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

Sampath Bank PLC
No. 110, Sir James Peiris Mawatha,
Colombo 02 and at No 19,
Dalada Veediya, Kandy.

Plaintiff

-Vs-

Kaluarachchi Sasitha Palitha
Owner of 'Sunrise Biscuit
Manufactures' at Industrial Zone,
Pallekale.

Defendant

SC Appeal No. 196/2011
SC/HC/CA/LA 453/2011
CP/HCCA/Kandy/157/2009
DC/Kandy/362/2004/MR

Kaluarachchi Sasitha Palitha
Owner of 'Sunrise Biscuit
Manufactures' at Industrial Zone,
Pallekale.

Defendant-Appellant

-Vs-

Sampath Bank PLC
No. 110, Sir James Peiris Mawatha,
Colombo 02 and at No 19,
Dalada Veediya, Kandy.

Plaintiff-Respondent

And Now

Sampath Bank PLC
No. 110, Sir James Peiris Mawatha,
Colombo 02 and at No 19,
Dalada Veediya, Kandy.

Plaintiff-Respondent-Appellant

-Vs-

Kaluarachchi Sasitha Palitha
Owner of 'Sunrise Biscuit
Manufactures' at Industrial Zone,
Pallekale.

Defendant-Appellant-Respondent

Before: Buwaneka Aluwihare PC. J.
L.T.B. Dehideniya. J. and
Murdu N.B.Fernando, PC. J.

Counsel: Chandaka Jayasundera PC with Vishmi Fernando instructed by P. Wickremasekara for the Plaintiff-Respondent-Appellant.
Rohan Sahabandu PC with Ms. Hasitha Amarasinghe for the Defendant-Appellant-Respondent.

Argued on: 03.05.2018

Decided on: 09.09.2019

Murdu N.B. Fernando, PC. J.

The Plaintiff-Respondent-Appellant (the plaintiff-appellant) came before this Court being aggrieved by the judgement of the Civil Appellate High Court of Kandy dated 04-10-2011 setting aside the judgement of the District Court of Kandy dated 14-09-2009 wherein the relief claimed by the plaintiff was granted.

This Court on 08-12-2011 granted Special Leave to Appeal on the following questions of law.

01. Where a bank has granted an overdraft facility when does the prescriptive period commence?

    (a) from demand or
    (b) from the date of the grant of the last overdraft facility

02. Does a conditional acknowledgment of the debt come within the purview of Section 12 of the Prescription Ordinance?

The plaintiff-appellant instituted action on 26-02-2004 in the District Court of Kandy against the Defendant-Appellant-Respondent (defendant-respondent) seeking inter-alia a sum of Rs. 1,426,433.93 together with interest on an overdraft facility granted by the plaintiff bank to the defendant.

In the answer, the defendant, while acknowledging obtaining overdraft facilities took up the position that the claim was prescribed. After trial, District Court entered judgement in favour of the plaintiff bank on the basis that the claim was not prescribed as the defendant has acknowledged the debt and therefore is estopped from denying the same. Being aggrieved by this judgement the defendant went before the Provincial Civil Appellate High Court in Kandy (the High Court).

In the High Court, judgement was entered in favour of the defendant upon the ground that in the absence of a contract with the condition that the overdraft is payable on demand, the trial judge was in error in holding that the prescription begins from the date of the letter of demand and secondly the letter which the trial judge considered as an acknowledgement of the debt cannot be treated as an unqualified acknowledgment of the debt.

Being aggrieved by the said judgement the plaintiff-appellant came before this Court and obtained Special Leave to Appeal on the two questions of law referred to above.

At the hearing before this Court and in the written submissions filed, the contention of the plaintiff-appellant was that prescription on an overdraft facility begins from the date of demand for payment whereas the defendant-respondent took up the position that it was from the date a particular overdraft is granted by the bank.

To buttress the argument, the plaintiff-appellant relied on Paget's Law of Banking and the Court of Appeal judgment of Wigneswaran J in **Gunawardena and others Vs Indian Overseas Bank (2001) 2 SLR 113** wherein a reference is made to Reeday's Law relating to Banking and the defendant-respondent relied on the Supreme Court judgement of **Hatton National Bank Ltd Vs Helenluc Garments Ltd. and others (1999) 2 SLR 365** in which Wijetunga J relied on Weeramantry on Law of Contracts and Chitty on Contracts.

The learned President's Counsel for the plaintiff-appellant submitted that the two judgements referred to above, namely, Court of Appeal judgment of **Gunawardena and others Vs Indian Overseas Bank (2001) 2 SLR 113** and the Supreme Court judgement of **Hatton National Bank Ltd Vs Helenluc Garments Ltd. and others (1999) 2 SLR 365** conflict with each other and if the Supreme Court decision of *Helenluc* is followed, it would undermine the entire regime of overdraft facilities been granted by banks to secure the financial needs of its customers. Thus, the learned President's Counsel argued that in keeping with banking practices, the modern banking authorities have adopted the position that prescription on an overdraft facility should begin to run from the date of demand for payment. The learned President's Counsel for the defendant-respondent strenuously argued that the Supreme Court judgment in which it was held that time starts to run not on demand but when each advance is made by the bank should be followed since it has a binding effect. The learned President's Counsel further submitted that the Court of Appeal judgement delivered a few months later (also in the year 1999) did not refer to the Supreme Court judgement of *Helenluc* and as such the Court of Appeal judgement is *per-incuriam* and should not be followed.

Before considering the above submissions, viz-a-viz the two questions of law raised before this Court, I wish to refer to the facts of the appeal before us in detail.

The defendant who was the sole proprietor of a business at the Industrial Zone of Pallekelle, Kandy maintained a current account with the Kandy branch of the plaintiff bank, from around the year 1997 and enjoyed banking facilities including medium term loan facilities and over drawing facilities. Admittedly there was no formal documentation entered between the parties or special arrangements made with regard to the overdraft facilities obtained by the defendant (commonly known as a TOD- temporary overdraft) and the last overdrawn facility obtained by the defendant was on 23-01-2001 by presenting a cheque for a sum of Rs. 30,000/=. Plaint was filed to recover the balance sum outstanding on the total overdraft facilities on 26-02-2004, 3 years and one month after the last over drawn date and the plaintiff bank in its plaint pleaded that the matter is not prescribed. The defendant accepted over drawing his account and for reasons stated in the answer claimed damages by way of a cross-claim.

At the trial, admissions were recorded and issues raised and a bank official gave evidence on behalf of the plaintiff and documents were marked including P5, defendant's letter of acknowledgment of the debt dated 25-12-2002. The bank official was cross-examined for four days and re-examined. After the closure of the plaintiff's case, the defendant raised two additional issues based on prescription and the plaintiff re-called the sole witness for the bank, the bank official who was further examined and cross-examined pertaining to the additional issues raised by the defendant. The defendant then gave evidence and parties were requested to file written submissions.

Thereafter judgement was entered in favour of the plaintiff bank. The learned judge made reference to the Supreme Court decision of *Helenluc* and held in the absence of a formal document pertaining to granting of overdraft facility, action to recover the sum due should be filed within three years from the date of providing the overdraft facility and in the instant case, since the defendant has categorically acknowledged the debt by P5, the cause of action is not prescribed and therefore rejected the defence of prescription taken up by the defendant and entered judgement for the plaintiff bank.

The defendant appealed against the said judgement to the High Court on the ground that the letter P5 is not an unconditional letter of acceptance of the debt; the judgment is not in accordance with the Prescription Ordinance and the interest claimed by the plaintiff bank is excessive.

In the High Court, the appeal was determined on written submissions and the High Court entered judgement in favour of the defendant upon the basis that the trial judge was in error when he held that prescription begins from the date of demand. The learned Judges further stated that the High Court follows the exception recognized by the Supreme Court in *Helenluc decision*. The 1st question of law this Court has to answer is based on this premise.

The next point considered by the High Court was whether the letter P5 is an acknowledgement of debt. The High Court relied on the case of **Hoare and Co. Vs Rajaratnam 34 NLR 219** and held by the said letter P5 the defendant not only acknowledged the debt but in addition requested the plaintiff bank to reschedule the overdue sum as a loan and therefore P5 cannot be treated as an unqualified acknowledgement of debt. The learned Judges of the High Court went onto state that prescription should be reckoned from the date of granting of the last overdrawn facility and held that the action filed by the plaintiff bank is prescribed and set aside the judgement of the District Court. The 2nd question of law raised before this Court is on this premise.

In the High Court judgment, a passing reference was made to the fact that letter P5 was not available in the brief and the learned President's Counsel for the defendant-respondent in his submissions before this Court constantly requested us not to consider P5. He further submitted that this Court should ignore banking practices as no expert evidence was led and enter judgement in favour of the defendant-respondent solely upon the *Helenluc decision*.

Upon perusal of the brief before us, we observe that not only P5 but none of the marked documents at the trial (excepting P8) are available in the brief. The written submission filed by the parties before the trial court are also not available in the brief. Nevertheless, both the plaintiff and the defendant in their list of witnesses and documents filed before the trial court

refer to the said letter marked P5 and during the trial the witness for the plaintiff and the defendant referred to this document and portions of the said letter P5 were reproduced *verbertim* in evidence and the trial judge based his judgment on P5. In the High Court too, written submissions were filed and judgment was entered revolving around P5.

Thus, in view of the facts and circumstances of this case, this Court will consider P5 and the evidence led at the trial pertaining to P5 in order to ascertain whether in fact P5 was an acknowledgment of debt or not. It is undisputed that the defendant wrote P5 addressed to the Manager, Sampath Bank, Kandy on 25-12-2002. It is undisputed that the defendant sent this letter in response to the letter of demand dated 12-12-2002 and by P5 the defendant acknowledged the debt, indicated his willingness to pay back the overdraft, regretted not been able to re-pay the bank in view of financial constraints faced by him and requested that the sum owed be rescheduled as a 10 year long term loan and that he be granted relief to repay it in instalments since he is not in a position to pay the lump sum at once by the given date. The learned trial judge before whom the defendant's evidence was led and cross-examined and who witnessed the defendant's demeanor came to a finding that P5 was an acknowledgment of the debt.

It is observed that the trial judge, placing reliance on the acknowledgement of the debt by P5 dated 25-12-2002 came to the finding that the plaint was not prescribed and went onto hold that if not for the acknowledgment of the debt and request for relief for payment of the debt by concessionary terms, the plaint would have been prescribed. Hence, it is clearly seen that the trial judge based his reasoning upon the ground that the overdraft facility obtained by the defendant would have been prescribed, if not for the acknowledgment of the debt by P5.

The High Court, it is observed reversed the judgment of the trial Court on two grounds. Firstly, the High Court went on the basis that the trial judge has held that the prescriptive period begins from the date of the letter of demand. This is a clear misconception and I am of the view that the High Court was in error in coming to such a finding. In fact, the trial Judge neither referred to the letter of demand nor to its date nor to the Court of Appeal decision of **Gunawardene and others Vs Indian Overseas Bank** in his judgement. The trial judge only refered to the ***Helenluc Decision*** which is a judgment of the Supreme Court and followed same and clearly stated that action should be filed within three years from the date of granting of the overdraft facility. Nevertheless, in view of the acknowledgment of the debt by the defendant by P5 the trial judge held, that the plaint was not prescribed. It appears that the High Court has not considered the District Court judgment from the said perspective of extension of the prescriptive period in view of the acknowledgment of the debt.

Secondly, it is observed, that the High Court, did not treat P5 as an acknowledgment of the debt. The High Court considered P5 as a conditional acknowledgment since the defendant requested the plaintiff bank to re-schedule the facility as a loan repayable over a period of 10 years in installments. The learned High Court judge relied on the 34 NLR case of **Hoare and Co. Vs Rajaratnam** and came to the conclusion that P5 cannot be considered as an acknowledgement of debt and on such premise held that the prescriptive period should be reckoned from the date of granting of the last over draft facility on 23-01-2001 and therefore the plaint filed on 26-02-2004 was clearly prescribed by one month. In my view, the above analysis of the High Court is also erroneous since the evidence led at the trial, unequivocally suggests that P5 (though not available in the brief) is an acknowledgment of the debt and an acknowledgment of the debt clearly interrupts and extends the prescriptive period.

Having referred to the facts of this case, let me now move onto the questions of law raised before this Court which I intend to answer based upon the facts and circumstances pertaining to this case and not on a vaccum or on a hypothetical basis. I wish to consider the 2nd question of law first.

"Does a conditional acknowledgment of a debt come within the purview of section 12 of the Prescription Ordinance?"

Section 12 of the Prescription Ordinance, reads as follows: -

> "In any forms of action referred to in sections 5,6,7,8,10 and 11 of this Ordinance, **no acknowledgment or promise** by words only **shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments** contained in the said sections, or any of them, or to deprive any party of the benefit thereof, **unless such acknowledgment shall be made or contained by or in some writing** to be signed by the party chargeable….." (emphasis is mine)

Thus, the law as stated in Section 12 of the Prescription Ordinance is very clear. If an acknowledgment is made or contained in writing signed by the party chargeable, it shall be deemed evidence of a new or continuing contract which would take the case out of the prescriptive period whether it falls under Sections 5,6,7,8,10 or 11 of the Prescription Ordinance.

In the appeal before us the cause of action weaves around granting of an over draft facility, temporary in nature for which no formal documents were executed between the plaintiff bank and the defendant and thus falls within Section 7 of the Prescription Ordinance which governs unwritten contracts or agreements.

Section 7 of the Prescription Ordinance, reads as follows: -

> "No action shall be maintainable for the recovery of any movable property, rent or mesne profit, or for money lent without written security, or …. for any money paid or expended by the plaintiff on account of the defendant, or for money due upon an account stated, or upon any unwritten promise, contract, bargain or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen."

This section clearly indicates, in the event of an unwritten agreement, action has to be filed within three years from the date the cause of action arises or in other words a three year restriction is placed on recovery of money lent without written security or money expended by the plaintiff on account of the defendant.

From the foregoing and a plain reading of Sections 7 and 12 of the Prescription Ordinance it is clearly seen, that in the case of granting of temporary over drafts by banks when no documentation is available, action has to be filed within three years from the date the cause of action arises in order, to overcome prescription. Nevertheless, the said provisions speaks of an exemption, being an acknowledgment of debt by the defendant in writing, which would take the case out of the three year window and extend the prescription period. This is the position taken by the trial judge in his judgment, though a specific reference was not made to the provisions of the Prescription Ordinance in holding that the plaint was not prescribed.

It is observed that the learned Judges of the High Court, relied on the case of **Hoare and Co. Vs Rajaratnam** (supra) to hold otherwise. Hence a detailed consideration of the facts of the said case is material. The above case decided in 1932 is in respect of goods sold and delivered and work and labour supplied where the prescriptive period is one year. The plaintiff company relied on a letter sent by the defendant Rajaratnam where it was stated,

> *"In reply to your letter of....., on account of the fall of rubber prices, you will have to wait another couple of months for settlement. In the meantime, please send your contractor to put right the leaking roof…….*",

to take the case out of the one year window. Based on this letter, the company took up the position that in view the acknowledgment of debt by the defendant and the two month extension sought, the prescriptive period should begin two months after the date of the said

letter. The trial judge gave judgement in favour of the plaintiff company upon the basis that the defendant has not denied the letter to be an acknowledgment of indebtedness and there was an unconditional promise to pay on the expiration of two months from the date of the letter. However, in appeal the said decision was over-ruled by the Supreme Court as the court held, that though the letter was an acknowledgment of debt, since the subsequent correspondence implied that the request of Rajaratnam for a couple of months to make the payment was refused by the plaintiff company, that the company cannot thereafter rely upon the said letter as an extension of time and held that the letter was not an unconditional promise to pay at the expiration of two months to take the case out of prescription and therefore the plaint was prescribed.

The facts of the appeal before us, in my view cannot be compared with the above case. The statement in the said letter to 'wait a couple of months for settlement and in the meantime put right the leaking roof,' I consider to be vastly different to P5, where there was a specific acknowledgment of the debt, willingness to pay back the over drawn sum and regret for not paying same earlier. In any event the relationship of a bank and a customer is different to goods sold and delivered and work and labour supply contract.

The defendant was a customer of the bank operating a current account for a number of years and enjoying banking facilities, presenting cheques and obtaining temporary over draft facilities based upon existing interest rates and was in receipt of monthly banking reconciliation statements which were never disputed. The evidence led at the trial indicated that subsequent to the cheque for Rs 30,000/= honoured by the bank in January 2001, many cheques presented by the defendant were not honoured by the plaintiff bank as there were no funds in the account and the monthly bank statements clearly indicated the total sum due to the bank together with the interest on the overdraft facility already obtained and the expenses incurred for cheque returns. The evidence also indicated that on verbal intimation of the outstanding debt, cheques of the defendant and others, drawn in favour of the defendant were deposited in the defendants account which too were dishonored. Thereafter, by letter dated 12-12-2002 when the plaintiff bank informed the defendant the total sum due, the response of the defendant by P5 while acknowledging the debt was his willingness to re-pay, regret for delay in making payments and request for re-scheduling of the sum.

Thus, in my view no parallel can be drawn between the case of **Hoare and Co. Vs Rajaratnam** and the appeal before us. Similarly, the letter referred to in the said case and P5 in the instant appeal are not comparable. Clearly, P5 was a letter which acknowledged a debt and came within the purview of Section 12 of the Prescription Ordinance.

In the said circumstances, the High Court was in error in holding that P5 was not an acknowledgment of the debt. It is observed that the High Court did not consider nor refer to Section 12 of Prescription Ordinance in its judgement when it analysed P5 and thus, glossed over the question of extention of the prescriptive period when an acknowledgment of the debt is forseen.

Let me go back to Section 12 of the Prescription Ordinance once again. The section very clearly indicates that acknowledgment should not be by words but be in writing. It does not state that the acknowledgment should be unqualified or unconditional. It only speaks of acknowledgment of a debt.

This section has been considered by this court on many an occasion, most of the cases pertains to goods sold and received and work and labour supplied contracts. In **Perera Vs Wickremaratne 43 NLR 141** Soertsz J. upheld the position taken up by the trial judge that though the debt was statute barred, in view of the acknowledgment of debt, the plaintiff has a right to recover the debt by virtue of section 12 of the Prescription Ordinance and observed as follows: -

> " '*I wish to settle'* is not merely an acknowledgment of the debt from which a promise to pay can be inferred but it is an acknowledgment with an express declaration of a desire to pay. It has frequently been laid down that when there is an acknowledgment of a debt, without any words to prevent the possibility of an implication of a promise to pay it, a promise to pay is inferred. Much more, then, must, such a promise be inferred when the acknowledgment is coupled with an expression of desire to pay."

GPS de Silva J (as he then was) in the Court of Appeal judgement of **Rampala and others Vs Moosajees Ltd and another 1983(2) SLR Page 441** relied on and quoted the above referred observation of Soertsz J. The said case also was in respect of goods sold and delivered contract. In the said case, a letter written by the Managing Agents (Whittals Estates) on behalf of its agent (the estate owner) stating "immediately we hear from them, we will let you know what arrangements have been made with regard to the repayment of the outstanding account" was constituted as an acknowledgment of a debt from which a promise to pay the debt could reasonably be inferred. The Court went on to hold that the letter of acknowledgment (by the agent) was sufficient to take the case out of prescription and therefore the plaint was not prescribed.

The above observations of the learned judges, clearly lay down the legal regime that our courts should consider. The Courts should look at the whole of the evidence led and especially examine the sequence of correspondence entered into, by and between the parties, in ascertaining whether an inference could be drawn with regard to the promise to pay. Thus, the provisions of Section 12 of the Prescription Ordinance should be construed in the stated background to come to a finding with regard to the extension of time, in the event a matter is statute barred. The above stated judicial dicta also points to the fact that an acknowledgment of debt need not be unqualified and unconditional. It could be qualified and conditional. Furthermore, in many an instance, the courts have considered the contents of the correspondence, and the letters of acknowledgment and have come to the conclusion that a letter of acknowledgment comes within Section 6 of the Prescription Ordinance. i.e. written agreements where the period of prescription is six years as opposed to Section 7, unwritten agreements where the period of prescription is three years. I do not wish to go so far or delve into such areas in this appeal.

In the case before us, the learned judges of the High Court held that P5 cannot be construed as an acknowledgement of debt. In my view, the said finding of the High Court is erroneous. P5 written by the defendant himself is clear and precise. It indicates an acknowledgment of the debt and willingness to make the payment. Thus, P5 clearly falls within the provisions of Section 12 of the Prescription Ordinance.

In the said circumstances, I answer the 2nd question of law raised before this Court in the affirmative. I also hold that P5 is an acknowledgment of the debt by the defendant which would extend the prescriptive period beyond the three year window as envisaged in Section 12 of the Prescription Ordinance. Thus this Court holds, the plaint filed, based upon a cause of action pertaining to temporary over draft facility, is not prescribed and upholds the judgement of the District Court. Further, this Court holds that the plaint filed in the District Court is not violative of a positive rule of law as laid down in the Civil Procedure Code.

Moreover in **People's Bank Vs Lokuge International Garments Ltd 2010 B.L.R. page 261**, a matter pertaining to an export bill of exchange between a banker and a customer J.A.N. de Silva CJ held, when liability is admitted at some point before the prescription ends, it operates as a renewal of the running of prescription.

In the Court of Appeal judgement of **Saparamadu and another Vs People's Bank 2002 (2) SLR page 15**, a matter concerning trust receipts, Shiranee Thilakawardane J. held even where the period of prescription has expired, a part payment or an acceptance of the sum which was due would take the case out of the prescriptive period.

Similarly, in **Gunawardene and others Vs Indian Overseas Bank** (supra) Wigneswaran J. held that the question of prescription does not arise if there had been an acknowledgment of the debt due.

If I may put it simply, in this appeal, the defendant last over drew his account on 23-01-2001 and by P5 dated 25-12-2002 acknowledged the debt and thereby extended the prescriptive period. The plaint was filed on 26-02-2004 within the three year period envisaged in Section 7 of the Prescription Ordinance. Therefore, I hold that the plaint cannot be construed as prescribed and thus the judgment of the High Court is erroneous and should be set aside on this ground and this ground alone.

Let me now, move onto the 1st question of law raised before this Court.

> *"Where a bank has granted an overdraft facility, when does the prescriptive period commence, from demand or from the date of grant of the last overdraft facility?"*

This was the more contentious matter argued before us and as stated at the beginning of the judgment where the parties submitted that there were conflicting judgements of the Appellate Courts, namely, **Helenluc decision** of the Supreme Court and **Gunawardene and others Vs Indian Overseas Bank** a decision of the Court of Appeal.

I wish to approach this question of law based upon the facts and circumstances of this case. I do not intend to enter into an arena of academic discourse having in mind, the request of parties for a divisional bench to hear and determine this appeal was not granted.

Thus, if I may summarize the findings pertaining to this appeal, in respect of this question of law the trial judge categorically followed the *Helenluc decision* of the Supreme Court and held, that in the absence of a formal documentation pertaining to granting of the overdraft facility, action to recover the sum should be filed within three years from the date of providing the overdraft facility.

The High Court also followed the *Helenluc decision* though it reversed the trial court finding on the erroneous basis that the trial judge considered the letter of demand to be the commencement of the prescriptive period.

Therefore, it is apparent that both the District Court and the High Court have relied on the *Helenluc decision* of the Supreme Court but came to completely opposite findings on prescription, based upon P5 the acknowledgment of the debt.

This Court has already considered the position in respect of acknowledgment of the debt by P5 and discussed the said issue in detail and answered the 2nd question of law raised before this Court in the affirmative. This Court also determined that the judgment of the High Court is erroneous when it held that the plaint filed in the District Court of Kandy is prescribed and set aside the said judgment on the said ground alone. In the said circumstances, the necessity to answer the 1st question of law, raised before this Court in my view does not arise.

Notwithstanding above, let me look at the said question in the perspective of the facts and circumstances of the instant appeal. Admittedly, the defendant obtained overdraft facilities from the plaintiff bank for which an interest is charged. The total sum overdrawn, sum cleared and the interest component is reflected in the monthly bank statements issued. Admittedly, the defendant last over drew his account on 23-01-2001. Thereafter the cheques presented were not honored and the defendant was informed of the status of the account verbally and by letter on 12-12-2002. The said letter and the debt was acknowledged by the defendant on 25-12-2002.

Thus, when there is an acknowledgment of the debt as far as prescription is concerned, the date of the grant of the last overdraft facility and the date of demand becomes insignificant. What is material is the date of acknowledgement of the debt. Therefore, this question of law raised before us, as formulated, in my view cannot be answered by this Court with a simple 'yes' or a 'no', without any reference to the facts of the instant appeal.

The learned President's Counsels for the Appellant and the Respondent vigorously propounded their respective cases before us based upon the demand theory and the last overdrawn theory supported by the two cases which the said Counsel intimated as conflicting judgements. Hence, I would now proceed to consider the said two cases.

Firstly, the *Helenluc decision* of the Supreme Court. In June 1996, Hatton National Bank in the capacity of an assignee filed plaint against Helenluc Garments Ltd and five of its directors for recovery of monies advanced on an overdraft facility granted to Helenluc Garments Ltd by Dubai Bank initially in or around 1982. Dubai Bank first assigned its interests to Union Bank of the Middle East and the Union Bank (then known as the Emirates Bank) assigned its rights to Hatton National Bank. Plaint was filed in the Commercial High Court, 14 years after the issuance of the overdraft, where there was no formal documentation executed and only based upon a letter of demand issued six days prior to filling of the plaint in May 1996. The plaint also stated that the overdraft facility granted to Helenluc Garments Ltd was secured by a hypothecary bond executed in 1982 and a director's guaranty also issued in 1982 by the original assignor Dubai Bank. The case was heard ex-parte against Helenluc and its directors and was dismissed firstly, upon the basis that no evidence was led to establish the

date of the grant of the overdraft, and secondly, even assuming it was granted on or around the same time the hypothecary bond was issued i.e. in 1982, the prescriptive period on the hypothecary bond (10 years) had lapsed, and the plaint was prescribed against Helenluc Garments Ltd. and its directors. Hatton National Bank appealed against the said judgment to the Supreme Court. This Court dismissed the bank's appeal against the company and allowed the appeal only against the directors of the company, upon the basis, that the cause of action formulated against the directors was based on the guaranty bond, there was an express term in the guaranty bond not to plead prescription and therefore prescription would not operate against the directors and remitted the case back to the High Court to proceed against the directors.

With regard to the company the Supreme Court decision was twofold. In respect of the hypothecary bond, since a period of 10 years had lapsed and in view of the provisions of Section 5 of the Prescription Ordinance this Court held that the cause of action was prescribed. However, with regard to the overdraft, Wijetunga J stated as follows: -

> "In the absence of any material to show that the parties to this action has contracted otherwise, I am of the view that a demand was not a condition precedent to an action based on the principal transaction. No evidence has been led as to when this overdraft was granted. The learned trial judge was right in thinking that it was granted at or about the time the hypothecary bond was signed and that the claim was prescribed."

Thus, the letter of demand dispatched one week prior to filing of action was disregarded by the Court. There was no instrument before the Court to establish the demand to be a pre-condition and the Court, in my view, quite rightly held that the overdraft granted 14 years ago was clearly prescribed. This case I consider to be unique and distinguishable since there was also no evidence before Court pertaining to the granting of the facility or the date of the last overdraft given by Dubai Bank 14 years ago upon which Hatton National Bank went to Court. It appears that the account was dormant for approximately 14 years until a demand was made one week prior to filing of plaint.

In the above stated judgement, Wijetunga J at pages 367 and 368 referred to the views of two eminent authors as follows: -

> "overdrafts are loans by the banker to the customer and in general no demand is necessary, so that time runs against the banker in respect of each overdraft from the time when it is made. A bank cannot therefore recover against a customer on an overdraft which has lain dormant for the prescriptive period which, in Ceylon in the absence of a written contract would be three years."
>
> Weeramantry – Law of Contracts

> "An overdraft is a loan by the banker to the customer. At common law, in the case of an overdraft repayable on demand, a demand was in general not a condition precedent to bringing an action and time ran against the banker in respect of each advance from the time when it was made."
>
> - Chitty - Law of Contracts

Based upon the foregoing statements the contention of the learned President's Counsel for the Respondent before us was that no demand is necessary to sue on an overdraft and time starts running on the date or point of issuance of the final overdraft.

In my view, the statements referred to above by the said two authors who are authorities on the Law of Contract, is based on the basic tenants or the 1st principles of offer and acceptance. The customer makes an offer verbally or in writing or by presenting a cheque and the bank accepts the offer and grants the sum requested. Thus, the clock starts ticking from the time the particular transaction comes into effect.

However, there are other factors that could affect a banking transaction or for that matter any transaction. There could be acknowledgment, part payment, re-scheduling, novation, cancellation which would change the character, the relationship between the parties. As we are aware, an overdraft is a loan granted by a banker to a customer on specific conditions. It could be a 'repayable on demand overdraft', planned or unplanned over draft, authorized or unauthorized overdraft, a permanent overdraft or a temporary overdraft, over draft issued in writing and given for a specific duration or without a limitation, it could be verbal, oral, unwritten or given at the discretion of the bank, it could be for a specific performance of for an unspecified reason, a demand could be a condition precedent or not. Thus, each overdraft will be governed by its terms and conditions and a general statement in my view cannot be given to "overdrafts" per se. Similarly, when answering the questions of law raised before this Court, a hypothetical answer cannot be given without considering the facts and circumstances of each appeal.

In the *Helenluc decision* referred to above, Wijetunga J. at page 370 refers to the two eminent authors once again and their statements as follows: -

> "Weeramantry ….. states under the heading, 'Agreements not to plead limitation' that it is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable…

> Chitty dealing with the English Law on agreement not to plead the statute also states….. that an express or implied agreement not to plead the statute whether made before or after the limitation period has expired, is valid if …. and will be given effect to by the Court."

From the above statements, it could be seen that an agreement not to plead a statute /limitation/ prescription or otherwise can be made expressly or impliedly. Thus, the above statements too, imply that the facts and circumstances should be considered in deciding when prescription begins to run in respect of each overdraft. Each case, each situation, should be analysed independly and a determination made as to when the prescription begins to run. It is a subjective test.

In the instant appeal, the trial judge considered the evidence led and held, in the absence of a formal documentation pertaining to granting of the overdraft facility, prescription runs from the date of providing the facility. However in view of the acknowledgment of the debt discussed earlier, the trial judge came to the conclusion that the plaint was not prescribed.

Let me now move onto the Court of Appeal judgement of **Gunawardane Vs Indian Overseas Bank**. (supra)

This case revolves around issuance of trust receipts and overdraft facilities to a partnership business named AMK Agency. The plaint was filed in the District Court by the bank against the five partners. Summons were not served on one partner and the case went ex-parte against another partner who filed answer but was not represented at the trial. The three partners who were represented did not lead any evidence but only pleaded prescription. After trial, judgement was entered for the bank against the partners. The three partners who were aggrieved went before the Court of Appeal and the Court of Appeal upheld the trial court findings.

In its judgement, the Court of Appeal, referred to the contention of the appellant that the plaint was prescribed under Section 7 of the Prescription Ordinance based on the last date of payment theory propounded on the statement of Weeramantry in Law of Contracts and held that the question of prescription does not arise as there was acknowledgment of the debt due. In the said judgment, Wigneswaran J. referred to the significance of several acknowledgements that the money would be paid, recorded in evidence and held the question of prescription would arise only if there was no acknowledgment or undertaking by the defendant to pay the outstanding dues to the plaintiff. In the penultimate paragraph of the judgement, Wigneswaran J. stated that the entire case of the defence savors of a desire on the part of the defendants to brush aside their obligations and responsibilities and delay payment lawfully due to the bank as long as possible.

In discussing the question of prescription at pages 119-120 of the judgement, Wigneswaran J. stated as follows: -

> *"overdraft facility is afforded by a bank by permitting a customer to overdraw his current account up to certain limits. The current account being operative and in force the facility too will continue to be operative until cancelled and or unless the money due to the bank is demanded by it. If the customer does not take steps to pay-off the overdrawn amount, interest will accrue on such overdrawn amount and shall continue to be a debt due to the bank until there is a repayment of the debt or cancellation of the debt. The overdraft facility itself will come to an end, as stated above, on the cancellation of the facility or when the bank demands repayment. This would be generally so unless there are special arrangements to the contrary. It was held in* ***William and Glyn's Bank Ltd. Vs Barnes (1981 Com. LR 20)*** *that in the absence of special arrangements overdraft dues are repayable on demand and limitation (prescription) will begin to run from the promised date of repayment of a fixed term loan or from the date of demand in any other case. (vide also T.G.Reeday - The Law relating to Banking)"*

However, as stated earlier the finding of the Court of Appeal was based upon the acknowledgment of the debt and not on the question of the commencement of prescription been on demand or on grant of last overdrawn facility.

In this case, it is also a noteworthy fact, that the defendant partnership admitted the existence of a contract based upon granting of overdraft facilities. As evidence led by the bank established, the defendant partnership abided by the terms of the said contract. The plaintiff bank was, as stated in the judgement prevented from producing or furnishing written documents pertaining to the grant of the overdraft facility, in view of circumstances beyond its control, namely the riots of 1983.

Thus, in my view the said two judgements are distinct in nature, and in facts and circumstances and can be distinguished. The two judgements do not conflict with each other. *Helenluc decision* of the Supreme Court follows the grant of last over drawn theory and the Court of Appeal decision is based on acknowledgment of the debt.

Nevertheless, the reference in the above quoted statement of Wigneswaran J. *in the absence of special arrangements overdraft dues are repayable on demand and limitation will begin to run from the promised date of repayment of a fixed term loan or from the date of demand in any other case* appears to be the bone of contention between the parties in the instant appeal heard before this Court.

As I see, in respect of "overdrafts", parties are at variance only with regard to a very narrow issue. If the overdraft is granted based on documentation (an offer and acceptance; a request and a written agreement) there is no issue, parties will be governed by same. If the agreement lays down a provision that a demand is a pre-condition or the overdraft is repayable on demand there is no issue, no controversy. That is why, as commented earlier, it is not possible to answer the question of law as formulated raised before this Court, there being no clarity or being unsure whether the word overdraft therein refers to a written undertaking or not. Generally, an overdraft is given, whether it be permanent or temporary for a particular period of time and/or with a particular credit limit or ceiling and advances could be drawn once or many times at the convenience of the customer and interest accrues on a daily basis on the outstanding sum. There is no hard and fast rule that a particular advance should be paid at a particular time. The overdraft is an ongoing facility and could be cleared by making payments (on the total outstanding including the interest) at the discretion of the customer, subject to it being within the agreed time and ceiling. In such a situation the question of law raised before this Court cannot be answered without referring to the said factors.

Thus, where there is no formal documentation, no verbal understanding of an overdraft been given, then in such a situation, when will prescription begin to run appears to be the narrow issue, that this Court will have to ponder, though the question of law raised before this Court covers the entire gamut of the law pertaining to overdrafts.

In my view the ratio of the two judgments relied on by the parties before us, and discussed in detail earlier can be distinguished and do not conflict with each other as adverted to before this Court. The Sri Lankan Courts have constantly held, that in the absence of formal documentation prescription begins to run from the last drawn date, subject however, to an acknowledgment of the debt which would extend the time period.

In another Court of Appeal judgement delivered in January1999 (prior to the two judgements referred to above) **Indian Overseas Bank Vs Ramdas and others 2000 (3) SLR 322** Edussuriya J. followed the last overdrawn date theory with regard to an overdraft given on an oral agreement. In the said judgement reference was made to certain English authorities as well as the Paget's Law of Banking (9th Edition), where the author questioned the applicability of the last drawn theory (enunciated in **Parrs Banking Company Ltd Vs Yates (1898) 2 QB 460**) and whether it is any longer good law, in respect of continuing guarantees. The above referred Court of Appeal judgement also refered to the Privy Council decision of **Wright Vs New Zealand Farmer's Co-operative Association of Canterbury Limited [1939] 2 AER 701,** where it was held, that so long as there is a continuing guarantee, the number of years which have expired since any individual debt was incurred is immaterial.

From the foregoing it is seen that though Sri Lankan Courts have followed the last overdrawn date theory, the applicability of same based on a 1898 case, has been queried by our Courts in present day context. Therefore, I wish to refer to the said query in somewhat detail.

In Paget's Law of Banking (15th Edition) John Odgers QC at page 141, discusses it as follows: -

"Over drafts on current account

An overdraft is money lent: 'a payment by a bank under an arrangement by which the customer may overdraw is a lending by the bank to the customer of the money'.

An overdraft limit will often be expressly agreed: this is called a 'planned' or 'authorised' overdraft.

If, however, a customer gives a payment instruction (including by a cheque that is presented for payment) that would take the customer beyond the agreed overdraft limit (if any), then that is treated as an implied request for a further overdraft. The bank is not obliged to honour the request and permit further borrowing, although it may have an obligation not to act irrationally. If the request is within the mandate, and the bank chooses to honour it, then that is an acceptance of the request and an agreement to provide a further overdraft. Such a further overdraft is often called an 'unplanned' or 'unauthorised' overdraft, and will often attract higher interest and charges.

An overdraft is repayable on demand and standard forms of charge over security invariably provide accordingly. Nevertheless, the right to repayment on demand should be exercised so as not unduly to prejudice the borrower's interests, in the shape, for example, of outstanding cheques drawn in the belief that the overdraft is available. The position was summarised by Ralph Gibson J in ***Williams and Glyn's Bank Ltd v Barnes*** *(1981 Com. LR 20)*

> 'There is an obligation upon the bank to honour cheques drawn within the agreed limit of an overdraft facility and presented before any demand for payment or notice to terminate a facility has been given. That obligation, however, does not by itself require any period of notice beyond the simple demand. The bank may, by the contract, be required to honour cheques drawn within the agreed facility before the demand for repayment or notice to terminate but still be free to require payment by the customer of any sums previously lent, which will be increased by any further cheques which the bank must honour.'

The drawing of a cheque or the issue of any other form of payment instruction may be taken as a request for an overdraft.

In the same book Paget's Law of Banking at page 129, the author discusses, **"Overdrafts"** under the heading **"Limitation of Actions"** as follows: -

> *"The limitation period in respect of a claim for repayment of an overdraft appears to commence from the date on which demand for repayment is made and not from the date on which the overdraft was granted. The contrary view was taken by the Court of Appeal in Parr's Banking Co Ltd v Yates, where a claim against a guarantor was held to be time-barred in respect of advances made more than six years before the issue of the writ. However, in modern banking practice, overdrafts are treated as repayable on demand, and it is thought that Parr's case does not represent the law today. In any event an unsecured overdraft which creates a debt the repayment of which is not conditional on demand appears to fall within s 6 of the Limitation Act 1980, and the cause of action would accrue on the date on which written demand was made."*

Thus it is seen from the above passages *firstly*, when a bank lends money to a customer on an arrangement expressly or otherwise, generally known as an overdraft, until the said arrangement is terminated, the bank is obliged to honour the arrangement. It could be terminated by notice or by a demand for payment and cause of action to sue arises at that point of time. *Secondly*, unsecured overdrafts where repayment is not conditional on demand also falls within the provisions of the UK Limitation Act and the cause of action arises on demand.

UK Limitation Act of 1980 specifically Sections 5 and 6, reversed the position at common law in respect of demand been made with regard to qualifying loans. The said Limitation Act at **Section 5** refers to action founded on **simple contract** and **Section 6** refers to special time limits for actions in respect of certain loans, more fully known as **qualifying loans** (which does not provide for a fix or determinable date for repayment of debt and does not make the debt repayable conditional on demand). Thus the author of Paget's Law of Banking states, that the limitation period in respect of a claim for repayment of an overdraft commences from the date on which demand for repayment is made and not from the date on which the overdraft was granted.

Further at page 549, the author goes on to state that modern bank guarantee forms obviate the need to consider such issues by providing for the guarantor to discharge his liability to the bank on service of written demand on him and such a demand will be essential to complete the bank's cause of action and time for the purposes of the Limitation Act of 1980, will run from the service of demand.

As we are aware, banking law and practice in this 21st century has evolved into a different arena in comparison to the **Parrs Banking Co. Ltd case** (supra) decided in the 19th Century. In UK, the law has kept abreast with the said trends and the common law pertaining to prescription has undergone many changes with the enactment of the Limitation Act of 1980, superseding the 1963 and the 1908 Limitation Acts.

However, in Sri Lanka the position is different. Limitation or prescription for written and unwritten agreements comes within the purview of the Prescription Ordinance of 1871. The said Ordinance does not provide for continuing guarantees or quantifying loans or loans which does not provide for repayment of a debt on or before a fixed or determinable date or repayable conditional on demand.

The concept of overdraft does not fit into the traditional wording provided for in Sections 6 and 7 of the Prescription Ordinance pertaining to written and unwritten agreements. It cannot be compartmentalized. Overdraft is a continuing agreement, written or unwritten, expressly or impliedly entered into by the parties. Overdraft is not a once and for all drawing or payment. It is issued for a length of time subject to a fixed ceiling. In the circumstances, I see merit in the modern approach pertaining to banking law and practice that demand ought to be the criterion.

However, the function of this Court is to interpret the Law. Reform of the Law is left to the Legislature. Nevertheless, I am of the view that this is an area which should be considered and looked into by relevant authorities and reforms made where necessary.

The modern approach to banking law and practice is not new to our Courts. In **Seylan Bank Limited Vs Intertrade Garments (Pvt) Ltd. SC CHC 32/98** (**2004 BALR 41),** Shirani Bandaranayake J., (as she then was) considered and analyed this position with referance to many decided cases and writings of eminent authors.

At this juncture, I wish to refer to Atkin L.J.'s observations in **Joachimson Vs Swiss Banking Corporation (1921) 3 KB 110 at Page 129,**

> *"the question appears to be in every case, did the parties in fact intend the make the demand a term of the contract? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention, the nature of the demand may be material"*

A demand made within a reasonable period of time and a demand to incorporate all sums due, should be a sine qua non, to filing an action, to commence a cause of action as referred to in the Prescription Ordinance. When entering into banking transactions, banks

should be more vigilant and cautious and grant facilities only on documentation, where minds meet and intentions are put on paper. If banks are lackadaisical in its action, if proper guidelines are not adhered to in granting banking facilities, the banks will have to face the consequences. As stated at the commencement of the judgement, I do not wish to delve into this aspect in detail or go into depth since it will not assist me to find an answer to the 1st question of law raised before this Court.

In **Bank of Ceylon Vs Aswedduma Tea Manufactures (Pvt) Ltd. SC (LA) Appeal 175/2015** dated **27-10-2017** a recent judgement of this Court pertaining to granting of temporary overdraft facilities, Anil Gooneratne J.'s observations are illuminating and thought provoking. The Court observed that the High Court erred, in holding that a legally binding agreement did not arise when overdraft facilities were granted and also erred in not considering the basic tenants of the Law of Contracts. Gooneratne J. went onto examine the grant of overdrafts from two aspects.

Firstly, the offer and acceptance, the basic rule of Law of Contracts. There was a written request and a bank memorandum that approved the request and posed the question, ***What more do you need?***

Secondly, drawing and offering of a cheque and honouring the cheque by the bank. On this issue Court relied on two English authorities, namely **Peter Royston Voller Vs Lloyds Bank Plc** No B 3/99/1177 dated 19-10-2000, an opinion of Wall J. of the Court of Appeal and **Barclays Bank Ltd. Vs W J Simms Son and Cooke (Southern) Ltd and another [1979] 3 AER 522** an opinion of Robert Goff J. and came to the conclusion, that where there is a meeting of mind an existence of a written contract is not required. Although in this case reference was not made to the demand theory or the last drawn theory, it espoused the cause of meeting of minds being the significant ingredient of an overdraft and went on to hold that after overdrawing your own current account and benefiting from same, a party is estopped from denying liability.

Thus, my considered view is that each case should be looked upon its merits. Its facts and circumstances. Sweeping statements will not do. Each instance should be analysed and considered and a determination made.

With regard to the instant appeal, I will borrow Gooneratne J.'s phrase and rephrase it to suit the appeal before us. ***What more do you need when you have acknowledged a debt?***

In concluding, I wish to refer to the Questions of Law raised before this Court, once again.

01. Where a bank has granted an overdraft facility, when does the prescriptive period commence, from demand or from the date of grant of the last overdraft facility?
02. Does a conditional acknowledgment of the debt come within the purview of Section 12 of the Prescription Ordinance?

In view of the facts and circumstances of this case and the superseding acknowledgment of the debt by the Defendant-Respondent, the 1st Question of Law raised before this Court will not arise for answer by this Court.

For the reasons enumerated in this judgement, I answer the 2nd Question of Law raised before this Court in the affirmative.

In the facts and circumstances pertaining to the instant appeal, I re-iterate that P5 is an acknowledgement of the debt by the Defendant-Respondent and when there is an acknowledgment of the debt, prescription commences to run from the date of acknowledgment of the debt. Therefore, the finding of the District Court that the plaint was not prescribed is correct and is in accordance with the law.

For the reasons adumbrated in this Judgement, I hold that the judgment of the Civil Appellate High Court of Kandy dated 04-10-2011 is erroneous and should be set aside.

Further I determine, that in view of the acknowledgment of the debt by the Defendant-Respondent, the plaint filed in the District Court was not prescribed and therefore, the Plaintiff-Appellant is entitled to the Judgement granted by the District Court.

The Judgment of the District Court of Kandy dated 14-09-2009 is affirmed.

Appeal is allowed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.

I agree

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree

Judge of the Supreme Court