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

In the matter of an appeal against the judgment of the High Court Judge dated 19.12.2003 under and in terms of Section 5 of the High Courts of the Provinces (Special Provisions) Act No. 10 of 1996 read together with Section 755 of the Civil Procedure Code.

Ceylon Comany Group (Pvt) Ltd.,
Level 4, Millenium House,
Nawam Mawatha,
Colombo 02.

Plaintiff

S.C. (C.H.C.) Appeal 11/2004
Case No. H.C. (Civil) 127/2000 (1)

Vs.

Southern Group Team Holdings (Pvt) Ltd.,
No. 155/5, Castle Street,
Colombo 08.

Defendant

AND NOW BETWEEN

Southern Group Team Holdings (Pvt) Ltd.,
No. 155/5, Castle Street,
Colombo 08.

Defendant-Appellant

Vs.

Ceylon Comany Group (Pvt) Ltd.,
Level 4, Millenium House,
Nawam Mawatha,
Colombo 02.

Plaintiff-Respondent

Before: **Hon. S. Thurairaja, P.C., J.**

Hon. Janak De Silva, J.

Hon. Mahinda Samayawardhena, J.

Counsel:

Harsha Amarasekera, P.C. for the Defendant-Appellant

Aruna de Silva for the Plaintiff-Respondent

Written Submissions:

16.03.2018 and 28.06.2022 by the Defendant-Appellant

07.03.2018 by the Plaintiff-Respondent

Argued on: 20.05.2022

Decided on: 24.07.2024

Janak De Silva, J.

The Plaintiff-Respondent (Respondent) instituted this action on 10.09.2000 against the Defendant-Appellant (Appellant) in the High Court (Civil) of the Western Province (Holden in Colombo) ("Commercial High Court"). The action was based on two causes of action.

Firstly, the Respondent seeks to recover a sum of Rs. 130 million in total with interest at 16% per annum from 16.09.1997 up to the date of the decree and thereafter with legal interest on the aggregate sum until payment in full.

Secondly, the Respondent seeks to recover a sum of Deutsche Mark ("DEM") 23,298/- or its value in Sri Lankan Rupees together with legal interest thereon from the date of the decree until payment in full.

The first cause of action is based on a Memorandum of Understanding ("MOU") (P1) the Respondent had entered into on 15.08.1997 with Messrs. Chandrasiri Tilak Maliduwapathirana, Kithsiri Saman Maliduwapathirana, Priyantha Maliduwapathirana and Ajantha Maliduwapathirana (collectively referred to as "TPG").

TPG held 95% of the issued share capital of the Subsidiaries referred to in the MOU which were Southern Group Tea Industries (Private) Limited, Southern Group Mulatiyana Teas (Private) Limited, Southern Group CTC Teas (Private) Limited and Southern Group Goluwawatta Tea (Private) Limited. In terms of the MOU, parties agreed to incorporate a Holding Company to function as the Holding Company of the Subsidiaries for the purposes set out in the MOU. The Holding Company of the Subsidiaries was Southern Group Tea Holdings Limited, the Appellant.

According to the MOU, the Respondent was obliged to invest a sum of Rs. 115 million in the Appellant and for the Appellant to issue 11,500,000 debentures. The Respondent had the option of converting the debentures and interest into shares of the Appellant on or before 30.11.1997.

In terms of Clauses 5.3 and 5.4 of the MOU, the Respondent was authorised to conduct a due diligence inquiry within 3 months from the signing of the MOU to ascertain the viability of the project. It was agreed between the parties that, in the event the debentures were not converted into shares on or before 30.11.1997 by the Respondent, the Appellant shall redeem 50% of the par value of debentures at the end of the period of 18 months from the date of issue and the balance within 36 months from the date of issue.

The Appellant, by letter dated 01.12.1997, requested a further sum of Rs. 15 million from the Respondent to be advanced in favour of the Appellant (P3). The Appellant issued receipts with respect to both payments (P2 and P4).

According to the Respondent, the Appellant failed to convert the said debentures into shares, which led to the accrual of the first cause of action.

The second cause of action is for a sum of DEM 23,298/-. The Appellant, by way of a letter dated 04.11.1997, addressed to the Manager of Hatton National Bank PLC City Office (P14) requested the opening of a letter of credit for the aforesaid amount for the import of 6 oil burners for the Appellant's tea factories. This letter was copied to Mr. Gamini Jayasooriya, the Managing Director of the Respondent. According to the Respondent, this amount was lent and advanced by the Respondent to the Appellant by providing the Appellant a letter of credit for the said amount to import six oil burners.

The position taken up by the Appellant is that it did not receive any part of the sum of Rs. 130 million and thus not obliged to issue any debentures. It was further claimed that the Respondent did not have any contractual nexus with the Appellant to sue it, the plaint did not disclose a cause of action against the Appellant and that there was a misjoinder of causes of action.

The Respondent led the evidence of its Chief Accountant and marked in evidence documents P1 to P14(a). The Appellant did not lead any evidence.

On 19.12.2003, the learned Judge of the Commercial High Court entered judgment as prayed for by the Respondent. This appeal is against the said judgment.

I will examine each of the contentions made by the Appellant.

Receipt of a sum of Rs. 130 million

The Appellant denies having received a sum of Rs. 130 million from the Respondent as alleged.

The Appellant contended that the burden of proof lies with the Respondent to demonstrate that the monies were lent to the Appellant, the Appellant was obligated to repay, and that the Appellant failed to do so.

In its written submissions, the Appellant argues that the Respondent failed to adduce the only evidence which could conclusively have established the advance of the monies to the Appellant, being the Appellant's bank account statement. This, I must confess, is an unusual argument to have been made on the part of the Appellant in view of Section 106 of the Evidence Ordinance.

Section 106 casts on a person the burden of proving any fact which is especially within his knowledge **[***Per* H. N. G. Fernando, C.J. in ***Mohamed Auf v. Queen*** **69 N.L.R. 337 at 343]**. It states that "*[w]hen any facts is especially within the knowledge of any person, the burden of proving that fact is upon him*". A fact can be said to be especially within the knowledge of one party, only if it is apparent that the same fact is not or is probably not, within the knowledge of the other party **[ibid.]**.

An aid in this regard would be illustration (b) of Section 106, which states that:

> "*106. […]*
>
> *<u>Illustrations</u>*
>
> *(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him* "

The Appellant's contention that the Appellant's bank statement should have been presented to the Court as evidence of payment advanced by the Respondent is untenable. It is important to note that the Appellant's bank statement is confidential, and it is unrealistic to expect the Respondent to provide such evidence.

On the contrary, the Respondent has presented documents issued by the Appellant that demonstrate that money was, in fact, given to and received by the Appellant.

The Respondent marked in evidence a receipt dated 15.08.1997 (P2) issued by the Appellant confirming the receipt of a sum of Rs. 115,000,000/= from the Respondent on account of advance on purchase of ordinary shares. In the answer, the Appellant

contended that this receipt was issued at the request and insistence of some of the Directors of the Respondent for a different purpose although such payment was never received by the Appellant.

However, the Appellant failed to rebut this evidence which was corroborated by the Accountant of the Respondent. In fact, not even a question was posed to the Accountant challenging his evidence on this fact.

Where the petitioner has led evidence sufficient in law to prove his status, i.e., a *factum probandum*, the failure of the respondent to adduce evidence which contradicts it adds a new factor in favour of the petitioner. There is then an additional "matter before the Court", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely, that the evidence led by the petitioner is uncontradicted **[*Edrick De Silva v. Chandradasa De Silva* (70 N.L.R. 169);** See ***Cinemas Ltd. v. Sounderarajan* (1998) 2 Sri. L. R. 16 at 19** and ***Gnanapala Weerakoon Rathnayake v. Don Andrayas Rajapaksa and Another*, S.C. Appeal No. 120/2009, S.C.M. 01.08.2017 at page 5]**.

The learned Commercial High Court Judge made the following observation (at page 11):

> "*It is interesting to note that not even a suggestion was made to the plaintiff's witness that the sums of money were not received by the defendant or that the said sums of money were paid by the defendant.*"

The learned Judge has correctly expounded the law. There is no ground to interfere with this finding of fact.

Similarly, the Appellant has issued a receipt dated 01.12.1997 (P4) acknowledging the receipt of a sum of Rs. 15,000,000/= from the Respondent as a temporary loan. The request for this loan had been made by letter dated 01.12.1997 (P3) wherein it is stated

that the Appellant is facing a cash flow deficit of Rs. 15 Million for settlement of Bought leaf advances.

For the same reasons adumbrated in relation to P2, the learned Judge was correct to find that a sum of Rs. 15 Million had in fact been given by the Respondent to the Appellant.

The defense advanced by the Appellant on the non-receipt of the sum of Rs. 130 Million is frivolous and vexatious. Moreso, in particular due to the letters marked P5 to P10 wherein it is admitted that the said sum was due and owing to the Respondent from the Appellant. I shall advert to these communications in detail later.

Privity of Contract

The points made by the Appellant on the nature of the transaction and privity of contract can be dealt together.

The Appellant contends that the transactions set out in the plaint were never intended to be of the nature of a loan transaction. According to the Appellant, the true nature of the transactions was that the Respondent was investing in the equity of the Appellant by the infusion of a sum which was later converted into an equity stake in the Appellant.

It was submitted that this fact is borne out clearly in the MOU and the endorsement contained on the receipt P2 which states that monies were received by the Appellant *"on account of an advance on purchase or ordinary shares"*.

It is true that according to the MOU and P2, the sum of Rs. 115 Million was given by the Respondent on account of an advance on purchase of ordinary shares of the Respondent. Moreover, it is clear that the Respondent was not a party to the MOU.

It is trite law that a third party who is not an original party to a contract, can incur no liability under it unless he accepts such liability later on [*Wille's Principles of South African Law*, Hutchinson (General Ed.), van Heerden, Visser and van der Merwe, 8th ed. (2003, Third Impression), 469]. Events subsequent to the execution of the MOU establish that the Appellant assumed liability under the MOU on the basis of *novation*.

Novation

Novation is a mode by which a contract is terminated. It has its origins in Roman Law according to which novation occurs when a new obligation is substituted for an old one. According to Lee [R. W. Lee, *The Elements of Roman Law*, (Fourth Ed. 1956), Sweet & Maxwell Limited, 415]:

> *"[…]* ***novation might assume several forms. It might consist merely in the substitution of the formal stipulation for another kind of obligation, as, for example, for a liability arising from a contract of sale. It might vary the substance of an existence obligation, as by adding or taking away a condition or a time limit or a surety. Lastly, it might take the form of substituting a new creditor or a new debtor.*** *[…] The substitution of a creditor could not take place without the consent of all three parties; but a new debtor might be substituted without the consent of the old one. For, just as I can discharge your debt by payment without your knowledge or consent, so I can discharge it by substituted agreement without your knowledge or consent. "* (emphasis added)

According to Nicholas [Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962), page 200, Fn. 1], for there to be a novation, the new contract must effect some change in the old. The change might be either, in the parties, or in the form (e.g. one or more informal contracts might be novated by a single stipulation, which would be more easily either sued upon or released), or in the content, or in more than one of these. Accordingly, it appears that Roman Law acknowledged that novation can take place through a combination of different forms of novation.

An important requirement for novation to be effective was the existence of the intention to novate (*animus novandi*). This requirement appears to have been introduced by Justinian as Gaius does not refer to this requirement. It was also necessary that novation is only to take place when the parties have expressly stated that they have made the new agreement with the intention of novating the first. In the absence of either one of these two factors there was no novation. Nevertheless, Nicholas [supra.] states that if novation was made only by a change of debtors, the original debtor could not be prejudiced by the extinction of his debt, and his consent was therefore not necessary.

The concept of novation in Roman-Dutch Law is described by Wille [*Wille's Principles of South African Law*, Hutchinson, Van Heerden, Visser and Van Der Merve (eds.), 8th ed., (Juta & Co. Ltd.), 2003, page 487] as follows:

> *"The term 'novation', used in a wide sense, means a new contract which extinguishes the original obligation between the parties and replaces it by a fresh obligation. There are many varieties of novation in the wide sense, depending on whether the original parties alone are parties to the new contract, in which case the novation is called 'novation proper'; or whether a new debtor is substituted for the old debtor, called 'delegation'; or whether a new person is substituted for one of the original parties both as creditor and debtor, called 'assignment'. […] In all cases of novation the parties to the original agreement must agree to the new contract and if third parties are substituted they must also agree."*

This classification of novation is adopted by Weeramantry [Weeramantry, The Law of Contracts, Vol. II, page 718] where it is stated that:

> *"The term 'novation' is used in two senses. In its wider sense it means the creation of a fresh contract by the extinction of a pre-existing one in whose room*

it stands. In its narrower sense it refers to one only of the varieties of novation comprised within the broader meaning of the term.

Novation in the wider sense is of four varieties:

(a) The substitution of a new debt for an existing debt. This is known as 'novation proper'.

(b) The substitution of a new debtor for an existing debtor. This is known as 'delegation'.

(c) The substitution of a new creditor for an existing creditor. This is known as 'cession'.

(d) The substitution of one of the original parties of a third person who takes over both rights and obligations. This is known as 'assignment'."

My brother Samayawardhena J. in ***Chelliah Ramachandran and Others v. Hatton National Bank Ltd. and Another*** **[S.C. (C.H.C.) Appeal 03/2012, S.C.M. 12.02.2024]** refers to ***Kabab-Ji SAL v. Kout Food Group*** **[2021] UKSC 48** and several other decisions cited therein which state that there are differences between assignment and novation. No doubt there are important differences between *novation proper* and assignment as explained therein, such as what can be assigned and between the requirements needed to effect assignment and *novation proper*. To that extent novation (in the wider sense) and assignment are distinct concepts. Nevertheless, the end result of novation (in the wider sense) and assignment is the creation of a fresh contract by the extinction of a pre-existing one in whose room it stands and to that extent, assignment can be categorized as one of the varieties of novation.

I need not address the conflict of law issue between Roman-Dutch Law and English Law since the concepts are similar. The corresponding concept in English law is "accord and satisfaction by a substituted agreement" **[**Weeramantry, *The Law of Contracts*, Vol. II, page 719 cited with approval in ***Chelliah Ramachandran and Others v. Hatton National Bank Ltd. and Another*** **[supra. at page 13]**.

In ***De Silva v. Hirdaramani Ltd.*** **[56 N.L.R. 481 at 488]** it was held that:

> "*[…] the names given to different kinds of novation in Roman-Dutch law and in other systems of law drawing on the civil law are a convenient means of classifying different kinds of transaction but, […], introduce no principle which would not equally operate in similar circumstances under the law of contract in England.*"

In ***Palaniappa v. Saminathan*** **[17 N.L.R. 56 at 58]** Lord Moulton referring to the corresponding English law concept of "accord and satisfaction by a substituted agreement" held:

> *"No matter what were the respective rights of the parties inter se, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it."*

Chitty on Contracts [Hugh Beale, 33rd ed., Vol. 1 (Sweet and Maxwell, 2020), at para. 22-031] states that novation is a generic term which signifies *"[…] that there being a contract in existence, some new contract is substituted for it, either between same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.*" **[**c/f ***Scarf v. Jardine*** **(1882) 7 App. Cas. 345, 351;** ***The Tychy*** **(No.2) [2001] 1 Lloyd's Rep. 10, 24]**.

For novation to occur, all parties involved in the transaction must consent to replacing the existing agreement with a new one or substituting one party with another **[*Sri Lanka Co-operative Marketing Federation Ltd. Markfed v. Ambewela Livestock Co. Ltd.*, S.C. (C.H.C.) Appeal No. 54/2007, S.C.M. 27.03.2014 at page 13]**. Chitty on Contracts [supra., at para. 19-087] states that "*the consent of all parties shall be*

*obtained**: in this necessity for consent lies the most important difference between novation and assignment***."

Upon an objective examination of the communication marked P5 to P10, it is clear that there has been express agreement between the Appellant and the Respondent for the novation of the original obligation between TPG and the Respondent by a new obligation.

On 05.11.1998, the Chairman of the Appellant, Thilak Maliduwapathirana wrote, using a company letterhead, letter to the Chairman of the Respondent (P5) referring to the funds advanced to the Appellant by the Respondent. P5 reads as follows:

> *"I refer to the several discussions you and your fellow directors/officers had with us in the recent past with regard to the funds advanced to our company by the Comany Group. Even at this stage, I feel that to abide by the agreement we have reached signed and sealed is the best course of action for all the parties. This would have prevented all the needless disputes and the misunderstandings, which are not in the interest of anybody.*
>
> *However, since you have now decided not to go ahead with the terms in the M.O.U.,* ***we have no other option other than settling the moneys paid by you****. In settling this money, we request you kindly to consider the following repayment program.*
>
> 1) ***To settle 50% of the moneys advanced together with the accrued interest at the end of 18 months commencing from the 31st October 1998.***
> 2) ***To settle the remaining 50% of the funds advanced within 36 months from the 31st of October 1998 together with the interest due on that sum.***
> 3) ***To consider the interest rate on the moneys advanced at 14%.***
>
> *We make this request to you as;*
>
> a) *Until recently we were hopeful that you would continue as per the agreement and we did not make any provision for settlement of funds advanced by the your company. Furthermore we had to invest a considerable amount of internal funds for the purchase of new machinery, machinery modification and conversions.*

b) *In general the current trends in the tea markets are not favorable. The situation in the case of CTC teas is worse and our CTC tea factory is making heavy losses at present. These factors have affected our cash flows adversely.*

We thank you very sincerely for the assistance rendered to us by you in the past and trust that you will extend your support at this stage as well." (emphasis added)

The letter P5 did not confirm the amount advanced to the Appellant by the Respondent. The Chairman of the Respondent by letter dated 19.11.1998 (P6), written in response to letter P5, drew the attention of the Appellant to this fact.

P6 reads as follows:

"Referring to your letter dated 5th November 1998 regarding the settlement of funds paid by us, ***I would like to point out to you that you haven't confirmed to us the amount advanced to your Company being Rs. 130 Million in your letter.*** *Moreover the date of repayment and number of the installments have not been indicated as well.*

In general, financial and lending institutions ascertain whether the principal and interest are repaid on monthly basis once the payback period is fixed since these are basic and essential for the settlement. As such, the number of instalments also should accompany with it.

Therefore, I would like to state the following comments with my reply to your request.

1) *We accept the period, 18 months commencing from the 31st October 1998, as the payback period of the first 50% (Rs. 65 Million) with the interest as requested by you. However, you have not specified the number of the installments and the settlement date for this 50% payment, and even not referred to the period from when to when the interest is accrued.*

2) *Remaining 50% (Rs. 65 Million) of the funds advanced by us should be settled within 18 months commencing from 30th April 2000 with the interest, but the number of installments, the settlement date for the balance and the period for the interest are not given likewise.*

3) *As discussed earlier and agreed, the annual rate of the interest has been fixed at 16%. I would give at an annual rate of 12% to you if the settlement of the money will be completed much earlier that the scheduled date.*

Taking the conditions requested by you into consideration I request earnestly to you to confirm the above and give your prompt reply in details on the settlement to be fulfilled properly.

I trust that the good relationship and friendship between us will be held on in keeping and carrying out our words." (emphasis added)

In response, the Chairman of the Appellant, Thilak Maliduwapathirana wrote a letter dated 02.12.1998 (P7), again using a company letterhead, to the Chairman of the Respondent setting out the settlement program of the Rs. 130 Million advanced by the Respondent.

P7 reads as follows:

"Thank you for your letter dated 19th November.

***The settlement program of the Rs. 130 Million advanced by your Company will be as follows**.*

1) *The first 50% (Rs 65 Million) of the advance together with the accrued interest will be paid before the end of 18 months commencing from the 31st of October 1998. The accrued interest that is settled along with the above would be for the period from 16th August 1997 to end April 2000 or up to the date of settling in the 50% advance, if the settlement is done before the due date.*

   The settlement of the 50% advance as well as the accrued interest will be made in one installment before the 30th of April 2000.

2) *The remaining 50% (Rs. 65 Million) of the funds advanced will be settled with in the 18 months commencing from end April 2000.*

   The interest for same will be paid along with the repayment of the advance in one installment before the end October 2001.

3) *We thank You for your offer to reduce the rate of interest from 16% to 12% if the settlement of the advance is completed earlier than the scheduled dates.*

We assure you once again that we will make every endeavor to complete the settlement much sooner than the scheduled dates.

We appreciate all the assistance extended by you in the past and trust that it will be continued in the future. " (emphasis added)

The Chairman of the Respondent, by letter dated 07.12.1998 (P8) responded to P7 by agreeing to the proposed repayment duration of 36 months but disagreed with the method of repayment. He suggested that the capital and interest to be paid bi-annually on the basis of proportionate installments and the capital and interest to be paid monthly.

P8 reads as follows:

> *"Thank You very much for your letter dated 2nd December 1998.*
>
> *As per my previous proposal and subsequent correspondence, I basically agree to your repayment duration within 36 months.*
>
> *But I find your suggestion for the method of repayment is incorrect. Hence I would like to propose as follows.*
>
> 1. *The Capital and the interest to be paid bi-annually on the basis of proportionate installments*
> 2. *The capital and the interest to be paid monthly.*
>
> *Please decide on the above options and confirm clearly how you would prefer to repay within the said period.*
>
> *I wish you every prosperity and fortune in your business."*

The Chairman of the Appellant, Thilak Maliduwapathirana wrote a letter dated 21.01.1999 (P9), again using a company letterhead, in response to P9. It goes on to state that Mr. Thilak Maliduwapathirana had a detailed discussion with his Board with regard to the suggestions made by the Chairman of the Appellant in respect to the settlement of the loan and that in principle they all agree that this should be settled as soon as possible and the suggestion of biannual payments is an ideal method to be adopted. P9 reads as follows:

> *"Thank you very much for your letter dated 7th December 1998. I'm sorry that I could not attend to it early as I was out of the country for about 2 weeks and soon after I returned I was down with an attack of Chicken Pox. After a long absence, I came back to office only today and I trust that you will understand the delay.*

I had a detailed discussion with my board with regard to the suggestions made by you in respect to the settlement of the loan obtained by us. On principle, we all agree that this should be settled as soon as possible and your first suggestion (Bi annual payments) is an ideal method to be adopted. In fact as I mentioned to you when I met you last, we are making every endeavor to repay the loan in full by organising funds through some other source. *However, as we do not wish to make any changes once we have agreed on repayment method, we suggest following.*

- *The settlement of the first 50% of the loan as well as accrued interest will be done before 30th April 2000, However the number of instalments may vary.*

- *The remaining 50% together with interest also will be settled before end October 2001. The instalments will be stated above.*

In this way we feel more comfortable in settling the loan within the stipulated time frame. However as mentioned earlier we would make every effort to settle the loan before the schedule dates and get the benefit of the reduced interest rates offered by you.

Whilst appreciating all the help extended by you to us in the past and trust that you would consider our request favorably.

We take this opportunity to wish you a very happy new year and prosperity in your business." (emphasis added)

This letter was replied to by the Chairman of the Respondent by letter dated 09.02.1999 (P10) which reads as follows:

"Thank You very much for your letter dated 21st January 1999. Whilst appreciating your efforts in trying to settle the loan within the time frame given. I would like you to confirm on the following:

a) *The settlement of the 1st 50% of the loan as well as accrued interest to be settled before 30.04.2000 as mentioned in your letter, but the minimum number of installments within the said period could only be confined to three (03).*

b) *The remaining 50% of the loan together with accrued interest to be settled before 31.10.2001 as stated in the said letter, but the minimum number of installments within this period could also be confined to three (03).*

Let me take this opportunity to thank you and the Board of Directors of M/S. Southern Group Tea Holdings Ltd. Once again for their sincere efforts in settling the loan and trust would confirm the above."

In response, the Chairman of the Appellant, Thilak Maliduwapathirana wrote a letter dated 02.06.1999 (P11) confirming to settle the loan as stipulated in P10.

There is no express evidence of TPG agreeing to the variation of the MOU. However, in ***Karthikesu v. Ponnachchy*** **[14 N.L.R. 486 at 487]** Lascelles C.J. held:

> "*Novation may take place, **not only by express agreement, but also tacit or by implication**, the **consent of the parties** to the novatio **being implied from the circumstances and the conduct of the parties**. **In the latter event**, however, the inference must be so probable and conclusive as to **make it quite clear that the parties intended to recede from the original obligation and to replace it by another** - in fact, it must be a necessary inference, the **new obligation being inconsistent and incompatible with the continued existence of the original obligation**.*" (emphasis added)

In ***Chelliah Ramachandran and Others v. Hatton National Bank Ltd. and Another*** **[S.C. (C.H.C.) Appeal 03/2012, S.C.M. 12.02.2024 at pages 12-14]** my brother Samayawardhena, J. held that:

> "*[t]o effectuate this, the intention of the parties to substitute the old contract with the new contract must be **unequivocally evident, avoiding speculative interpretation**, as such a transition entails serious legal ramifications.*
>
> *[…]*
>
> ***This does not however mean that there must be an express agreement entered into between the parties for novation to take effect**. **A novation can be inferred provided there is strong evidence that the parties intended to replace the original contract** with a new one*."

In ***Musst Holdings Ltd. v. Astra Asset Management UK Ltd. & Another*** **[(2023) EWCA Civ. 128 at para. 56]**, it was held that "*[t]he consent of all parties is required for a novation. Consent can* ***either be provided expressly or can be inferred from conduct****. Whether consent has been provided is a question of fact*".

Novation exists to give business efficacy to the relationship between parties in a transaction **[ibid., para. 57]**. As opined by Lightman J. in ***Evans v. SMG Television Ltd*** **[(2003) EWHC 1423 (Ch) at para. 181]**, "*[t]he proper approach to deciding whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened. […] The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct*".

Admittedly, the Appellant was not a party to the MOU. It was between the Respondent and Chandrasiri Tilak Maliduwpathirana, Kithsiri Saman Maliduwapathirana, Priyantha Maliduwapathirana, and Ajantha Maliduwapathirana who jointly held 95% of the issued share capital of the Subsidiaries. According to the MOU, "Parties" therein mean TPG and the Respondent including their respective successors and permitted assigns.

The communication marked P5, P7, P9 and P11 referred to earlier was under the hand of the Chairman of the Appellant, Thilak Maliduwapathirana who is part of TPG. He states, in P9, that the Board of Directors of the Appellant held detailed discussions in respect of the settlement of the loan obtained and in principle they all agree that this should be settled as soon as possible. The communication establish that the new arrangement was agreed between the parties due to business efficacy.

Moreover, this communication clearly establishes that there was a novation involving both a *novation proper* and a *delegation* in the sense outlined earlier. In ***De Silva v. Hirdaramani Ltd.*** **[56 N.L.R. 481 at 488]** the Privy Council held that:

> *"This it may be observed would not be novation proper according to Roman Dutch law, because there would be a change of debtor, as well as a change in*

the terms of the obligation. Nor would it be delegation, because there would be a change of the terms of the contract, as well as a change of debtor. It might be regarded as a mixture of novation and delegation, and in principle their Lordships see no reason why this could not be so."

In the context of the needs of modern commercial transactions, such adaptation should be possible in principle to provide flexibility to meet the modern complexities of commerce. There can be no objection in principle to a transaction containing one or more varieties of novation in its narrower sense.

The *novation proper* occurred by the money invested by the Respondent in terms of the MOU for the subscription of the issued share capital being considered as a loan. *Delegation* occurred by the Appellant undertaking to pay the said loan instead of TPG.

No doubt there was no written agreement clearly reflecting the *novation proper*. However, *Wille's Principles of South African Law* (supra. page 488) states that the novation agreement may be oral, even if the old contract was in writing **[*Lowrey v. Steedman* (1914) AD 532 at 539,** See also ***Rodrigo v. Ebrahim* (44 N.L.R. 513)]**.

The Respondent's witness, the Chief Accountant of the Respondent company, in his evidence on 03.09.2002 stated as follows:

"*Q: So money has been given but no debentures issued. [T]hen what happened?*

A: The managing director of the plaintiff and the Southern group directors had a discussion and they converted that into a loan.

Q: So that no debentures or shares were ever given by the defendant to the plaintiff?

A: No."

This part of his evidence was not challenged and the learned High Court Judge was entitled to act on this prima facie evidence which became cogent and overwhelming evidence by reason of the failure to contradict the witness and by the failure to lead evidence in rebuttal.

The Appellant has advanced an argument that the matter must be governed by English law as it qualifies to be a matter under the term 'corporations' pursuant to Section 3 of the Introduction of Laws of England Ordinance, No. 5 of 1852. This argument is redundant as was pointed out by the Privy Council in ***De Silva v. Hirdaramani Ltd.*** **[supra]**. Moreover, the concept novation is considered to be a part of the modern law of contracts in both English and Roman-Dutch laws **[*Ran Banda and Others v. People's Bank* [2004] 2 Sri. L. R. 31 at 33-34]**.

In the present case, the Respondent sought to recover the monies advanced to the Appellant. The Appellant consistently indicated in its letters to the Respondent that it regarded the Rs. 130 million as a loan and would endeavor to repay it. The MOU involved the formation of a Holding Company and the conversion of debentures into shares of that company. Consequently, from the correspondence marked P5 to P11, it can be inferred that both parties intended to treat the payment as a loan.

The totality of the evidence has proved on a balance of probability that the Appellant received a sum of Rs. 130 Million from the Respondent and that the parties had later agreed to treat it as a loan given to the Appellant by the Respondent. The Appellant failed to repay the loan as agreed. The learned Judge correctly concluded that a sum of Rs. 130 Million and interest thereon as pleaded by the Respondent is due and owing from the Appellant. There are no grounds to interfere with these findings of the learned Judge of the Commercial High Court.

Second Cause of Action

The Respondent contended that pursuant to a request made by the Appellant, the Respondent lent and advanced a sum of DEM 23,298/- by providing the Appellant with a letter of credit for the said sum to enable it to import six oil burners.

Appellant in response notes that the letter dated 04.11.1997 (P14) was merely a covering letter to a set of documents sent to the bank and does not prove that the letter of credit was opened by the Respondent or that any funding was provided by the Respondent to the Defendant.

It is notable that the Managing Director of the Respondent company had been issued a 'carbon copy' as reflected at the bottom of the letter. In ***Parr Construction Co. v. Pomer*** **[217 Md. 539, 144 A. 2d 69 (1958) at 542]**, it was held that "*[a] carbon copy of a letter is considered to be a duplicate original; and, as such, it constitutes primary rather than secondary evidence*". In any case, the Respondent's witness, the Bank Manager of the Hatton National Bank, Mattakkuliya branch presented the document marked P14(a) which had the Appellant's Deputy General Manager's signature. The authenticity of the letter in question could have been verified through the testimony of Mr. Nadarajah Premakumar, the Bank Manager. However, the full evidence provided by Mr. Premakumar is not available to this Court; only his re-examination has been presented. Consequently, on 20.05.2022, this Court directed the parties to submit a complete copy of Mr. Premakumar's testimony. The journal entry from that date further noted that if the proceedings could not be located and submitted, the Court would rely on the available evidence on record.

The Respondent's witness was subjected to cross-examination, during which the Appellant did not challenge the witness regarding the sum of DEM 23,298/- provided by the Respondent to the Appellant.

The Appellant in appeal submitted that it chose not to lead further evidence because it believes the true nature of the transaction is clear from the documents, making additional evidence unnecessary. Moreover, the Appellant contended that the Respondent only led evidence of Mr. Premakumar to produce document P14 and did not substantiate the claim with more comprehensive evidence.

During the proceedings in the Commercial High Court on 04.06.2003, the Respondent's witness, Mr. Premakumar, in his re-examination, provided evidence indicating that the letter dated 04.11.1997 was addressed to the Hatton National Bank by the Appellant. Additionally, Mr. Premakumar produced the letter marked P14(a). Despite ample opportunity, the Appellant failed to dispute this evidence or challenge the arguments put forth by the Respondent. Therefore, I concur with the conclusion of the learned Judge of the Commercial High Court, considering the Appellant's failure to present evidence or contradict the existing evidence through cross-examination.

For all the foregoing reasons, the appeal is dismissed costs.

JUDGE OF THE SUPREME COURT

S. Thurairaja, PC, J.

I have had the occasion to read and consider the draft judgment by Justice Janak De Silva and the separate opinion by Justice Samayawardhena.

I find myself in agreement with the conclusion reached by my brothers that the appeal should be dismissed. After careful consideration, however, I am inclined to vary with the standard of proof and degree of evidential strength upon which an inference of novation has been drawn by Justice Janak De Silva.

I am disposed to agree with Justice Samayawardhena's reasoning that an inference of novation in the absence of express agreement requires strong, robust evidence to support it. In the independent facts, circumstances and weight of submitted evidence of this instant case, such an inference of novation can be drawn on a balance of probabilities.

Thus, the appeal should be dismissed with costs.

JUDGE OF THE SUPREME COURT

Samayawardhena, J.

I agree with the conclusion of my brother, Justice De Silva, that this appeal should be dismissed with costs.

There is no presumption of novation; the presumption is against it. The parties are bound by the terms and conditions of the contract. However, when there is a novation of the contract, the rights and obligations of the parties are extinguished altogether. The old contract is then replaced with a new contract, which may be between the same parties or new parties, and may have the same terms and conditions or different terms and conditions. This entails serious legal consequences. Hence, the first principle is that there must be an express agreement between the parties for novation to take effect. The intention of the parties is pivotal for this transition. However, a novation can also be inferred, provided there is strong evidence that the parties intended to replace the original contract with a new contract. These are not novel ideas. However, I wanted to reiterate these points to emphasize that proving novation is a complex and challenging task.

As I stated with the agreement of my brother, Justice Thurairaja, in ***Chelliah Ramachandran and Others v. Hatton National Bank Ltd and Others***

(SC/CHC/APPEAL/03/2012, SC Minutes of 12.02.2024), in order to decide whether there is a novation of the old agreement, the use of terms by parties are not decisive.

I am not in favour of conflating the concept of novation with concepts such as assignment, delegation or cession.

Normally, novation is raised as a defence. In this case, the respondent filed the case against the appellant to recover more than 130 million with interest on the basis that there is a novation. The appellant was not a party to the original contract. However, on the balance of probabilities, the respondent proved that the appellant is liable to pay.

JUDGE OF THE SUPREME COURT