage and such mortgages are not enforceable through parate execution.

This appeal stems from an interim Order i.e. an Order granting the interim injunction as prayed for by the plaintiff, restraining the defendant bank from proceeding with the sale of five properties secured by five mortgage bonds. The defendant bank resorted to this course of action to recover default payment pertaining to two term loans and an overdraft facility granted to the plaintiff by the bank.

Thus, the matter to be examined by this Court, is limited to the granting of injunctive relief and the question to be determined in this appeal is whether the plaintiff has established a case for such relief or not.

In order to answer the said query, I wish to look at the grievance of the plaintiff as reflected in the plaint.

The plaintiff averred that it is in the trading business and for many years has obtained a number of overdraft facilities secured upon fourteen mortgage bonds. The plaintiff annexed five such mortgage bonds to the plaint. (**P3A** to **P3E**)

The plaintiff further averred, that in 2009 a request was made by the plaintiff to the defendant bank to reschedule the facilities obtained by the plaintiff and release one secured property in order to pay back the overdue sum of money but the bank released nine properties and rescheduled the outstanding facilities.

The plaintiff annexed as **P4 and P4A**, the letter of the defendant bank dated 26-02-2009 which the plaintiff had to counter sign and an application form to be perfected. The position of the plaintiff was that the said documents were not signed and returned to the bank and by the said act the plaintiff pleaded it rejected the offer of the bank for rescheduling of the banking facilities. The plaintiff further averred in spite of the rejection, the bank had gone ahead and rescheduled the facilities and opened two new term loans.

Another document annexed to the plaint was **P5**, plaintiff's letter to the Monitoring Division of the Central Bank dated 21-02-2012, alleging that the defendant bank has fraudulently prepared documentation in opening two term loans and praying that the plaintiff should not be black listed and that the plaintiff's name be removed from the list of defaulters maintained by the Credit Information Bureau. (CRIB)

The rest of the documents annexed to the plaint were **P6** defendant bank's response to the complaint (**P5**) made to the Central Bank (forwarded to the defendant bank by the Central Bank); **P7** and **P8** bank statements received by the plaintiff pertaining to the two term loans; **P9, P10** and **P11** the board resolution published in three newspapers; **P12** notice of sale served on the plaintiff by the bank; **P13, P14** and **P15** photographs and affidavits of the photographer and another pertaining to the notice of sale.

Thus, the case presented by the plaintiff was that the notice of sale was not properly affixed to the property to be sold. Hence, the plaintiff moved for a declaration that the bank has no right to take steps in respect of the two term loans and that the resolution passed by the bank is null and void. The plaintiff also prayed for a permanent injunction against the sale of the five lands reflected in the schedule to the plaint, an interim injunction and an enjoining order in the interim.

From the foregoing it is amply clear that the plaintiff was seeking declaratory relief against the rescheduling of banking facilities executed in 2009, solely upon the ground that **P4** and **P4A** were not counter-signed and returned. The plaintiff admitted that a request for rescheduling was made by the plaintiff and did not dispute the receipt of proceeds consequent to the rescheduling. The plaint did not disclose steps or action taken by the plaintiff to dispute or challenge the rescheduling from the point of granting of the facility until filling of plaint, i.e., from February 2009 to August 2013, a period of 4 ½ years excepting dispatch of **P5**. The letter annexed as **P5** was addressed to the Central Bank and not to the defendant bank as erroneously pleaded in the plaint.

The plaint also does not indicate follow up action taken by the plaintiff consequent to rescheduling in 2009, receipt of the bank statements (**P7** and **P8**) and the board resolution (**P9, P10** and **P11**) authorizing recovery procedure under the Recovery of Loans Act. The photographs (**P13**) and the two affidavits (**P14** and **P15**) are only in reference to one secured property and in my view no consequences flow from **P13, P14** and **P15** to justify the plaintiff's case for injunctive relief presented to the High Court.

The plaint filed by the two plaintiffs was supported by an affidavit, sworn to by the 2nd plaintiff in his personal capacity. It is observed that a further affidavit sworn to by the 2nd plaintiff on behalf of the 1st plaintiff company is also available in the brief. No counter affidavits have been filed disputing the defendant banks statement of objections and the numerous documents annexed thereto.

The impugned Order of the High Court does not examine or consider the plaintiff's relationship with the bank, the numerous facilities obtained, the time lapse (February 2009 to August 2013 i.e., from the date of rescheduling and issuance of term loans to the date of resorting to legal action to challenge the rescheduling). The Order is silent on the large number of documents tendered with the statement of objections which referred to the rescheduling of the facilities, the letters of demand, the outstanding monies and the consequences of default which entailes the bank to resort to the Recovery of Loans Act to re-coup the monies extended by the bank.

The impugned Order only focuses upon the letter of offer (**P4** and **P4A**) issued by the bank in February 2009 and the fact that it has not been acknowledged and counter signed, to come to a finding that there was no consensus between the parties with regard to the rescheduling of the banking facilities. It is observed based only upon the said fact that the High Court granted the interim injunction to the plaintiff and restrained the sale of secured properties resorted to by the bank, in terms of the Recovery of Loans Act.

Having examined the factual matrix of the instant case, I now move onto consider the legal submissions presented by the appellant and the respondent before this Court.

The Counsel for the appellant pivoted his submission upon the ground that the plaintiff was not entitled to obtain equitable relief from the High Court, as the plaintiff suppressed and misrepresented facts to the High Court. He went onto contend that the plaintiff acted in a wrongful and dishonest manner and invoked the jurisdiction of the trial court to obtain injunctive relief. The submission of the appellant was that the respondent did not act in good faith, a necessary ingredient to obtain equitable relief from our courts, as clearly enunciated by the jurisprudence of our courts.

To substantiate his argument, the learned Counsel relied upon the case of **Alphonso Appuhamy v. Hettiarachchi [1973] 77 NLR 131** where this Court quoted with approval the observations made in two English authorities. It reads as follows:

> *"A plaintiff applying ex-parte comes (as it has been expressed) under a contract with the court that he will state the whole case fully and fairly to the court. If he fails to do that, and the court finds, when the other party applies to dissolve the injunction, that any material fact had been suppressed or not properly brought forward, the plaintiff is told that the court will not decide on the merits, and that as he has broken faith with the court, the injunction must go."*
>
> *"I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex-parte applications to this court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is alted, to discharge the order at once, so as to impress upon all persons who are suitors in this court the importance of dealing in good faith with the court when ex-parte applications are made"* (page138)

The Counsel for the appellant, further submitted that a misstatement of true facts which puts an entirely different complexion on the case when presented to obtain injunctive relief, would amount to misrepresentation and suppression of material facts warranting dissolution of the injunction without going into the merits of the matter and that a party cannot plead that the misrepresentation was due to inadvertence or that he was unaware of certain facts which he omitted to place before court. Ref. **Hotel Galaxy (Pvt) Ltd. and others v. Mercantile Hotel Management Ltd. [1987] 1 Sri LR 5; Walker sons and Company Ltd. v. Wijayasena [1997] 1 Sri LR 293.**

Thus the appellant contended, based upon the pronouncements in the aforesaid **Hotel Galaxy case**, firstly, the concealment and suppression by the plaintiff that the rescheduling of the banking facilities was a direct response to the specific request of the plaintiff; secondly, that it was with the express consensus and consent of the plaintiff; and thirdly, the specific averment in the plaint that the rescheduling was done on the own volition of the defendant bank amounts to gross misrepresentation, which warrants dissolution of the interim injunction issued by the High Court.

The Counsel also contended, that the plaintiff at all times benefitted from the rescheduling and that the proceeds of the term loans were utilized to reschedule some of the overdue sums and clear certain facilities and release a number of properties back to the plaintiff. The suppression by the plaintiff of the utilization and benefit it derived from the rescheduling

together with the fact that no steps or action were taken or resorted to by the plaintiff to dispute or challenge the rescheduling from 2009 i.e. the grant of rescheduling up until 2012, when representations were made by the plaintiff (vide **P5** to the Central Bank) also amounts to misrepresentation which on its own, the appellant contended, warrants dissolution of the interim injunction.

Further, the learned Counsel submitted that in the light of the numerous defenses raised by the defendant bank in its objections, the High Court could not have been convinced firstly, that a prima facie case had been presented by the plaintiff or that the plaintiff had a legitimate, legally enforceable and or a recognizable right or more over a reasonable prospect of success in the instant case. Thus, based upon the said submission too, the Counsel for the appellant contended that an interim injunction ought not to have been issued by the High Court.

The attention of this Court was also drawn by Counsel to the decisions of this Court in **Amarasakera v. Mitsui and Company Ltd. and another [1993] 1 Sri LR 22** and **Yasodha Holdings (Pvt) Ltd. v. Peoples Bank [1998] 3 Sri LR 382**, wherein the grounds on which an injunction can be issued was critically analyzed.

This Court having considered the submissions of the appellant and especially the contention that the plaintiff has concealed and suppressed material facts from the trial court, failed to act in good faith in invoking the jurisdiction of court, see merit in the submissions of the appellant.

Further, we see merit in the submission made, that the failure of the trial judge to judicially analyze and evaluate the case of the defendant bank (presented to the trial court and reflected in the statement of objections and the documents annexed thereto) together with the misrepresentation referred to above are material factors warranting dissolution of the interim injunction granted by the trial court.

Having said that let me move on to examine the case presented by the respondent.

The learned President's Counsel rested his case to uphold the impugned Order upon the ground that the letter of offer pertaining to the rescheduling was not accepted by the respondent and for that reason submitted that the board resolution was *void abinitio.* It was also contended, that the resolution relates to two distinct borrowers and relying on the case of **Ramachandran and another, Ananda Siva and another v. Hatton National Bank and others [2006] 1 Sri LR 293** vigorously argued that third party mortgages cannot be enforced through parate execution.

The learned Counsel also referred to two other decided cases of this Court, viz, **Hatton National Bank Ltd. v. Jayawardene and others [2007] 1 Sri LR 18** and **DFCC Bank v. Muditha Perera and others [2014] 1 Sri LR 128** and distinguished the rationale of the said

cases and submitted that this Court should not be guided by the dicta in the said cases and should refrain from lifting the veil of incorporation of the plaintiff company in the instant appeal, for the reason that the appellant did not allege fraud on the part of the plaintiff and or that another party benefitted from the facility given to the plaintiff.

Further, the respondent contended that the resolution was bad in law, since the facilities referred to therein were less than the minimum amount specified in the Recovery of Loans Act and drew the attention of this Court to the judgement of **Nanayakkara v. Hatton National Bank Ltd. S.C.Appeal 53/2017- S.C.M. 28.11.2017.**

I wish to consider firstly, the submission presented by the respondent, pertaining to the board resolution.

In the impugned Order no reference is made with regard to the legality or validity of the resolution passed in 2010. The cases referred to above and heavily relied upon by the respondent before this Court were not considered, referred to or evaluated in the impugned Order. We observe that the passing of the resolution or the date of the resolution was not a matter of contention for the High Court. The Order only states that the offer for rescheduling was not accepted by the plaintiff and that there was no consensus between the parties. That was the sole ground upon which the High Court granted the interim injunction in the instant appeal.

Likewise, the plaint too does not refer to the validity or the legality or the infirmities of the board resolution (**P9**) passed way back in 2010. The grievance of the plaintiff as reflected in the plaint pertains to the notice of sale. The principal ground is that adequate notice was not given by the bank to the plaintiff prior to publishing of the notice of sale. Moreover, the plaintiff pleads that the notice of sale was not exhibited on the properties advertised to be sold and great prejudice will be caused to the plaintiff. This Court observes the **P13** photographs and the **P14** and **P15** affidavits were tendered to court to justify this contention. Based upon the notice of sale the plaintiff moved for interim relief.

Thus, it is undisputed that in the trial court the resolution passed by the bank in June 2010, was not an issue upon which the parties were at variance. In the said circumstances, to plead that the board resolution is *void abinitio*, before this Court in my view, has no merit. The substantive issue pertaining to the board resolution has still not been considered and or determined by the trial court. The impugned Order which this Court is called upon to examine and adjudicate does not refer to the board resolution or its validity or legality and is purely founded upon the contention that there was no consensus between the parties. Therefore, the challenge to the resolution on the ground that it is bad in law, cannot be maintained before this Court, in the instant appeal.

The second contention put forward by the respondent is with regard to 3rd party mortgages. This Court is mindful that there are two plaintiffs before Court. The 1st plaintiff is the company and the 2nd is its managing director. The plaint filed was supported by an affidavit sworn to by the managing director in his personal capacity. A further affidavit was also filed by the managing director for and on behalf of the company. Therefore, in my view, I see no merit in the contention put forward with regard to the plaintiff being two distinct borrowers.

Similarly, I see no merit in the contention of the respondent that the mortgages in issue (**D1** to **D5**), are 3rd party mortgages. Moreover, to rely upon the dicta in **Ramachandran's case** (supra) and to present an argument that **D1** to **D5** i.e., third party mortgages are not subject to parate execution, is fallacious and in my view a frivolous ground to contend the correctness of the impugned Order.

The inherent power of a trial court, to piece and or lift the veil of incorporation and ascertain the true nature and identity of the parties before it, cannot be stifled and or curtailed prematurely. When facts and circumstances demands and in order to mete out justice, a trial court is entitled to go beyond the corporate veil. Ref. **HNB v. Jayawardena case** (supra). In this instant appeal, the trial court has still not gone into that stage to examine or evaluate such fact. Thus, in my view, this contention put forward by the learned President's Counsel for the respondent, does not stand to reason. Hence, a discussion on the cases relied upon by the respondent in this appeal, will only be of academic interest and will not assist in determining this appeal.

This brings me to the last and final submission of the respondent namely, the letter of offer pertaining to the rescheduling of facilities. The contention of the respondent was since the rescheduling was not formally assented to by the respondent that the respondent did not agree or accept the rescheduled banking facilities and therefore the respondent refrained from making any payments upon the said facility.

The appellant in response argued, that the rescheduling of facilities was done in deference to the respondent's own request (**R**) made in December, 2008 where by the respondent requested, to clear and off-set several other facilities obtained by the respondent during the years 2001 to 2008 by way of overdrafts, short term loans and import demand loans and to give the respondent a longer period of time i.e., long term loan to re-pay the monies which were then due to the bank on the said facilities.

The appellant further contended that the request of the respondent (**R**) is a very material factor which has been deliberately concealed by the respondent from the trial court. The Counsel also submitted that consequent to the request of the respondent (**R**) the appellant issued the letter dated 26-02-2009 (**S**) and acceded to the respondents request for rescheduling of the outstanding monies. Thereafter only, the defendant granted the term loans of longer

duration and transferred the necessary funds to the respondents account in March 2009. Thus, the Counsel contended, the proceeds of the two new term loans through which such moneys were dispensed has been received by the respondent and utilized to clear the overdue monies and thereby the respondent has immensely benefitted from the two term loans.

The appellant further contended that the respondent was fully aware of the transfer of funds and not only benefitted but enjoyed the fruits of such proceeds from March 2009 and that the respondent did not dispute rescheduling of the facilities, up until filling of the instant case. The appellant also drew our attention to a draft copy pertaining to a resolution of the plaintiff printed on the letter head of the 1st plaintiff company filed by the plaintiff together with **P4** and **P4A** in the trial court and contended that the plaintiff appears to have resolved to obtain the rescheduled facilities, which factor was unchallenged by the respondent.

In the aforesaid circumstances the appellant submits, a contract came into being. The learned Counsel went onto contend that an offer could take place by express words or by conduct and in the instant matter it was by conduct. Though the letter dated 26-02-2009 (**S**) (also marked by the respondent as **P4)** and the application form (**P4A**) was not signed and returned, the appellant contends that by conduct the respondent has accepted the rescheduling of the facilities in the year 2009 and is estopped from challenging the rescheduling of the banking facilities, four years later by filling the instant case in 2013.

I have considered the submissions made by both parties and the documents and material in the brief pertaining to the specific contention that there was no consensus between the two parties.

I have carefully examined the request made by the respondent on 22-12-2008 (**R**) to re-schedule the existing banking facilities citing a litany of woes and hardships and the letter dated 26-02-2009 (**S** and **P4**) by which the appellant acceded to the request of the respondent to reschedule the existing banking facilities. I have also examined the bank statements produced before the High Court (**P7** and **P8**) reflecting that in March 2009 two new term loans were given, the proceeds of the two new term loans were credited to the respondents account and thereafter utilized to clear the moneys overdue on three existing banking facilities.

The respondent does not deny the said factors, especially the granting, crediting and utilizing of the proceeds of the two loans. Its contention is that it was done without its consent on the volition of the appellant itself. No evidence has been produced to establish that the respondent at any point of time objected, disputed or challenged the said transfer of funds to clear the overdue sums in the three existing banking facilities or communicated or corresponded with the bank not to proceed with the rescheduling on the ground that the rescheduling has not been accepted by the respondent.

Thus, I am of the view although the documentation was not perfected and returned to the bank that by conduct, the respondent has acquiesced with the rescheduling and concurred with the procedure adopted by the appellant. Therefore, the respondent is now estopped from challenging the rescheduling of the banking facilities upon the basis that it was done without the respondents' express and written consent.

In our legal system, contracts entered into by and between parties, either expressly or impliedly have been recognized as valid contracts enforceable in terms of the law. In the law of contract, what is material is the offer and acceptance. It could be oral or in writing, expressly stated or inferred by implication, entered into by word or by conduct. The essential element is the acceptance of the offer with a mutual understanding.

Weeramantry, in his illuminating thesis on **Law of Contract** at page 124 observes as follows:

> *"Acceptance of an offer may take place by express words or by conduct."*

Chitty on Contracts, Volume I, General Principles [31st ed] under the title 'Express and Implied contracts observes:

> *"Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated […] express and implied contracts are both contracts in the sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in word and in the other case by conduct."* (chapter 1-096)

Whilst appreciating that the intricacies of a contractual obligation or whether the ingredients of a contract have been fulfilled is a matter for the trial court to elucidate, the sweeping statement made by the High Court, that there was no consensus between the parties, for rescheduling of the banking facilities, in my view is a wrongful presumption. From the reading of the impugned Order, it is extremely clear, that the High Court has come to such a finding merely because the documents **P4** and **P4A** were not signed and returned. The High Court when making such order has not considered or examined the request (**R**) made by the plaintiff for rescheduling of the banking facilities nor the past relationship between the plaintiff and the defendant bank when all such material was before court. It had completely ignored or thought it irrelevant or immaterial to consider the time lapse of approximately three to four years, when no steps were taken by the plaintiff to dispute or challenge the rescheduling or even communicate with the defendant bank its dissention with regard to the granting of the two new term loans by which the plaintiff's, past dues have been completely wiped-off and cleared.

This court is also mindful that the only document tendered by the plaintiff to substantiate any action been taken during the time duration March 2009 [time of granting of the two new term loans] and August 2013 [filling of plaint] is **P5**, which is addressed to the Central Bank and not even to the defendant bank.

In the aforesaid circumstances, for the High Court to come to a finding that the plaintiff has established a prima facie case in favour of the plaintiff, in my view is unwarranted and erroneous.

The High Court, upon the ground of balance of probability too, determined that the properties mortgaged are sufficient to recover the monies outstanding. Therefore, the finding made without examining or considering the defaulted sum vis-á-vis the value of the properties mortgaged, in my view is untenable. Similarly, the High Court has failed to give any basis or reason for such finding and in my view on the said ground too, the impugned order cannot be justified.

Thus, based upon such unfounded assertions of the plaintiff, to grant an interim injunction to restrain the defendant bank from taking steps under the provisions of the Recovery of Loans Act, in my view is ill-founded and preposterous.

The prime duty of a court of law is to consider and examine the case presented by the parties and come to a finding in terms of the law. In the impugned Order, it is regretted to note that the rudiments of the law have been completely ignored and brushed aside. However, it should be borne in mind that the observations and views expressed herein, are to determine this appeal. It should not prejudice the parties in the adjudication of their claim and should not in any way be construed at the trial as the concluded view on any matter of law or fact to be decided at the trial.

The attention of this Court was also drawn to the below mentioned dicta, by the Counsel for the appellant to substantiate its case.

Amerasinghe, J., in the **Mitsui case** (supra) observed;

> *"what the learned District Judge was expected to do was to consider the material before him placed by all the parties and decide whether the plaintiffs prospect of success was real and not fanciful and that he had more than a merely arguable case"* (page 35*)*

In **Yasodha Holdings case** (supra) this Court observed;

> *"The power which the court possess of granting injunctions should be very cautiously exercised and only on clear and satisfactory grounds. An application for an injunction is an appeal to an extra ordinary power of the court and the*

applicant is bound to make out a case showing a clear necessity for its exercise" (page 387)

In the case referred to above, Yasodha Holdings among other grounds moved court for interim relief against the bank, when the bank took steps to transfer the defaulting company's bank account to non-performing category and report the company to the Sri Lanka Credit Information Bureau.

In the said case, Amerasinghe, J., went onto observe:

> *"I am of the view that the balance of convenience in this case lies in allowing the normal banking laws and procedures to operate. The equities are in favour of the bank. The submission that the bank would not stand to lose anything is an untenable proposition having regard to the fact its loan portfolio, liquidity and profitability have been and will continue to be affected if it cannot take such measures, as it is entitled in law to protect its interests. Moreover, the appellant has failed to show that irreparable harm would be sustained unless the injunction was granted [.....]*
>
> *If the bank, acting in accordance with the law, takes certain steps that might eventually harm the appellant's business the appellant should not be restrained, for the harm sought to be prevented does not relate to acts that are unlawful or wrongful [....] The harm, if any, that might be cased would be that which the appellant has brought upon itself by failing to liquidate its debts".* (page 386)

I fully concur with the aforesaid observations expressed by this Court pertaining to grant of injunctions in banking matters and am of the view the power of the trial court to grant injunctions should be exercised cautiously and on distinct grounds specifically referred to and laid down in the Order of the court.

In the instant appeal, the respondent has already been reported to the Sri Lanka Credit Information Bureau (CRIB), a board resolution passed to recover monies due by sale of mortgaged properties, respondent given sufficient time to repay its debts and upon the failure of the respondent to honour its obligations the bank has resorted to publish the notice of sale and follow the provisions of the Recovery of Loans Act.

The High Court, when making the impugned Order, has not evaluated the aforesaid facts and especially the plethora of material tendered to the High Court by the bank together with its statement of objections. It has not considered the respondents' prospect of success at the trial vis-á-vis the respondents initial request for rescheduling and the conduct of the respondent. It has not examined the respondents' deep silence and the failure to dispute the liability and or reject or challenge the rescheduling alleged to be done by the bank on its own

accord and volition. It has not examined the conduct of the respondent in the light of the receipt of bank statements and more so, on receipt of the letters of demand. It has failed to evaluate the belatedness or the lapse of time between the grant of rescheduling of facilities and resorting to litigation. It only parrots that there was no consensus between the parties without examining the true nature of the relationship between the parties. It overlooks the beneficial interest accrued to the respondent in view of the rescheduling and or re-arrangement of the loans.

Most importantly, the impugned Order does not consider the relevancy or comment upon the misrepresentation and gross suppression of material facts, which this Court has time and again observed, disentitles a party from receiving equitable relief. **Alphonso Appuhamy v. Hettiarachchi; Hotel Galaxy v. Mercantile Hotel Management Ltd.; Amarasekara v. Mitsui and Company Ltd.;** and **Yasodha Holdings v. Peoples Bank cases** discussed earlier.

In the aforesaid circumstances, I hold that granting relief by way of an interim injunction as prayed for by the respondent and detailed in the plaint filed in the High Court is not sustainable in law for the reason that the respondent has failed to establish a prima facie case, a reasonable prospect of success and more so, that the balance of convenience is in favour of the respondent.

Therefore, for reasons more fully adumbrated in this Judgement, I answer the two questions of law, raised before this Court in the affirmative and in favour of the appellant.

I allow the appeal of the Appellant and set aside the Order of the High Court dated 20th June, 2014. The interim injunction issued by the High Court is thus dissolved.

I further direct the 1st and 2nd respondents in these proceedings to pay a sum of Rs 500,000/= as costs of this appeal to the appellant.

Appeal is allowed.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree

Judge of the Supreme Court

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

I had the privilege of reading the judgment written by Her Ladyship Justice Murdu N. B. Fernando in its draft form. I am in agreement with the conclusion reached by Her Ladyship to set aside the Order of the High Court dated 20.06.2014 on the basis of suppression of material facts by the Plaintiff-Respondents (herein after the Plaintiffs) which has a direct bearing in answering the second question of law allowed by this Court.

The letter marked 'R' with the objections is a request made by the 2nd Plaintiff, who is also the Managing Director of the 1st Plaintiff, to reschedule the overdraft facilities. 'R' does not contain any specific reference to loan accounts maintained under the 1st plaintiff's name and 2nd plaintiff's name. The documents marked 'S' and 'V' marked with the objections (also marked as P4 with the Plaint) contain terms relevant to the proposed rescheduling of the loans of the 1st Plaintiff and of the 2nd Plaintiff respectively. Whether such terms were accepted by the Plaintiffs orally or by their conduct will have to be considered and decided at the trial proper. Even the Defendant bank has admitted that the 2nd Plaintiff refused to sign the offer letter- vide P6. It must be noted that 'S' and P4 were addressed to the Directors of the 1st Plaintiff and 'V' and P6 were addressed to the 2nd Plaintiff. No signature is found neither on 'S' nor on 'V' to indicate that they were accepted by signing the document. It is somewhat uncommon for a bank to release money or securities either prior to fulfilling the terms of agreements or prior to a formation of a new contract or agreement with regard to the existing defaulted loans. In that backdrop whether the Defendant bank made mere book entries while the money remaining in its coffers when the Plaintiffs were not in agreement with the offers have to be decided at the main trial after hearing evidence. It must be observed that the draft resolution of the 1st Plaintiff company annexed with P4 and P4a has not been signed and there is no board minute to show that it was passed. Whether there are sufficient facts available to lift the corporate veil and whether the properties mortgaged may not be considered as third party mortgaged properties and whether the Defendant bank can proceed to sell may become issues at the trial proper since the property mortgaged being the managing director's property may not be sufficient to lift the corporate veil. Thus, still there may be an arguable case for the Plaintiffs.

On the other hand, it must be noted that the Plaintiffs themselves have admitted that a rescheduling took place after they made a request and some properties were released- vide paragraphs 9 and 10 of the plaint. It appears that while enjoying the said benefit of releasing some properties through the impugned rescheduling of the loans and without refusing to accept such relief on an impugned invalid agreement, the Plaintiffs have filed the action challenging the impugned rescheduling. Under such circumstances, it is difficult to say that the Plaintiffs have come to courts with clean hands to ask for interim injunctions.

However, in evaluating whether the Plaintiffs had a prima facie case the document marked 'R', 'AA1','AA2', ÁA3', ÁA4', 'BB1', 'CC1', 'CC2', 'CC3', 'CC4', 'DD', 'EE1', 'EE2'

with the objections are highly relevant, since these documents indicate that the Plaintiffs possibly had the knowledge from about 2010 regarding the resolution and the new accounts numbers 500941 and 500945 which appeared to have been opened after the impugned rescheduling. Suppression of these documents in presenting the plaint while praying for an enjoining order and an interim injunction poses the question whether the Plaintiffs have presented a genuine claim; whether the Plaintiffs concealed those documents since those documents may favour a situation that indicates a possible acceptance of the offers to reschedule orally or by their conduct and whether it was done with the knowledge and consent of the Plaintiffs. It further questions why the Plaintiffs delayed filling an action challenging the resolution and rescheduling of loans till the bank decided to go ahead with the auction doing necessary publications, and communicated it to the 2nd Plaintiff as evinced by documents marked HH1 to HH22. On one hand, delay defeats equity and on the other, suppression of material facts disentitles the Plaintiffs from obtaining equitable reliefs without going into the merits of the case. The learned High Court Judge has not given his mind to the contents of the aforesaid documents, the suppression of the material documents and the delay in presenting the plaint. Thus, the 2nd question of law allowed by this Court has to be answered in favour of the Defendant bank.

Therefore, I agree that the appeal must be allowed and the order granting interim injunction has to be set aside. I further observe that Rs.500000.00 has been deposited as a security in terms of the order made on the occasion of issuing an enjoining order. Since the Plaintiffs are not entitled to interim reliefs they prayed, said deposit can be released to the Defendant Bank.

Judge of the Supreme Court