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

In the matter of an application for Leave to Appeal under section 5C of the High Court of the Provinces (Special Provision) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

Multiform Chemicals Limited,
No. 659, Elwitigala Mawatha,
Colombo 05.

Plaintiff

S.C. Appeal No. 183/2011
SC/HCCA/LA No. 334/2010
WP/HCCA/COL/75/10 (LA)
D.C. Colombo Case No. 48202/MR

Vs.

Adrian Machado,
Rianda Paint and Chemical Industries,
No. 131/14, Thimbirigasyaya Road,
Colombo 05.

Defendant

AND BETWEEN

Adrian Machado,
Rianda Paint and Chemical Industries,
No. 131/14, Thimbirigasyaya Road,
Colombo 05.

Defendant-Petitioner

Vs.

Multiform Chemicals Limited,
No. 659, Elwitigala Mawatha,
Colombo 05.

Plaintiff-Respondent

AND NOW BETWEEN

Multiform Chemicals Limited,
No. 659, Alwitigala Mawatha,
Colombo 05.

And Presently,
Multiform Chemicals (Private) Limited,
No. 659, Alwitigala Mawatha,
Colombo 05.

Plaintiff-Respondent-Appellant

Vs.

Adrian Machado,
Rianda Paint and Chemical Industries,
No. 131/14, Thimbirigasyaya Road,
Colombo 05.

Defendant-Petitioner-Respondent

Before: **Hon. Vijith K. Malalgoda, P.C., J.**

Hon. Kumudini Wickremasinghe, J.

Hon. Janak De Silva, J.

Counsel:

Manohara De Silva, P.C. with Sasiri Chandrasiri for the Plaintiff-Respondent-Appellant

Dr. Sunil F. A. Coorey with Nilanga Perera for the Defendant-Petitioner-Respondent

Written Submissions tendered on:

23.12.2011 by the Plaintiff-Respondent-Appellant

20.04.2012 by the Defendant-Petitioner-Respondent

Argued on: 19.02.2024

Decided on: 18.07.2024

Janak De Silva, J.

The Plaintiff-Respondent-Appellant ("Appellant") instituted the above styled action to recover a sum of Rs. 1,722,724/19 and interest thereon from the Defendant-Petitioner-Respondent ("Respondent"). According to the plaint, the Appellant sold raw material to the Respondent which was utilised to manufacture paint. The Appellant permitted the Respondent to make purchases on two (02) separate credit facilities payable within 30 and 60 days respectively. This action was filed as the Respondent failed and neglected to pay the amounts due and owing to the Appellant.

During the trial, originals of the purchase orders and the corresponding invoices were marked as P15 to P50(a) by the Appellant during the evidence-in-chief of the Chief Accountant of the Appellant. The Respondent objected to all these documents and moved that they be marked subject to proof.

The learned Additional District Judge overruled the objections and allowed these documents to be admitted in evidence without being subject to proof. The invoices were allowed to be marked without being subject to proof as they were documents prepared by the Appellant. The purchase orders were allowed to be marked without being subject to proof as they were prepared by the Respondent.

The Respondent appealed to the High Court of Civil Appeal of the Western Province Holden in Colombo ("High Court"). During the hearing, the Respondent informed that only the objection in relation to the purchase orders are maintained.

The High Court held that since the Respondent had denied the alleged transactions, it was possible for the Respondent, in view of Section 67 of the Evidence Ordinance, to move that the documents relevant to the transaction be marked subject to proof.

In addressing the contention of the Appellant that it was not possible for the Appellant to call the Respondent to testify, the High Court held that this issue does not arise since the Respondent had informed Court that the Respondent will testify. The High Court went on to state that in the event the Respondent failed to testify, it is possible for the trial judge to draw adverse inferences according to law.

The High Court held that the purchase orders must be marked subject to proof and varied the order of the learned Additional District judge to that extent.

The Appellant sought leave to appeal which was granted on the following questions of law:

(1) The High Court erred by failing to properly consider the provisions of Section 61 and 62 of the Evidence Ordinance;
(2) The High Court misdirected itself by applying the provisions of Section 67 of the Evidence Ordinance;
(3) The High Court erred by not considering that the Plaintiff is unable to produce further evidence other than the best and/or primary evidence of a document authored by the Defendant which was delivered to the Plaintiff by the Defendant;
(4) The High Court also failed to consider that in the event the Defendant denies the authenticity of documents P15 to P50(a) when giving evidence, it would be open to the Plaintiff to lead evidence in rebuttal. In the absence of a denial of the Defendant of the authenticity of these documents raised through the Pleadings or Issues, the High Court misdirected itself in calling upon the Plaintiff to furnish further proof of the said documents;
(5) The High Court erred by allowing the documents P15-P50(a) to be marked subject to proof.

Before examining these questions of law, it must be said that the record does not bear out the basis on which the Respondent moved that the invoices and purchase orders be marked subject to proof. It is probable it was done on the basis of impugning the *authenticity* of those documents since in his answer the Respondent claimed that all dues to the Appellant have been paid. The High Court proceeded on this basis.

There is an inveterate practice amongst civil trial counsel to move that Court allows certain documents to be marked subject to proof. This practice is not *per se* objectionable as it has a legal basis. Section 136 of the Evidence Ordinance reads as follows:

> *"136 (1) When either party proposes to give evidence of any fact,* ***the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant****; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.*
>
> *(2)* ***If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the court is satisfied with such undertaking****.*
>
> *(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may in his discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."* (emphasis added)

What is objectionable is the practice of moving that a document be marked subject to proof without specifying the matters on which proof is required. Judges have become passive observers of such practice. This is not a healthy practice and more often than not, leads to additional issues as in this case. Moreover, it signifies a poor grasp of the relevant evidentiary principles. A trial judge must not condone such practices. There is

a duty on a trial judge to inquire from the party moving that a document be marked subject to proof, what is required to be proved in the document.

In ***Prasanth and Another v. Devarajan and Another*** **[(2021) 2 Sri.L.R. 419 at 428]**, Samayawardhena, J., enriched by his wealth of experience as a trial judge, perceptively observed that:

> *"There is a practice among some lawyers to get up and say "subject to proof' whenever a document is marked in evidence by the other party. This they do as a matter of course or as a matter of routine and not with any particular objective in mind, except perhaps to prolong the trial. It is regrettable that most of the time the party who produces the document obliges to this without a murmur. If we are serious about law's delays, we must put an end to this bad practice. When a counsel routinely says "subject to proof', the Judge must ask what he wants the other party to prove in the document. If this simple question is asked, I am certain the objection would be withdrawn or at least the issue to be addressed would be narrowed down."*

In view of my observations and exhortations to trial judges, I deem it necessary to expound the procedure and evidentiary principles involving the tender of documentary evidence at civil trials before addressing the questions of law in this matter.

I shall do so without reference to Section 3(a) of Act No. 17 of 2022 since the Respondent objected to the purchase orders being received in evidence and the Appellant is yet to close its case. The application of Section 3(b) of Act No. 17 of 2022 will be considered later.

Civil Procedure Code

According to Section 154 of the Civil Procedure Code, every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.

At this point, if the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.

Where no objection is taken when the document is sought to be tendered in evidence, and the document is not forbidden by law to be received in evidence, any objection to its receipt as evidence is deemed to have been waived. [See ***Kenakal v. Velupillai*** **(2 N.L.R. 80);** ***Muttuya Chetty v. Appu*** **(4 N.L.R. 184);** ***Silva v. Kindersly*** **(18 N.L.R. 85);** ***Siyadoris v. Danoris*** **(42 N.L.R. 311)**].

However, if the opposing party objects to a document being admitted in evidence when it is first tendered, commonly two questions arise for determination.

Firstly, whether the document is authentic, in other words, if it is what the party tendering it represents it to be, and Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.

It is pertinent to observe that more than 65 years ago, Basnayake, C.J. in ***Mendis v. Paramaswami*** **[62 N.L.R. 302 at 307]** commended Section 154 and more especially its explanation to all Judges of first instance in civil proceedings. Regrettably, the trial judge in this matter failed to do so.

In my view, there is a third, which in fact is the most fundamental, question which arises in terms of Section 136 of the Evidence Ordinance. That is whether the document proposed to be tendered in evidence is *relevant* in terms of the Evidence Ordinance.

Therefore, three issues arise for consideration by the trial judge when a document is sought to be tendered in evidence. They are; *relevancy*, *admissibility* and *authenticity*. All three must be determined by reference to the evidentiary rules in the Evidence Ordinance.

Relevancy

Relevancy is a question of fact. In terms of Section 5 of the Evidence Ordinance, evidence may be given in any suit or proceeding of the existence or non-existence of every *fact in issue*, and *relevant facts* and of no others.

According to Section 3 of the Evidence Ordinance, *facts in issue* means and includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability , asserted or denied in any suit or proceeding, necessarily follows. Section 3 explains that one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Evidence Ordinance relating to the relevancy of facts. Thereafter, Sections 6 to 55 enumerate several *relevant facts*.

Facts in issue and *relevant facts* in a civil trial must be understood in the context of the issues raised by the parties as the trial proceeds on the issues and not on the pleadings. As Prasanna Jayawardena, P.C., J. held in ***Seylan Bank Limited v. Clement Charles Epasinghe and Another*** **[S. C. Appeal 39/2006, S. C. M. 01.08.2017 at page 8]**, "*[…] the scope and ambit of the trial had been defined by the admissions and issues which were framed at the commencement of the trial, in terms of section 146 of the Civil Procedure Code.*"

Accordingly, the first matter that a trial judge must address when a document is sought to be marked in evidence is whether it provides evidence of the existence or non-existence of any *fact in issue* or a *relevant fact*. Where the answer is in the negative, the document cannot be allowed to be marked in evidence, even subject to proof, and the questions of *authenticity* or *admissibility* does not arise for consideration.

Where the answer is in the affirmative, the next question is its *admissibility*.

Admissibility

Admissibility is a question of law. Although the word *admissibility* is not defined in the Evidence Ordinance, it is referred to in at least two sections. Sections 65 and 91 identifies certain categories of documentary evidence which are *admissible*.

According to Coomaraswamy [E. R. S. R. Coomaraswamy, *The Law of Evidence*, Vol. I (Stamford Lake Publication, 2022), page 64] *admissibility* is a negative concept and is exclusively legal. *It implies that the law has laid down rules of exclusion according to which evidence cannot be received even though it is both material and relevant. Evidence is inadmissible if it is rejected for some reason other than immateriality or irrelevance. It is admissible if there is no rule for its rejection other than a rule dealing with materiality or relevance. "Admissibility" here means the concept of the absence of an applicable rule for exclusion.*

There is a distinction between *admissibility* and *relevancy*. In terms of Section 5 of the Evidence Ordinance, evidence may be given in any suit or proceeding of the existence or non-existence of every *fact in issue*, and of *relevant facts* and of no others. Sections 6 to 55 of the Evidence Ordinance identifies different categories of *relevant facts*. Nevertheless, there may be rules of exclusion which exclude evidence of such *facts in issue* or *relevant facts*. Thus, the terms *relevancy* and *admissibility* are not co-extensive.

Where a party seeks to produce a document which is objected to by the other party on the basis of *admissibility*, as a general rule the trial judge must decide upon the objection then and there as the question of *admissibility* is not one of fact but one of law. Having done so, it is possible for the document that satisfies the test of admissibility to be admitted in evidence, subject to proof of its *authenticity* provided it provides evidence of the existence or non-existence of any *fact in issue* or a *relevant fact*.

Authenticity

According to Coomaraswamy [E. R. S. R. Coomaraswamy, *The Law of Evidence*, Vol. II, Book I (Stamford Lake Publication, 2022), page 70], *authenticity* usually means proof that the document was written or executed by the person who purports to have done so.

According to Section 67 of the Evidence Ordinance, if a document is alleged to have been signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

In ***Robins v. Grogan*** **[43 N.L.R. 269 at 270]** it was held that a document cannot be used in evidence until its genuineness has been either admitted or established by proof which should be given before the document is accepted by the Court. Where there has been no admission as to the execution of a document which has been produced, it becomes necessary to prove the handwriting.

However, the question of authenticity must now be examined by trial judges keeping in mind the provisions of Section 154A. (1) of the Civil Procedure Code which reads as follows:

> "*154A. (1) Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, it shall* ***not be necessary to adduce formal proof of the execution or genuineness of*** *any deed, or* ***document*** *which*

is required by law to be attested, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless –

(a) in the pleadings or further pleadings in an action filed under regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or

(b) the court requires such proof:

Provided that, the provisions of this section shall not be applicable in an event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.

(2) The provisions of subsection (1), shall mutatis mutandis apply in the actions on summary procedure under this Code.". (emphasis added)

Where evidence of the due execution of a document is led in relation to a document and the trial judge is satisfied upon a consideration of the probative value of the evidence led, that the impugned document was in fact drawn up by the party alleged to be its author, it can be said that the *authenticity* of such document has been proved.

Probative value of evidence means the weight to be attached to the evidence tendered and is different from *admissibility* of evidence. It is a question of fact that cannot be regulated by a set of precise rules. As Birch J in ***R v Madhub Chunder*** **[(1874) 21 WRL 13]** held, *"For weighing evidence and drawing inferences from it there can be no canon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited."* Where the party producing the document fails to prove its *authenticity* as required in a particular case, the document cannot be used in evidence.

Invariably, there may be situations where a document is produced at the trial from the custody of the person who received it. When such document is produced in evidence and is objected to by the other party on the basis of *authenticity*, the trial judge *may* allow the document to be marked subject to its *authenticity* being proved by the party

producing it in evidence provided that the document is relevant and admissible. This is one situation where a document can be allowed to be marked subject to proof which in this instance means proof of its *authenticity*.

Another instance is where a document purporting to have been sent to the other party is sought to be marked and that party asserts that it was never received. There the document may be allowed to be marked subject to proof of having been sent and received by the other party. Here the issue is mode of proof and not *authenticity*.

There are some instances when a document cannot be allowed to be marked even subject to proof without first proving certain facts. For example, as explained in illustration (b) to Section 136 of the Evidence Ordinance, where it is proposed to prove by a copy the contents of a document said to be lost, the fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced. Here again, the question is mode of proof of secondary evidence.

According to Coomaraswamy [E. R. S. R. Coomaraswamy, *The Law of Evidence*, Vol. I, 2nd ed., (Lakehouse Investments Limited, 1989), pages 647-648], the *authenticity* of a document may be proved in any one or more of the following ways:

(a) The evidence of the party who signed or wrote the document;
(b) The evidence of a person who saw him sign or write it;
(c) The evidence of someone who is acquainted with his handwriting. This can be in one of the three ways set out in the explanation to Section 47 of the Evidence Ordinance;
(d) By the evidence of an expert who compares the writing with some other writing known to be that of the signatory;
(e) By proof of the admission by the writer;
(f) By comparison by the court under Section 73 of the Evidence Ordinance;
(g) Circumstantial evidence arising from the intrinsic evidence of the contents or by presumptions.

Where a document is *relevant* and *admissible* and its *authenticity* is admitted by the other party the document can be marked without subject to proof. However, where the *authenticity* of such document is challenged by the opposing party, the document can be allowed to be marked subject to its *authenticity* being proved by the party seeking to tender it in evidence. However, the trial judge must inquire from the party that is moving that the document be marked subject to proof, as to whether it is the *authenticity* or mode of proof that is in issue and record it.

Having set out the applicable evidentiary principles, let me examine their application to the facts and circumstances of this case under each of the questions of law on which leave was granted.

Question of Law No. 1

The question is whether the High Court erred by failing to properly consider the provisions of Sections 61 and 62 of the Evidence Ordinance. The contention is that the best evidence has been produced in terms of Section 62 of the Evidence Ordinance since the Appellant has produced the originals of the purchase orders forwarded by the Respondent. Therefore, these documents cannot be marked subject to proof as there is no possibility on the part of the Appellant to adduce further evidence of the said documents.

This contention is based on a misconception of the applicable evidentiary principles. According to Section 61 of the Evidence Ordinance, the contents of documents may be proved either by primary or secondary evidence. Section 62 explains that primary evidence means the document itself produced for the inspection of the court.

These provisions deal with the mode of proof of the contents of documents. However, the issue before the trial judge was whether the purchase orders should be marked subject to proof. Although the record is silent on the basis for this request, it is clear that it was based on the need to prove *authenticity*.

There is, in my view, a difference between the proof of the contents of a document and the proof of its *authenticity*. Proof of the contents of a document attracts the rules in Sections 61 and 62 of the Evidence Ordinance. The *authenticity* of a document cannot be proved by the mere production of the original of the document. It must be proved by any one or more of the ways in which the authenticity of a document may be proved which have been explained more fully above under ***Authenticity***.

The High Court has clearly appreciated this distinction between mode of proof of the contents of a document and its *authenticity* and held that the purchase orders must be marked subject to proof in order to ensure that its *authenticity* is proved in terms of Section 67 of the Evidence Ordinance before it is admitted in evidence.

Accordingly, the question of law No. 1 is answered in the negative.

Question of Law No. 2

The issue is whether the High Court misdirected itself by applying the provisions of Section 67 of the Evidence Ordinance which reads as follows:

> "*67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.*"

The Appellant contends that if the purchase orders are marked subject to proof, the burden will be on the Appellant to prove it. Our attention was drawn to the decision in ***P. B. Umbichy Limited v. MV Mosceince and Jugolinija Rijek Yugoslavia*** **[(1998) 2 Sri.L.R. 291 at 297]** according to which the burden of proving a document marked subject to proof according to law is on the party who produces it.

According to the Appellant, this results in the Appellant being compelled to take out summons on the Respondent compelling him to give evidence on behalf of the Appellant. It is contended that such a course of action is not open. The Appellant relies

on the decisions in ***Gunatilaka and Others v. Ratnayake*** **[(1908) 2 Matara Cases 19]** and ***Dalton Wijeratne v. Harmine Wijeratne*** **[(1993) 1 Sri.L.R. 313 at 314 and 317]**.

I agree that once the purchase orders are marked subject to proof, the burden is on the Appellant to prove its *authenticity*. Section 102 of the Evidence Ordinance states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The Respondent has denied the transactions on which the Appellant bases its cause of action. The purchase orders are an essential component of the cause of action pleaded by the Appellant. If no evidence is led, the Appellant fails.

Moreover, the Respondent cannot be asked to prove the negative, namely that the purchase orders were not issued by him. In ***Laxmibai (Dead) Thru Lr'S. and Another v. Bhagwanthbuva (Dead) Thru Lr'S. and Others*** **[Civil Appeal No. 2058 of 2003, Decided on 29.01.2013]** the Indian Supreme held (at para. 15) that a negative fact cannot be proved by adducing positive evidence.

Nanda Senanayake in *Legal Maxims and Phrases* [1st ed. (Printed by author, 2023), pages 434-436] states that a negative is usually incapable of proof. The decision in ***New Indian Assurance Company Ltd. v. Nusli Neville Wadiya and Another*** **[Case No. Appeal (Civil) 5879 of 2007, Decided on 13.12.2007]** is cited in support. There, the Supreme Court of India referred (at para. 54) to the legal maxim, *ei incumbit probation qui dicit, non qui negat* (The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable or proof).

I am in agreement with this proposition of law and hold that the High Court was correct in determining that the purchase orders should be marked subject to proof and the burden of proving their *authenticity* is on the Appellant. It is justified even upon an application of Section 3(b) of Act No. 17 of 2022 since the Respondent denied the

transaction and the purchase orders were not included in the pleadings of the Appellant.

It is possible that parties to civil actions may seek to exploit this proposition of law to delay proceedings by requiring the other party to prove documents without a justifiable basis.

This mischief in my view has now been adequately addressed by the Section 154A. (1) of the Civil Procedure Code which lays down the rule that the execution or genuineness of any deed or document which is required by law to be attested cannot be impugned unless, the execution or genuineness of such deed or document is impeached and raised as an issue or the court requires such proof. The Proviso states that this rule will not apply to a deed or document a party seeks to produce which is not included in the pleadings of that party.

Section 3(b) of Act No. 17 of 2022 further seeks to prevent a party from moving without reasonable cause to get documents marked subject to proof by requiring the Court to decide whether it is necessary to adduce formal proof of the execution or genuineness of such deed or document considering the merits of the objections taken with regard to the execution or genuineness of such deed or document.

The trial judge can also impose high costs where at the end of the trial it is found that impugned documents were in fact executed by the party moving that they be marked subject to proof.

I have no hesitation in rejecting the contention of the Appellant that allowing the purchase orders to be marked subject to proof results in compelling the Appellant to call the Respondent as one of its witnesses. In ***Goonewardene v. De Saram*** **[64 N.L.R. 145 at 147]** H. N. G. Fernando, J. held that there is no requirement of law that it is only by the evidence of the person who has made a report that its *authenticity* can be proved **[**See also ***Rex v. Jinadasa*** **(51 N.L.R. 529 at 538)]**.

According to Coomaraswamy [supra., Vol. II, Book I, page 105C]:

> "*Section 67 does not render it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. It merely states with reference to deeds the universal rule that he who makes an allegation must prove it. No new rule is laid down as to the mode of proof. The nature of proof will depend to a large extent on the nature of the document.* ***The section does not require the writer of a document to be examined as a witness*** *nor does it require the subscribing witness to be produced.*[1]" (emphasis added)

Moreover, the objection of the Appellant overlooks the ways by which the *authenticity* of a document may be proved. There are other ways of proving the *authenticity* of a document other than by calling the maker of the document.

The *authenticity* can be proved by the evidence of a person who saw the maker sign or write it, the evidence of someone who is acquainted with his handwriting, by the evidence of an expert who compares the writing with some other writing known to be that of the signatory, by comparison by the court under Section 73 of the Evidence Ordinance and by circumstantial evidence arising from the intrinsic evidence of the contents or by presumption.

I am also not inclined to uphold the contention of the Appellant that the Respondent cannot be called as a witness by the Appellant.

In ***Gunatilaka*** **[supra., pages 20-21]** Wendt, J. held as follows:

> *"It is quite time that the practitioners understood that neither the law nor commonsense sanctions your calling your opponent as your witness and impliedly saying to the Court; "Whatever this man may say in support of my case*

[1] Ali v. Ruhman (21 W.R. 429)

will be true. Whatever he may say against it will be false." A party who calls his adversary as his witness must expect him to be treated like any other witness."

This is far from saying you cannot call the other party as a witness. It only states that if you do so, one cannot ask for special treatment. The other party will be treated like any other witness and nothing more nothing less.

In ***Dalton Wijeratne*** **[supra.]**, it was held that although Section 120 (1) of the Evidence Ordinance makes parties to the suit competent witnesses, it certainly does not expressly make them compellable witnesses. It was further held that Section 120 appears to imply that one party cannot compel the other party to give evidence in a civil suit and that the second proviso to Section 175 (1) of the Civil Procedure Code does not go beyond conferring a discretion on the court to permit a party to be called as a witness despite his name not being included in the list of witnesses required to be filed in terms of Section 121 of the Civil Procedure Code.

This statement must be understood on the facts and circumstances of that case. The plaintiff in a partition action was absent on the day fixed for trial but was represented by his counsel who sought the permission of court to call either the 2nd or the 6th defendant, as a witness. He stated that he was seeking to prove the pedigree by calling either one of them. This was opposed by the counsel appearing for the 6th defendant. Thus, the question that arose for determination is whether a party to an action can be compelled to testify against his will by another party to the action as his witness.

In the present matter, the Respondent informed the High Court that he will testify. The High Court has stated that if the Respondent does not testify contrary to this undertaking, permissible presumptions may be made in terms of the law.

I answer question of law No. 2 in the negative.

Question of Law No. 3

The issue is whether the High Court erred by not considering that the Appellant is unable to produce further evidence other than the best and/or primary evidence of a document authored by the Respondent which was delivered to the Appellant by the Respondent.

This issue deals with the mode of proving the contents of the purchase orders. It does not deal with the question of the *authenticity* of the purchase orders. As explained earlier, there are different ways of proving the *authenticity* of a document other than by calling the author of the document. Hence, for the same reasons adumbrated in Question of Law No. 1, Question of Law No. 3 is answered in the negative.

Question of Law No. 4

The Appellant contends that the High Court failed to consider that in the event the Respondent denies the *authenticity* of documents P15 to P50(a) when giving evidence, it would be open to the Appellant to lead evidence in rebuttal. In the absence of a denial by the Respondent of the *authenticity* of these documents raised through the pleadings or issues, the High Court misdirected itself in calling upon the Appellant to furnish further proof of the said documents.

This question is premised on certain factual and legal inaccuracies. The High Court did not call upon the Appellant to furnish further proof of the documents. It called upon the Appellant to prove the *authenticity* of the purchase orders as required by Section 67 of the Evidence Ordinance. The High Court arrived at this conclusion after observing that the Respondent had denied the impugned transaction.

The Appellant did not by reference to individual purchase orders specify in the plaint, the details of the transactions on which the sum claimed in the plaint is due and owing. In these circumstances, it was not possible for the Respondent to have impugned the *authenticity* of each and every purchase order. The Respondent in his answer denied

that any sum was due and owing to the Appellant. Hence, it was sufficient that the Respondent objected to the marking of the purchase orders when it was first tendered in evidence and moved that it be marked subject to proof.

As explained more fully in ***Kulasiriwardena v. Jayasinghe and Others*** **[(2016) 1 Sri.L.R. 93 at 101]**, "*when [a] statement […] was sought to be adduced as an Admission the court was required to give its mind to two aspects before proceeding to admit the statement. (a) As the impugned statement is one reduced to writing the court is required to consider whether admitting the document is obnoxious to the provisions governing admission of documents (mode of proof)[;] (b) Secondly, court is required to give its mind as to whether the impugned statement suggests any inference as to any fact in issue or relevant fact and if so, whether the statement is relevant under [S]ection 17 read with Section 21 of the Evidence Ordinance. (Relevancy).*"

The learned Additional District Judge did not do so. The High Court having appreciated the difference between the mode of proof and *authenticity,* correctly made order directing that the purchase orders should be marked subject to proof of their *authenticity*. The Appellant should now prove their *authenticity* in any one or more of the ways adumbrated above.

Question of law No. 4 is answered in the negative.

Question of Law No. 5

The issue is whether the High Court erred by allowing the documents P15-P50(a) to be marked subject to proof. For the reasons more fully set out above, the High Court was correct in directing that the purchase orders included in documents P15-P50(a) should be marked subject to proof.

Question of law No. 5 is answered in the negative.

The judgement of the High Court dated 09.09.2010 is affirmed.

For all the forgoing reasons, the appeal is dismissed. Parties shall bear their costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J.

I agree.

JUDGE OF THE SUPREME COURT