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

In the matter of an appeal in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended.

SC Appeal No: 48/2021
SC HC (CA) LA No: 216/2020
HCCA Colombo Case No:
WP/HCCA/COL/41/2019(LA)
DC Colombo Case No: DDR/425/2017

Indian Overseas Bank

having its Central Office at No. 763 Anna Salai, Madras (Chennai), India and having a branch at No. 139, Main Street, Pettah, Colombo 11.

PLAINTIFF

vs.

1. Saffany Chandrasekera
   also known as Sappany Chandrasekera

2. Nalini Natasha Chandrasekera

   Both of No. 66B/19, Sri Maha Vihara Road, Kalubowila, Dehiwala

   Carrying on business under the name, style and firm of Cambridge Traders at
   No. 22E, Quarry Road, Colombo 12.

DEFENDANTS

And between

1. Saffany Chandrasekera
   also known as Sappany Chandrasekera

2. Nalini Natasha Chandrasekera

   Both of No. 66B/19, Sri Maha Vihara Road,
   Kalubowila, Dehiwala

   Carrying on business under the name, style and firm of Cambridge Traders at
   No. 22E, Quarry Road, Colombo 12.

DEFENDANTS – APPELLANTS

vs.

Indian Overseas Bank,

having its Central Office at No. 763 Anna Salai, Madras (Chennai), India and having a branch at
No. 139, Main Street, Pettah, Colombo 11.

PLAINTIFF – RESPONDENT

And now between

1. Saffany Chandrasekera
   also known as Sappany Chandrasekera

2. Nalini Natasha Chandrasekera

   Both of No. 66B/19, Sri Maha Vihara Road,
   Kalubowila, Dehiwala

   Carrying on business under the name, style and firm of Cambridge Traders at
   No. 22E, Quarry Road, Colombo 12.

DEFENDANTS – APPELLANTS – APPELLANTS

vs.

Indian Overseas Bank,

having its Central Office at No. 763 Anna salai, Madras (Chennai), India and having a branch at No.139, Main Street, Pettah, Colombo 11.

PLAINTIFF – RESPONDENT – RESPONDENT

Before: **Vijith K. Malalgoda, PC, J**
Yasantha Kodagoda, PC, J
Arjuna Obeyesekere, J

Counsel: Chathura A. Galhena with Dharani Weerasinghe and Chathuni Peiris for the Defendants – Appellants – Appellants

Priyantha Alagiyawanna with Isuru Weerasooriya and Duminda Premaratne for the Plaintiff – Respondent – Respondent

Argued on: 16th January 2023

Written Submissions: Tendered by the Defendants – Appellants – Appellants on 14th July 2021 and 22nd February 2023

Tendered by the Plaintiff – Respondent – Respondent on 22nd July 2021 and 17th February 2023

Decided on: 23rd January 2024

Obeyesekere, J

The Plaintiff – Respondent – Respondent [the Plaintiff] is a bank duly incorporated in the Republic of India, with a branch office in Sri Lanka. It is a licensed commercial bank within the meaning of the Banking Act, No. 30 of 1988, as amended, and is a lending institution within the meaning of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 [the principal enactment], as amended by the Debt Recovery (Special Provisions) Amendment Act, No. 4 of 1994 [the Amendment Act] [collectively referred to as the Act].

The Defendants – Appellants – Appellants [the Defendants] who are carrying on business under the name, style and firm of 'Cambridge Traders,' were customers of the Plaintiff, and had maintained a current account with the Plaintiff.

Granting of credit facilities to the Defendants

The Plaintiff states that at the request of the Defendants, it issued the Defendants an offer letter dated 2nd July 2012, in terms of which, the Defendants were offered a cash credit facility of Rs. 75 million for a period of 12 months with an option to renew the facility for further periods of 12 months at a time, with interest to be calculated at the Primary Lending Rate [PLR], plus a margin of 1.50% per *annum*, and subject to other terms and conditions set out in the said letter. In essence, what the Defendants had been offered was a permanent overdraft facility.

The said offer letter also provided that the credit facility shall be secured by the personal guarantees of the Defendants and **by the mortgage of an immovable property** situated in Colombo 12, belonging to the 1st Defendant. The Defendants had acknowledged the said offer and thereby the terms and conditions contained therein, by placing their signature on the last page thereof. The assertion of the Plaintiff that the said offer letter contained the written agreement between the parties as contemplated by the Act has not been disputed by the Defendants. Certified copies of the said agreement, personal guarantees of the Defendants and the Mortgage Bond No. 8776 executed on 6th July 2012 to secure the said credit facility of Rs. 75 million and interest thereon had been annexed to the plaint.

It is admitted that:

(a) the Plaintiff permitted the Defendants to avail themselves of the said credit facility of Rs. 75 million through their current account;

(b) the Defendants had maintained the said current account by depositing and withdrawing monies;

(c) the credit facility had been renewed from time to time, with the last renewal for a period of one year having taken place in September 2015.

It is important to note that the loan account was reconciled by the Plaintiff on 30th September 2013, 31st March 2014 and 31st March 2015, with the balance outstanding on each occasion, which comprised of the capital sums of money withdrawn by the Defendants and the interest payable on the capital outstanding, amounting to over Rs. 76 million. The said balances have been communicated in writing to the Defendants and the accuracy thereof as well as the fact that the said sums of money are due and payable to the Plaintiff have been acknowledged in writing by the Defendants. Thus, the Defendants are estopped from disputing the accuracy of the balance outstanding as at 31st March 2015 on the credit facility obtained by them.

Institution of action

The Plaintiff states that even though the Defendants made payments after the renewal of the credit facility in September 2015, such payments were irregular. That the Defendants had defaulted in the settlement of the balance outstanding after the said renewal is reflected in the Statement of Accounts annexed to the plaint. After a series of correspondence between the parties during the period of August 2016 to June 2017 relating to the re-payment of the outstanding sums of money failed to yield any results, the Plaintiff had sent a letter of demand on 2nd September 2017 seeking the payment of:

(a) a sum of Rs. 83,883,674.99, which the Plaintiff claims was the debit balance outstanding as at 24th August 2017; and

(b) interest thereon at the rate of 16.48% per *annum* from 25th August 2017.

I must note that the Defendants failed to respond to the said letter of demand, and as held in **Disanayaka Mudiyanselage Chandrapala Meegahaarawa v Disanayaka Mudiyanselage Samaraweera Meegahaarawa** [SC Appeal No. 112/2018; SC Minutes of 21st May 2021], this is a circumstance which can be held against a defendant, although such failure to respond to a business letter cannot by and of itself prove the case of a plaintiff.

It is in these factual circumstances that the Plaintiff, acting in terms of Section 3 of the Act instituted action against the Defendants by filing a plaint on 12th October 2017 in the District Court of Colombo.

As provided for by the Act, the provisions of which I shall discuss in detail later in this judgment, the District Court issued a decree *nisi* for the sum prayed for in the plaint. The decree *nisi* having been served, the Defendants made an application supported by an affidavit seeking leave to appear and show cause against the decree *nisi* being made absolute. Accordingly, by its Order dated 21st February 2019, the District Court granted the Defendants leave to appear and show cause in terms of Section 6(2)(a), that is upon the payment of the sum of money specified in the decree *nisi*, or alternatively in terms of Section 6(2)(b), that is upon the furnishing of **security** sufficient to satisfy the said decree, in the event of it being made absolute.

It is perhaps important to note at this stage that the Defendants did not move that the property already mortgaged by them as security for the aforementioned credit facility by Mortgage Bond No. 8776, and which property had been valued at Rs. 75 million in 2012, be accepted as security, nor had the District Court given its mind to such fact, even though the District Court proceeded to act in terms of Section 6(2)(b) of the Act. It is this failure on the part of the District Court that the Defendants are complaining of in this appeal.

Invocation of appellate jurisdiction

Aggrieved by the said Order of the District Court, the Defendants had filed a petition in the Provincial High Court of the Western Province holden in Colombo [the High Court] seeking leave to appeal against the said Order. The High Court, while granting leave, had stayed the Order of the District Court. Following a full argument, the said appeal had been rejected and the Order of the District Court had been affirmed by the High Court by its judgment delivered on 15th July 2020.

By a petition filed on 18th August 2020, the Defendants sought leave to appeal against the judgment of the High Court. On 22nd March 2021, this Court, having heard learned Counsel, granted leave to appeal on the following question of law:

> "Did the Civil Appellate High Court err in law by affirming the District Court Order dated 21st February 2019 by holding that the Defendants are required to deposit security under Section 6(2)(a) or 6(2)(b) of the Debt Recovery Act, as amended, notwithstanding the fact that the Defendants have furnished a mortgage of a land in order to obtain the monies that are referred to in the plaint filed by the Plaintiff in the District Court?"

The above question of law brings into focus an important aspect of the Act, namely whether a security offered at the time of obtaining a loan facility can be considered as a security for the purposes of obtaining leave to appear in terms of Section 6(2)(b). This question does not appear to have been considered by this Court previously.

Before proceeding further, I must state that the District Court had entered the decree absolute on 31st August 2020, thus bringing the District Court proceedings to an end. The Plaintiff had thereafter executed the decree and accordingly, the property that is the subject matter of Mortgage Bond No. 8776 has been seized in satisfaction of such decree.

Introduction of legislation to expedite debt recovery

In order to give context to the provisions of the Act and the above question of law, I shall commence by going back in time to the late 1980s.

At that time, a bank licensed under the Banking Act, No. 30 of 1988 or a finance company licensed under the Finance Companies Act, No. 78 of 1988, which had lent and advanced monies to a customer and the repayment of which had been defaulted by the customer, had several options to choose from in order to recover the monies so lent and advanced, depending *inter alia* on whether the credit facility had been secured or not. The first and perhaps the most frequently adopted method was to resort to the regular procedure set out in the Civil Procedure Code and file a plaint followed by an answer and then proceed to trial, with the burden of proof being with the plaintiff bank or finance company. The second option that was available was where the credit facility had been secured by an immovable property. In such an instance [*and this being before the introduction of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990*], if the lender was a State bank, it was able to sell the immoveable property by way of *parate* execution, provided such power had been conferred by the incorporating statute of such bank. The third was to resort to the provisions of the Mortgage Act which were available where a loan had been secured by movable or immovable property. The fourth was to file action under summary procedure, as provided by Section 703 of the Civil Procedure Code, provided the criteria set out therein had been satisfied.

The view that prevailed at that time, which is borne out by the speech made by the then Minister of Justice during the second reading of the Debt Recovery (Special Provisions) Bill [*vide* Hansard of 24th January 1990] was that where a credit facility was not secured, the provisions of the Civil Procedure Code were inadequate for the speedy recovery of monies lent and advanced by banks and finance companies, and that new laws must be introduced to provide lenders with an expeditious method of recovering their debts. Reference was made to the recommendations of the Committee chaired by Justice D. Wimalaratne in support of this position. It is in this background that the Government of that time proposed the enactment of several new laws and consequential amendments to several existing laws [fourteen altogether] as part of its debt recovery legislation

package in order to improve the debt recovery environment in the country. One such proposed law was the Debt Recovery (Special Provisions) Bill.

The Debt Recovery (Special Provisions) Bill

The said Bill had been referred to this Court by the President, in terms of Article 122(1)(b) of the Constitution, for its special determination on whether the Bill or any provision thereof is inconsistent with the Constitution. In its determination on **The Debt Recovery (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills 1990, Vol. VI, page 3 at page 5] this Court observed as follows:

> "*It needs to be emphasised that legal provisions for the expeditious recovery of debts – not **before** they fall due, but **after** default by the borrowers – by banking and financial institutions **are not burdens or punitive measures imposed on borrowers**. Expeditious debt recovery is, in the long-term, beneficial to borrowers in general for at least two reasons. Firstly, expeditious repayment or recovery of debts enhances the ability of lending institutions to lend to other borrowers. Secondly, the Law's delays in respect of debt recovery, howsoever and by whomsoever caused, tend to make lending institutions much more cautious and slow in lending: by refusing some applications, by requiring higher security from some borrowers, and by insisting on more stringent terms as to interest from other borrowers. Expeditious debt recovery will thus tend to make credit available more readily and on easier terms, and will maximise the flow of money into the economy. Undoubtedly, there is a legitimate national interest in expediting the recovery of debts by lending institutions engaged in the business of providing credit, and thereby stimulating the national economy and national development*." [emphasis added]

In **Mahavidanage Simpson Kularatne v People's Bank** [SC Appeal No. 04/2015; SC Minutes of 15th September 2020], Murdu N. B. Fernando, PC, J, referring to the preamble of the Act which states that it is an Act to provide for the regulation of the procedure relating to debt recovery by lending institutions, observed at page 5 that, "*This legislation was brought into operation together with many other laws and amendments to existing laws in the early 1990s, for the manifestation of the economic development of the country*

and for the financial stability and efficient working of the lending institutions and also for the expeditious recovery of debts due and owing to a lending institution."

Thus, several provisions were introduced by the Act with a view to expediting the recovery of monies lent and advanced by banks and finance companies. One of the most notable provisions in the Act is that once the lending institution has established to the satisfaction of the District Court that the sums of money claimed in the plaint are due and owing to it, the Court shall issue in the first instance a decree *nisi*, and thereafter the burden of proving that the said sums of money are not due, shifts to the defendant, with the defendant first being required to obtain the leave of the Court in order to discharge this burden. It would thus be seen that a defendant against whom action has been filed under the Act is required to follow a two tiered process – the first is to obtain leave of Court in terms of the criteria laid down in the Act to defend the action, and the second is, if leave is granted, to thereafter satisfy Court that the monies claimed are not due from the defendant and that accordingly, the decree *nisi* should be discharged.

Section 2 – the gateway to the Act

While Section 2 is the gateway to the Act, sub-Section (1) thereof reads as follows:

> "*A lending institution (hereinafter referred to as the 'institution') may, subject to the provisions of subsection (2) recover debt due to it by an action instituted in terms of the procedure laid down by this Act, in the District Court within the local limits of whose jurisdiction–*
>
> *(a) a party defendant resides; or*
>
> *(b) the cause of action arises; or*
>
> *(c) the contract sought to be enforced was made*."

Jurisdiction in respect of any action filed under the Act has been vested with the District Court. Even though the High Court of the Western Province established under the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 [the Commercial High

Court] has jurisdiction in respect of commercial transactions, Schedule 1 of the said Act has specifically excluded from the jurisdiction of such Court actions instituted under the Act.

Being the gateway to the Act, Section 2 sets out three requirements that must be fulfilled in order to resort to the scheme of expeditious recovery of loans provided for in the Act. The first requirement is that the sum alleged to be in default should not be less than Rs. One hundred and fifty thousand.

Lending institution

The second requirement is that action should only be filed by a 'lending institution,' which term has been defined in Section 30, as amended by the Amendment Act, to mean a licensed commercial bank, a company registered under the Finance Companies Act No. 78 of 1988 to carry out finance business, the National Savings Bank, the National Development Bank, the Development Finance Corporation of Ceylon and includes a liquidator appointed under the Companies Act to wind up any of the above institutions.

The only exception to the requirement that the plaintiff must be a lending institution in order to invoke the provisions of the Act is contained in Section 25, in terms of which a person who *inter alia* knowingly draws a cheque which is subsequently dishonoured by the bank for want of funds is guilty of an offence under the Act, and proceedings can be instituted against such person in the Magistrate's Court by such person to whom the cheque was issued. This position was confirmed in **Officer in Charge, CID v Soris** [(2006) 3 Sri LR 375], where the majority of this Court accepted the submission of the Attorney General that:

(a) while Parts I to IV of the Act which set out the recovery procedure in respect of monies lent and advanced by lending institutions applies only to a lending institution, Part V of the Act under which Section 25 has been placed contains no such limitation;

(b) in terms of Section 25(1)(a), criminal responsibility is cast on any person who transacts business with any institution or person irrespective of such institution or person being a lending institution; and

(c) if it was within the contemplation of the Legislature that "person" should include only those transactions or financial business with a lending institution, Section 25(1)(a) would have made it clear in unambiguous terms that the person contemplated in Section 25(1)(a) is only a person who has transactions with a lending institution.

Recovery of a 'Debt'

The third requirement in Section 2 is that action should be filed only to recover a **debt**. Pursuant to the Amendment Act, the definition of 'debt' in Section 30 reads as follows:

> " '*debt' means a sum of money which is ascertained or capable of being ascertained at the time of the institution of the action, and which is in default,* ***whether the same be secured or not****, or owed by any person or persons, jointly or severally or as principal borrower or guarantor or in any other capacity, and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution,* ***but does not include a sum of money owed under a promise or agreement which is not in writing****;*" [emphasis added]

Thus, the fact that the credit facility granted to the Defendant had been secured by the mortgage of an immovable property is not an impediment to the Plaintiff invoking the provisions of the Act in order to recover the sums outstanding on the credit facility.

It must perhaps be mentioned that the words, "*to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution*" were agreed to be added during the hearing into the constitutionality of the Bill before this Court in order to address an argument that affording the privilege and advantage of recovering debts unconnected with ordinary banking transactions and allied transactions through the provisions of the Act would be violative of Article 12(1) of the Constitution.

The above definition of 'debt' has made it mandatory that an action, while satisfying the several other requirements set out therein, must be based on a promise or agreement which is in writing, even if the sum of money that is sought to be recovered is otherwise capable of being ascertained.

In the determination of this Court in the **Debt Recovery (Special Provisions) (Amendment) Bill of 2003** [Decisions of the Supreme Court on Parliamentary Bills 1999-2003, Vol. VII, page 435 at page 437], it was held that:

> " *(ii) Section 2(1) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term 'debt' is defined in Section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt 'does not include a sum of money owed under a promise or agreement which is not in writing'.*
>
> *In view of the reservation* ***the special procedure could be resorted to only in instances where there is a written promise or agreement on the basis of which the sum due is claimed****. This is broadly similar to the provision in the summary procedure on liquid claims. The amendment in clause 8 of the Bill, repeals the definition of the term 'debt' in section 30. The substituted definition excludes the words referred to above which limit its applicability to money owed under a promise or agreement which is in writing. The resulting position is that the court would not have any written evidence of the commitment on the part of the debtor when it issues decree nisi in the first instance.*
>
> *We are inclined to agree with the submission of the Petitioners that the two amendments referred to above would extend the application of the special procedure which is more stringent from the point of the debtor, to a wider category of persons and to any transaction had with the lending institutions, even in the absence of a written promise or agreement to pay*.
>
> *We are further of the view that there is no rational basis to extend the provisions of the Act that is presently in force in the manner referred to in (i) and (ii) above.*"

Priyantha Jayawardena, PC, J in his dissenting judgment in **Mahavidanage Simpson Kularatne v People's Bank** [supra; at page 19] held that, "*… this court has consistently held that actions instituted under the Debt Recovery Act to recover a debt must be based on a promise or agreement in writing so that 'written evidence of the commitment on the part of the debtor' could be prima facie established before entering the decree nisi*."

It is important to note that this definition of debt does not refer to by name the written promise or agreement or the instrument under which the money is owed – e.g., whether it is a term loan agreement, a pledge loan agreement, an overdraft agreement etc. Therefore, the District Court must not be influenced or guided by the name assigned to the credit facility under which the monies have been granted to a customer.

In **Kiran Atapattu v Pan Asia Bank Limited** [(2005) 2 Sri LR 276; at page 279], the Court of Appeal, referring to an argument that the defendant has not obtained a loan but only an overdraft which does not come within the meaning of 'debt' in Section 30, and having referred to the definition of debt, stated that, "*Therefore whether one calls the sum borrowed an overdraft or a loan, if it is capable of being ascertained it falls within the meaning of debt under section 30 of the Debt Recovery (Special Provisions) Act. Accordingly, there is no merit in the submissions made by the learned President's Counsel for the Defendant that the capital sum claimed by the plaintiff does not fall within the meaning of 'debt' in terms of section 30 of the Debt Recovery (Special Provisions) Act. It is my further view that the term 'debt' described in section 30 includes overdrafts, if the amount is capable of being ascertained or is ascertained at the time of institution of the action*."

Raja Fernando, J in **Eassuwaran and Others v Bank of Ceylon** [(2006) 1 Sri LR 365], while rejecting an argument that the Act "*is not applicable to claims based on recovery on credit facilities or on overdraft facilities and that Debt Recovery (Special Provisions) Act is applicable only to fixed/term loans where the amount due is clearly ascertainable*" held that the transactions which were referred to in the plaint fell well within the definition of debt.

In **Dharmaratna v People's Bank** [(2003) 3 Sri LR 307], the Court of Appeal, having referred to the definition of debt, rejected the argument of the defendant that the decree absolute was void and/or a nullity for the reason that an overdraft is not a debt or a loan and is therefore outside the purview of the Act.

At this juncture, there are two things that I wish to stress.

The first is that it is not the nomenclature of the credit facility that matters, but *inter alia* whether the sum is owed under a promise or agreement that is in writing and whether the other requirements in Section 2 and the definition of 'debt' have been satisfied. Thus, it is open to a lending institution to resort to the Act in order to recover any monies owed to it so long as that sum of money is (a) owed under a promise or agreement that is in writing, (b) the said sum is ascertained or capable of being ascertained, and (c) satisfies the other requirements in the said definition.

The second is the danger of insisting on using a particular nomenclature in order to invoke the provisions of the Act, especially with regard to overdrafts, for the reason that an overdraft can take many forms and therefore, a clarification is perhaps appropriate at this stage. In **People's Bank v Jagoda Gamage Nishantha Pradeep Kumara** [SC Appeal No. 234/2017; SC Minutes of 12th December 2022] this Court, having examined in detail the nature of an overdraft facility, has identified its different forms. Accordingly, a bank may allow a customer who does not have sufficient funds in his or her current account and who does not have a pre-determined arrangement reflected by way of a written agreement with the bank, to overdraw his or her account by simply honouring a cheque presented by such customer.

While in terms of Section 73 of the Bills of Exchange Ordinance, "*A cheque is a bill of exchange drawn on a banker payable on demand*", Section 3 of the Ordinance provides that, "*A bill of exchange is an **unconditional order in writing**, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer*." [emphasis added]

A cheque issued by one person to another may amount to a promise in writing that the sum reflected in such cheque is owed by the former to the latter. In a customer-bank relationship however, even though a cheque presented by a customer and honoured by the bank in spite of a lack of funds in the customer's account is reflective of an offer and acceptance and is undoubtedly an overdraft, such a cheque may not amount to a promise or agreement in writing by the customer that he or she owes such sum of money to the bank. Therefore, for the purposes of the Act, it appears that an action cannot be based only on such cheque for the simple reason that it is not reflective of a written promise or agreement made to the bank and is therefore outside the purview of the Act.

I am however mindful that in **Mahavidanage Simpson Kularatne v People's Bank** [supra], the majority expressed the view that the presentation with the plaint of two cheques by which the account had been overdrawn was sufficient compliance with the above requirement of a written promise. A similar view was expressed in **Eagle Breweries Ltd v People's Bank** [(2008) 2 Sri LR 199] where the Court of Appeal, whilst conceding that a statement of accounts and the cheques by which the account had been overdrawn do not come within the meaning of 'instrument' or 'agreement,' nonetheless held that a cheque or a statement of accounts from a bank could also be considered to constitute a document containing a contract entered into between two parties and would therefore come within the ambit of a 'document' in terms of Section 4(1) of the Act.

Section 4(1) of the Act

The Plaintiff, having satisfied the requirements in Section 2, and as mandated by Section 4(1) read together with Section 4(4), filed together with its plaint an affidavit of its Chief Manager to the effect that the sum claimed is lawfully due to the Plaintiff from the Defendants. A certified copy of the aforementioned agreement on which the action was based and certified copies of other documents relied upon by the Plaintiff had been annexed to the plaint.

The Defendants had raised an objection before the District Court that the originals of the said agreement and other documents had not been annexed to the plaint. Although that was not an issue by the time this appeal was filed, such objections continue to be taken

before the trial Court, probably for the reason that conflicting views have been expressed whether the written promise or agreement, reflected by an instrument, agreement or document, and upon which the action is based – whether it be the original or a copy thereof – must be annexed to the plaint. These objections stultify the objectives of the Act. I would therefore like to consider the relevant provisions of the principal enactment and the Amendment Act, with a view to clarifying this issue and prevent such objections being raised before the trial Court in the future.

Section 4(1) of the principal enactment provided as follows:

> "*The institution suing shall on **presenting the plaint** file an affidavit to the effect that the sum claimed is justly due to the institution from the defendant and **shall in addition produce to the court the instrument, agreement or document sued upon** or relied on by the institution*." [emphasis added]

Section 4(5) went on to state that:

> "*The institution shall tender with the plaint–*
>
> *(a) the affidavit and instrument, agreement or document referred to in subsection (1) of this section;*
>
> *(b) draft decree nisi; and*
>
> *(c) the requisite stamps for the decree nisi and service thereof.*"

The Amendment Act repealed Section 4(5), and repealed and replaced Section 4(1) with the following:

> "*The institution suing shall **on presenting the plaint**, file with the plaint an affidavit to the effect that the sum claimed is lawfully due to the institution from the defendant, a draft decree nisi, the requisite stamps for the decree nisi and for service thereof **and shall in addition, file in court, such number of copies of the plaint,***

affidavit, instrument, agreement or document sued upon*, or relied on by the institution, as is equal to the number of defendants in the action*." [emphasis added]

In **Mahavidanage Simpson Kularatne v People's Bank** [supra; at page 13] the majority held that "*At the point of presenting the plaint what is material is for a court to be satisfied upon the affidavit and the 'instrument, agreement or document' presented before it, that the sum claimed is a 'debt' lawfully due to the plaintiff bank and the 'instrument, agreement or document' annexed to the plaint is in conformity with the threshold provisions of section 4(2) of the Act for a court to issue a decree nisi, an ex-parte order against a defendant.*"

Although dissenting with the conclusion reached by the majority, Jayawardena, PC, J stated at page 17 that, *"… it is evident that in order to institute an action under the Debt Recovery Act, the 'debt' owed to the lending institution must be ascertainable or capable of being ascertained, at the time of the institution of the action, from a promise or agreement which is in writing. Thus, in order to ascertain the 'sum of money' due to a lending institution from the defendant, prior to entering the decree nisi under section 4(2) of the said Act, the said institution is required to produce the said written document in court."*

Jayawardena, PC, J cited the following reasons to support his finding that producing the agreement with the plaint is mandatory:

> "*[Section 4(2)] casts a duty on the court to be 'satisfied' that the instrument, agreement or document produced in terms of section 4(1) of the said Act is properly stamped, not 'open to suspicion by reason of any alteration or erasure or other matter on the face of it' and the action is not barred by 'prescription' before entering the decree nisi.* [page 13]
>
> *The words 'court being satisfied', in section 4(2) of the said Act, require an independent judicial mind to examine not only the facts stated in the affidavit but also the instrument, agreement or document presented by the lending institution with the plaint in order to determine whether the aforementioned requirements that*

are stipulated in section 4(1) have been complied with and a prima facie case has been established by the lending institution against the defendant, before entering a decree nisi in terms of the said Act. [page 13]

… [I]n terms of section 4(2) of the Debt Recovery Act, the decree nisi entered should state 'a sum not exceeding the sum prayed for in the plaint together with interest up to the date of payment and such costs as the court may allow.' [page 13]

However, the Debt Recovery Act does not stipulate the method by which a court could ascertain the sum claimed as interest… [page 13]

Hence, in order to calculate the agreed interest that is required to be included in the decree nisi, the lending institution should file the written instrument, agreement or document along with the plaint. [page 14]

Thus, I am of the view that section 4(2) of the Debt Recovery Act has imposed a duty on the court to be 'satisfied' that not only the principal sum but also the interest claimed thereon are lawfully due to the lending institution from the defendant before entering the decree nisi based on the documents filed with the plaint in terms of section 4(1) of the Debt Recovery Act. …[page 14]

… [I]t is evident that the procedural law has made it imperative to produce the instrument, agreement or document upon which a plaintiff sues to be filed along with the plaint when instituting action. [page 16]

Moreover, in terms of section 8 of the Debt Recovery Act, the court is conferred with the power to order 'the original of the instrument, agreement or other document, copies of which were filed with the plaint or on which the action is founded, be made available', for its perusal at the time the action is being supported. Accordingly, section 8 facilitates the requirement of court being satisfied that the lending institution has complied with the requirements set out in section 4(1) of the Act when the action is supported to obtain a decree nisi." [page 19]

The position in this regard can therefore be summarised as follows:

(1) Section 4(1) requires copies of the instrument, agreement or document sued upon to be filed in Court for the purpose of serving it on the defendants, and therefore means that such copies must form part of the plaint. This is reflected in Section 50 of the Civil Procedure Code which provides that, "*If a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.*";

(2) Given the fact that a plaintiff is entitled *ex parte* to a decree *nisi* in the first instance and thereafter the burden of disproving that the sum mentioned in the decree *nisi* is owed is on the defendant, it is critical for the District Court to be satisfied in the first instance itself that there is in fact a promise or agreement in writing and that the said promise or agreement is the basis of the action before Court;

(3) In terms of Section 4(2), at the time the decree *nisi* is issued *ex parte*, the Court must be satisfied that the instrument, agreement or document has been properly stamped and is not open to suspicion by reason of any alteration or erasure on the face of such document. The best way for the Court to be satisfied of this fact is for a copy of the agreement to be annexed to the plaint. Section 8 enables the Court to call for the original of the agreement in order to clarify any doubts that the Court may have with regard to the contents or authenticity of the agreement;

(4) The requirement laid down in Section 23, which is reproduced below, can only be satisfied by the District Court if a copy of the agreement is presented to Court with the plaint:

> "*In an action instituted under this Act the court shall, in the decree nisi, order interest agreed upon between the parties up to the date of decree nisi, and interest at the same rate on the aggregate sum of the decree nisi from the date of decree nisi until the date of payment in full. In the event of the parties not having agreed upon the rate of interest, the court shall in the decree nisi order interest at*

the market rate from the date of institution of action up to the date of decree nisi and thereafter on the aggregate sum of the decree nisi from the date of decree nisi until the date of payment in full.";

(5) When the Court is called upon in terms of Section 6 to consider the application of the defendant for leave to appear and defend the action, the Court must have the benefit of the agreement in order for the Court to be alert to the terms and conditions subject to which the credit facility has been granted and to make a proper determination on whether the defendant has made out a *prima facie* sustainable case.

I am therefore of the view that:

(a) It is mandatory for a plaintiff to produce with the plaint the instrument, agreement or document on which the plaintiff is suing and which contains the written promise or agreement;

(b) It is not mandatory for a plaintiff to produce the original of the said instrument, agreement or document sued upon, and tendering a copy would suffice;

(c) It is sufficient for the original of the said instrument, agreement or document sued upon to be available for production, if called upon by the Court.

<u>Section 6 of the Act</u>

If Sections 2 and 4 are at the core of a plaintiff's case, Section 6 is at the core of a defendant's case, and is very much the focus of this appeal.

Section 6(1) provides that, "*In an action instituted under this Act the defendant shall not appear or show cause against the decree nisi unless he obtains leave from the court to appear and show cause.*", and is reflective of the two tiered process that I referred to at the outset. Thus, where a defendant wishes to appear and show cause as to why the decree *nisi* should not be made absolute, it is imperative that he or she first seek and

obtain the leave of the District Court to do so. The prerequisites to seeking and obtaining leave are set out in Section 6(2).

Section 6(2) as it stood in the principal enactment reads as follows:

> "*The court shall upon the application of the defendant give leave to appear and show cause against the decree nisi either,–*
>
> *(a) upon the defendant paying into court the sum mentioned in the decree nisi; or*
>
> *(b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute; or*
>
> *(c) upon affidavits satisfactory to the court that there is an issue or a question in dispute which ought to be tried. The affidavit of the defendant shall deal specifically with the plaintiffs claim and state clearly and concisely what the defence is and what facts are relied on as supporting it."*

Section 6(2) was repealed and replaced by the Amendment Act, and presently reads as follows:

> "***The court shall*** *upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard,* ***grant leave to appear and show cause against the decree nisi****, either –*
>
> *[a] upon the defendant paying into court the sum mentioned in the decree nisi; or*
>
> *[b] upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute; or*

[c] upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence, which is prima facie sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit." [emphasis added]

The five requirements of Section 6(2)

A close examination of Section 6(2) reveals that there are **five requirements** that need to be complied with by a defendant who wishes to seek and obtain the leave of Court to appear and show cause.

The first is to make a written application seeking leave of Court to appear and show cause. As observed by the Court of Appeal in **People's Bank v Lanka Queen Int'l Private Limited** [(1999) 1 Sri LR 233 at 239], "*… in the absence of an application to show cause in writing as contemplated by section 6(2) it is possible to say that there is no proper application supported by an affidavit before court. If this interpretation is not given the amendment would become superfluous*." This position was reiterated in **Seylan Bank PLC v Farook** [(2021) 3 Sri LR 1 at page 10] where this Court took the view that, "*Moreover, a written application is necessary as the said Act does not permit the parties to lead oral evidence and/or produce fresh documentary evidence in an inquiry held in respect of an application filed under section 6(2) of the said Act to obtain leave to appear and show cause against the decree nisi entered by court.*"

It must perhaps be emphasised that the Act does not contain any provision to file answer, either at the stage of seeking leave or after leave has been granted.

The second is that such application must be supported by an affidavit. In **Seylan Bank PLC v Farook** [supra; page 11] this Court cited with approval the following passage from **People's Bank v Lanka Queen Int'l Private Limited** [supra; at page 237] where the Court of Appeal, referring to the Amendment Act, held as follows:

"*This new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show*

cause. On an examination of the amendment introduced in subsection 6(2) it is abundantly clear that the word 'application' which appeared in the original section has been qualified with the following words: 'upon the filing of an application for leave to appear and show cause supported by affidavit'. This shows that–

(a) it is mandatory for the defendant to file an application for leave to appear and show cause.

(b) such application must be supported by an affidavit which deals specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it."

The third is that the application and affidavit must deal specifically with the plaintiff's claim, as held in **Seylan Bank PLC v Farook** [supra; at page 12]. I must state that most applications made to the District Court seeking leave to appear and show cause do not deal with the plaintiff's case but instead contain a mere denial or a whole host of objections classified as technical objections or objections that are unrelated to the plaintiff's claim. While a mere denial shall not suffice – *vide* **Metal Packaging Limited and Another v Sampath Bank PLC** [(2008) 1 Sri LR 356] – this Court and the Court of Appeal have reiterated time and again that leave cannot be obtained by raising frivolous technical objections.

The Court of Appeal in **Ramanayake v Sampath Bank Ltd and Others** [(1993) 1 Sri LR 145 at page 153] has held that,

"*The defendant has to deal with the plaintiff's claim on its merits; it is not competent for the defendant to merely set out technical objections. It is also incumbent on the defendant to reveal his defence, if he has any.*

On the other hand, mere technical objections and evasive denials will not suffice.

If no plausible defence with a triable issue is set up, the judge can give the defendant leave to appear and show cause against the decree nisi by placing him on terms either under section 6(2)(a) or section 6(2)(b).

The purpose of section 6 of the Act (and also sections 704 and 706 of the (Civil Procedure) Code) is to prevent frivolous or untenable defences being set up and to avoid the lengthening of proceedings by dilatory tactics."

A similar view was expressed in **Seylan Bank PLC v Farook** [supra; at page 12] where it was held that:

"*Hence, a bare denial of the several averments in the plaint and/or setting out frivolous technical objections in the application, without stating a defence to the plaintiff's claim and the facts relied upon in support of the defence, does not satisfy the criteria set out in section 6(2) of the said Act. A defendant should not be allowed to delay the administration of justice and prevent the plaintiff from obtaining an early judgment by making such an application, as it would defeat the object of the said Act to ensure an expeditious recovery of debts. However, a defendant who has disclosed a defence to the plaintiff's claim, should not be deprived of his right to appear and defend the claim of the plaintiff*."

The stage at which an objection with regard to the procedure followed by a plaintiff can be considered by the Court was discussed in **Seneviratne and Another v Lanka Orix Leasing Company Ltd** [(2006) 1 Sri LR 230 at page 236]. In that case, the Court of Appeal, having referred to the following passage from '**Civil Procedure in Ceylon**' [1971; page 318] by K. D. P. Wickremasinghe that, "*In an action under the summary procedure on a liquid claim the defendant cannot be heard or allowed to take any objection, as to the regularity of the procedure, without having first obtained the leave of the Court to appear and defend. A judge cannot dismiss a summary action on a liquid claim on the merits of the case before granting the defendant leave to defend,*" held that a defendant cannot take objections at the stage leave is sought as to the regularity of the procedure followed by a plaintiff without first obtaining the leave of Court to appear and defend the action.

The fourth is that the application and affidavit must state clearly and concisely what the defence to the claim is and what facts are relied upon to support it. This would necessarily

require a defendant to explain if any payments have been made to reduce the debt owed by such defendant and to produce proof in support of such position.

The above four requirements are mandatory and are conditions precedent that must be satisfied by a defendant, (a) in order for the District Court to consider whether leave to appear can be granted, and (b) irrespective of whether leave is sought under paragraphs (a), (b) or (c) of Section 6(2). Failure to comply with these conditions precedent shall result in the District Court making the decree nisi absolute in terms of Section 6(3).

The fifth and final requirement is for the defendant to choose under which paragraph of Section 6(2) he or she is seeking the leave of Court to appear and defend. However, there is nothing to prevent a defendant seeking leave, alternatively of course, under each of the three paragraphs. Logically speaking, a defendant who has defaulted on the credit facilities made available to him will generally not seek leave under paragraph (a) as this would require him to deposit the sum mentioned in the decree *nisi*. Similarly, an application for leave under paragraph (b) also would be a rare occurrence for the reason that the security must appear to the Court to be reasonable and sufficient to satisfy the sum mentioned in the decree *nisi*, should it be made absolute. This however was one such case where an application under paragraph (b) could have been made.

Thus, on most occasions, leave would be sought under paragraph (c) on the basis that the application of the defendant supported by an affidavit discloses a *prima facie* sustainable defence. I am therefore of the view that while it is desirable, it is not mandatory for a defendant to express a choice with regard to the paragraph in terms of which he or she seeks leave.

<u>The role of the District Court</u>

Provided a defendant has complied with the aforementioned first four requirements of Section 6(2), the next step shall be for the Court to consider if the defendant's application to appear and show cause against the decree *nisi* should be allowed.

The task of the District Court is made easier where an application is made only under either paragraphs (a) or (b). As held by the Court of Appeal in **National Development Bank v Chrys Tea (Pvt) Ltd and Another** [(2000) 2 Sri LR 206 at 209], where leave is granted under Section 6(2)(a) or 6(2)(b), "*… the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree nisi*."

However, where an application is made directly, or on the face of it, as in this appeal, under paragraph (c), the District Court is required to consider the matters set out in the application and affidavit and be satisfied that the contents thereof disclose a defence which is *prima facie* sustainable. Three possible scenarios emerge at this stage.

The first is that if the District Court is satisfied that the application and affidavit disclose a *prima facie* sustainable defence, leave to appear can be granted, subject to such terms as to security, framing and recording of issues, or otherwise as the Court thinks fit. However, where the defendant admits liability to a part of the sum mentioned in the decree *nisi*, the Court should not grant leave to appear and show cause against the decree *nisi* under Section 6(2)(c) without requiring the defendant to pay into Court the said sum so admitted as a minimum condition to appear and show cause against the decree *nisi* [*vide* **Seylan Bank PLC v Farook** [supra; at page 16].

The second scenario is that if the District Court is not so satisfied, he or she may refuse the application and if leave has been sought in the alternative under paragraphs (a) or (b), make an appropriate order in terms of such paragraphs. However, where leave has only been sought under paragraph (c), does it mean that the District Court must act under Section 6(3) and proceed to make the decree *nisi* absolute? I think not.

It would perhaps be relevant to refer at this stage to the speech made by Mr. Harindranath Dunuwille, Member of Parliament, when the Bill pertaining to the Amendment Act was being discussed in Parliament [*vide* Hansard of 24th February 1994; column 1214] where he stated that, "*… I think it is fair to say that the law is not without mercy. Thankfully, the law is interpreted and the courts are manned by human beings and not automated machines which would not have a human face. Therefore, there is always an inherent right*

that is available to the Judges to ensure that the ends of justice are met and that the process of court is not abused. Therefore, Sir, I might mention finally that whatever the laws that are enacted, however stringent they may appear, it is always tempered with mercy at the hands of a reasonable Judge."

This brings me to the third scenario, which is linked to the question of law that must be answered in this appeal, and concerns the course of action the District Court should adopt where the Court is not satisfied that leave can be granted under paragraph (c), and where the defendant has not, on his own volition, made an application for leave under paragraph (a) or in the alternative, paragraph (b).

The application of these three scenarios was considered in **Seylan Bank PLC v Farook** [supra; at page 14], where this Court, referring to Section 6(2)I, held as follows:

> "*Accordingly, the above section has cast a duty on the court to be satisfied that the defendant has disclosed a defence which is prima facie sustainable against the claim made by the plaintiff, prior to making an order under and in terms of the said section.*
>
> *It is pertinent to note that the words 'prima facie' has been qualified by the addition of the adjective 'sustainable'. Thus, the court should not only be satisfied that the defendant has a prima facie defence, but that the defence of the defendant is prima facie* ***sustainable****. Accordingly, the court is required to consider whether the defence disclosed by the defendant can be sustained at the conclusion of the trial.*
>
> *If the court is not satisfied that the defendant has disclosed a prima facie sustainable defence, it has no jurisdiction to make an order under section 6(2)(c) of the said Act.* ***In such an instance, the court should make an order either under sections 6(2)(a) or (b) of the said Act.***
>
> *On the contrary, if the court is satisfied that the defendant has disclosed a prima facie sustainable defence, leave to appear and show cause against the decree nisi should be granted on the terms set out in section 6(2)(c) of the said Act*."

"The terms of an order granting leave to appear and show cause against the decree nisi are set out in sections 6(2)(a), (b) and (c) of the said Act. The use of the conjunction 'or' between the said sections requires the court to make an appropriate order either under sections 6(2)(a) or (b) or (c) of the said Act." [emphasis added]

I am therefore of the view that as in this appeal, even where the application of the defendant is silent with regard to the paragraph under which leave is sought or where it is apparent that the defendant is seeking leave only under Section 6(2)(c) and not under Section 6(2)(a) or (b), the District Court must consider leave, first under paragraph (c) and if not satisfied that leave can be granted under paragraph (c), then under paragraphs (a) or (b).

Is the imposition of security, mandatory in all cases?

There is one aspect arising out of Section 6(2)(c) that I must refer to. That is whether the granting of leave should always be subject to the imposition of terms or conditions or in other words, whether a defendant who has made out a *prima facie* sustainable defence is entitled to unconditional leave or leave without terms. This issue has been considered in several decisions, both of this Court as well as that of the Court of Appeal and is the basis on which the Defendants sought leave to appear and defend. I shall consider these judgments as there appears to be some ambiguity surrounding the issue of whether unconditional leave could be granted under Section 6(2)(c).

In **Ramanayake v Sampath Bank Ltd and Others** (supra; at page 152) the Court of Appeal considered Section 6(2)(c) of the principal enactment and expressed the view that, "*Leave may be granted unconditionally under section 6(2)(c) where the court is satisfied that the defendant's affidavit raises an issue or question which ought to be tried*.". However, in **Mahavidanage Simpson Kularatne v People's Bank** [supra; at page 19], the majority, having considered that in terms of Section 6(2)(c), leave can be granted "*on such terms, as to security, framing and recording of issues, or otherwise as the court thinks fit*" was of the following view:

"*The Legislature in no uncertain terms has laid down the procedure to be followed for a defendant to show cause against a decree nisi and I see no reason to deviate from the said provisions or to disregard such provisions. The Act does not permit 'unconditional leave' to appear. Leave to appear is always subject to conditions. The least being furnishing security as the court thinks fit. As discussed earlier the intention of the Legislature has to be fulfilled and the purpose of the Act should not be brought to naught by a court relying on technical objections to defeat the very purpose of the Act*."

In any event, as pointed out by De Silva, J. in the case of Peo'le's Bank vs. Lanka Queen International (Pvt) Ltd., (supra) section 6(2) (as amended by Act, No.4 of 1994) does not permit unconditional leave to defend the claim; ***the minimum requirement according to section 6(2) (c) is for the furnishing of security*** *determined by Court and the Court can exercise its discretion in determining the amount of security to be furnished by the defendant if he discloses a sustainable defence*." [emphasis added]

Thus, according to the majority opinion in **Kularatne**, leave to appear and defend cannot be given without conditions, with tendering security being a mandatory condition. A contrary view was however expressed in **Seylan Bank PLC v Farook** [supra; at page 18] where it was held that "*… the court is empowered to grant leave to appear and show cause against the decree nisi, without ordering security, under section 6(2)(c) of the said Act*."

While the issue of whether unconditional leave can be granted does not appear to have been directly addressed, the Court, having stated that, "*… a plain reading of the phrase 'or otherwise as the court thinks fit' shows that a* ***wide discretion*** *is conferred on the court to make an appropriate order under section 6(2)(c) of the said Act.*", held that it does not agree with the view expressed in **People's Bank v Lanka Queen Int'l Private Ltd** [supra] that unconditional leave cannot be granted, for the following reasons:

> *" … when the literal rule of interpretation is applied to the phrases 'on such terms as to security' '**or** otherwise as the court thinks fit', it is clear that the legislature has intentionally used two different phrases to enable the court to make two different types of orders. The use of the conjunction 'or' empowers the court to make either of the orders as is necessary to safeguard the interests of the plaintiff."*
>
> *"… the phrase 'or otherwise as the court thinks fit' should be interpreted to enable the court to make an appropriate order as it thinks fit, including an order granting leave to appear and show cause against the decree nisi without the defendant furnishing any security."* [pages 16-17]

The position, in my view, can be summarised as follows:

(1) The use of the words, "*on such terms*" applies to "*security, framing and recording of issues, or otherwise as the court thinks fit*" and therefore terms or *conditions* must be imposed when granting leave;

(2) The words, "*otherwise as the court thinks fit*" cannot be read to mean that the District Court is empowered to grant leave with no terms or conditions whatsoever;

(3) Leave to appear therefore cannot be granted without terms or conditions;

(4) The District Court does indeed have a wide discretion with regard to the terms on which leave can be granted, as demonstrated by the use of the words "*otherwise as the court thinks fit*", with the only limitation on such discretion being the requirement of the imposition of '*a'* term;

(5) It is not mandatory to impose *security*, as evinced by the use of the conjunction "or";

(6) In imposing terms, the District Court must be mindful of the objectives of the Act, and its discretion must be exercised judicially.

Facts of the case – revisited

Having referred to the applicable provisions of the Act, I shall now consider the course of action adopted by the Defendants. On 26th April 2018, the Defendants filed an application in terms of Section 6(2), duly supported by the affidavit of the Defendants, seeking *inter alia* the following relief:

(අ) පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කරන නියෝගයක් ලබා දෙන ලෙසත්,

(ආ) විත්තිකරුවන්ට විරුද්ධව ඇතුලත් කර ඇති නෛසයි තින්දු, ප්‍රකාශය, නියත තින්දු, ප්‍රකාශයක් බවට පත් නොකර විසුරුවා හැරීමේ නියෝගයක් ලබා දෙන ලෙසත්,

(ඇ) විත්තිකරුවන්ට විරුද්ධව ඇතුලත් කර ඇති නෛසයි තින්දු, ප්‍රකාශය, නියත තින්දු, ප්‍රකාශයක් බවට පත්කිරීමට කර ඇති ඉල්ලීම ප්‍රතික්ෂේප කිරීමේ නියෝගයක් ලබා දෙන ලෙසත්,

(ඈ) ඉහත (අ), (ආ) සහ (ඇ) ජේද යටතේ නියෝග ගරු අධිකරණය ලබා නොදෙන්නේ නම් විත්තිකරුවන්ට මෙම නඩුවට **කොන්දේසි විරහිතව පෙනී සිටීම සහ හේතු දැක්වීමට අවසර ලබා දෙන නියෝගයක්** ලබා දෙන ලෙසත්, [emphasis added]

(ඉ) ඉන් පසු විත්තිකරුවන්ගේ උත්තරය ඉදිරිපත් කිරීමට අවසර ලබා දෙන නියෝගයක් ලබා දෙන ලෙසත්,

I have already concluded that the Act does not contemplate the granting of leave without terms or conditions and to that extent, the application of the Defendants did not come within either of the three paragraphs of Section 6(2). Although specific reference has not been made to Section 6(2)(c), given the matters raised in the affidavit and the aforementioned prayer, it is clear that the Defendants were seeking leave to appear and show cause under and in terms of paragraph (c).

The following objections had been raised by the Defendants in their application:

(a) The documents annexed to the plaint are not originals nor have they been translated to Sinhala;

(b) The rate of penal interest stipulated in the Agreement is contrary to Central Bank guidelines relating to the imposition of penal interest;

(c) The Defendants have only obtained an overdraft facility and that an overdraft facility does not fall within the definition of a 'debt';

(d) A facility secured by a mortgage bond is outside the definition of 'debt' and cannot be the subject matter of an action under the Act; and

(e) The Defendants have repaid a sum of Rs. 55,998,005, which fact has been suppressed by the Plaintiff, and that the said sum of money has not been set off against the monies that the Defendants have overdrawn from their account.

With regard to each of the above, I must state as follows:

(a) I have already considered the relevant provisions of the Act and arrived at the conclusion that it would suffice for copies of the instrument, agreement or document to be tendered with the plaint and for the originals to be produced if ordered by Court in terms of Section 8;

(b) Section 23 of the Act provides that the parties may agree on the rate of interest and it is only when agreement has not been reached that market rates would apply. In terms of Section 22 however, "*No sum of money which constitutes a penalty for default in payment, or delay in payment, of a debt shall be recoverable in an action instituted for the recovery of such debt, in terms of the procedure laid by this Act.*"

In **Car Mart Ltd and Another v Pan Asia Bank Ltd** [(2004) 3 Sri LR 56], an argument was raised that the total sum sought to be recovered in the action includes the amounts charged as penal interest and that in view of Section 22, the Bank cannot recover penal interest in an action filed under the Act, thereby rendering the whole plaint bad in law and accordingly preventing the Court from entering a legally valid decree *nisi*. The Court, referring to the proviso to Section 6(3) which reads thus, "*Provided that a decree nisi, if it consists of separate parts may be discharged in part and made absolute in part …*", held as follows at page 59:

> "*This provision is similar to section 388(2) proviso of the Civil Procedure Code. The proviso to section 6(3) empowers the court to vary the decree nisi at the end of*

the action. If the defendant at the end of the case satisfies court that a sum of money is not legally due from him or a sum not legally recoverable from him (such as the sum referred to in section 22) the court has power to make adjustments to the decree nisi before making it absolute. If the court has no such power it would lead to an injustice.";

(c) I have already arrived at the conclusion that an overdraft facility falls within the definition of a 'debt' under the Act, as long as such facility is reflected in a written promise or agreement between the parties, and the other requirements are satisfied. Perhaps, I should reiterate that what is relevant is not the nomenclature attached to the written promise or agreement but that the amount claimed must be capable of being ascertained from such written promise or agreement at the time of the institution of the action;

(d) The definition given to 'debt' permits a facility secured by a mortgage bond to be recovered by way of an action instituted in terms of the Act.

It is a matter of regret that these objections continue to be raised, in spite of the Act being clear and in the backdrop of many judicial pronouncements addressing the same, and especially in proceedings instituted under an Act that has been introduced to expedite the recovery of debts. The objections raised by the Defendants are not only frivolous but once raised, required the learned District Judge to give his mind to such objections at the cost of his valuable judicial time. The situation is made worse when an appeal is made to the High Court and thereafter to this Court, wasting the valuable time that both Courts could otherwise allocate to other more deserving cases that require their attention.

What aggravates the situation in this appeal even further is that:

(a) The Defendants, having admitted that they obtained the credit facility, and in spite of a further admission in writing that the outstanding debit balance was Rs. 76 million as at 31st March 2015, raised as their primary defence that a sum of Rs. 56 million paid by them has not been credited to their current account. The Defendants however did not produce the relevant deposit slips to establish that such a sum has

in fact been deposited by them and that such sums have not been credited to their account. The failure to provide proof by way of the deposit slips was critical to this claim of the Defendants. The explanation for this failure is simple. Any person with a basic knowledge of banking is well aware that the elementary nature of an overdraft facility granted on a long term basis is such that the bank allows the customer to withdraw as well as deposit monies simultaneously and on a continuing basis, as long as the overdraft limit is not exceeded. Thus, even if one accepts the claim of the Defendants that they deposited Rs. 56 million, they have failed to establish that such monies have not been credited;

(b) Although the Mortgage Bond had been tendered with the plaint and even though the forced sale value of the property was fixed at Rs. 75 million in terms of a valuation report obtained in January 2012, the Defendants did not claim that the said property was sufficient to secure the repayment of the amount in default nor did they move that they be granted leave to appear and defend in terms of Section 6(2)(b). In other words, the question of law that is now before this Court has not been raised by the Defendants before the District Court. That was a very costly mistake on the part of the Defendants, which has resulted in two appeals spanning over four years.

Order of the District Court

The learned District Judge has considered each and every objection raised by the Defendants and has rejected them for the reasons contained therein, which reasons are not being challenged in this appeal. With the several objections of the Defendants having been rejected, the learned District Judge has quite rightly held that the Defendants have not made out a *prima facie* sustainable defence, which position too is no longer in issue.

What follows immediately after the said finding are the final two paragraphs of the Order, which read as follows:

"ඒ අනුව පනතේ 6(2)(බී) වගන්තිය අනුව නෛසයි තීන්දු, ප්‍රකාශය නියත තීන්දු, ප්‍රකාශයක් පත් කරනු ලැබුවහොත් එකි නෛසයි තීන්දු, ප්‍රකාශයේ සඳහන් මුදල් ප්‍රමාණය පියවීම සඳහා යුක්ති සහගත බවට සහ ප්‍රමාණවත් ලෙස පෙනී යන ඇපයක් විත්තිකරු විසින් සපයනු ලැබිය යුතු බව පෙනී යයි.

ඒ අනුව නෛසයි තින්දු, ප්‍රකාශයේ සඳහන් මුදල් හෝ එකි මුදලට සරිලන ලෙස ප්‍රමාණවත් ඇපයක් විත්තිකරුවන් විසින් ඉදිරිපත් කිරීමෙන් පසුව පමණක් නඩුවට පෙනී සිට නෛසයි තින්දු, ප්‍රකාශයට එරෙහිව හේතු දැකිවීම සඳහා 1 සහ 2 වන විත්තිකරුවන්ට අවසර දෙමි."

It is true that the learned District Judge has not considered whether the mortgage already in place was an adequate security to cover the decree *nisi* in terms of Section 6(2)(b) but the blame for that cannot be attributed to the learned District Judge but solely to the Defendants for not raising it. Although Section 6(2)(b) places the onus on the Court to be satisfied that the security is sufficient, the Court could not have done so in the absence of the Defendants placing that material before Court, especially with regard to the current value of the said property?

However, given the manner in which the Order had been crafted, it was open to the Defendants to move Court to accept as security the property mortgaged by them which had a forced sale value of Rs. 75 million. Instead of doing so, the Defendants opted to file a petition of appeal in the High Court seeking leave to appeal against the said Order of the District Court.

Appeal to the High Court and its judgment

Having heard both parties, the High Court had granted leave to appeal as well as a stay of the said Order.

In addition to the objections raised before the District Court, the Defendants raised the following two matters in its petition of appeal:

(a) The learned District Judge has failed to consider that he should act under Section 6(2)(a) or (b); [1994 අංක 09 දරන ණය ආපසු අයකර ගැනීමේ (විශේෂ විධිවිධාන) (සංශෝධන) පනතේ 06 (2) වගන්තිය අනුව විත්තිකාර-පෙත්සම්කරුවන් විසින් හේතු දැක්වීම සඳහා අවසර පතන ඉල්ලීමක් ඉදිරිපත් කල විට එකි වගන්තියේ (අ) සහ (ආ) උපවගන්ති අනුව ගරු අධිකරණය ක්‍රියා කළයුතු බවට වන කරුණ ගරු උගත් අතිරේක දිසා විනිසුරුවරයා සලකා බලා නොමැති බව].

(b) The learned District Judge failed to consider that the Defendants have already mortgaged a property valued at Rs. 75m when he directed the Defendants to place a security adequate to secure the sum in the decree *nisi*.

While the matter in (b) was never urged before the District Court, as far as the matter in (a) is concerned, the learned District Judge has acted under Section 6(2)(b) although not at the instance of, and therefore with no assistance from the Defendants. This complaint is therefore completely unwarranted. Even though the matter in (b) had been reiterated in the written submissions filed by the Defendants before the High Court, it has been done half-heartedly, with the focus being very much on seeking to set aside the Order on the basis that the learned District Judge failed to appreciate that the Defendants had made out a *prima facie* sustainable defence warranting leave to appear being granted under Section 6(2)(c).

Although in its judgment delivered on 15th July 2020, the High Court had considered the principal objections and overruled them for the reasons set out therein, the High Court has not considered whether the mortgaged property was an adequate security for the purposes of Section 6(2)(b). Aggrieved by the above judgment, the Defendants filed their petition of appeal before this Court on 18th August 2020, seeking to set aside the said judgment of the High Court and the Order of the District Court.

Question of law

It is in the above factual and legal circumstances that I must consider the aforementioned question of law, which for convenience is reproduced below:

> "Did the Civil Appellate High Court err in law by affirming the District Court order dated 21st February 2019 by holding that the Defendants are required to deposit security under Section 6(2)(a) or 6(2)(b) of the Debt Recovery Act as amended notwithstanding the fact that the Defendants have furnished a mortgage of a land in order to obtain the monies that are referred to in the plaint filed by the Plaintiff in the District Court?"

I have already stated that once the District Court forms the view that the defendant has not made out a *prima facie* sustainable defence and is therefore not entitled to leave under Section 6(2)(c), the District Court shall act under Section 6(2)(a) or (b), even though the defendant may not have sought leave under paragraphs (a) or (b). Although in this

case, the learned District Judge has allowed the Defendants to deposit a sum of money equivalent to the sum specified in the decree *nisi* or to furnish a security which is reasonable and sufficient to satisfy the sum mentioned in the decree *nisi*, the reality is that the learned District Judge has not considered whether that requirement could be satisfied by accepting as security for the purposes of Section 6(2)(b) the same property mortgaged to the Plaintiff at the time the credit facility was obtained. This becomes even more significant in view of the Plaintiff's failure to explain in the plaint why it chose not to proceed by way of *parate* execution, although such a course of action was available to it.

The question that I must answer is did the learned District Judge err in law when he failed to do so? In searching for the answer to that question, I shall bear in mind the rationale for the introduction of the Act and its provisions and the fact that the Act was meant to expedite the recovery of debts owed by customers to a lending institution. On the face of it, the provisions of the Act are lender friendly and accords with its objective. However, that does not mean that it is a piece of legislation that is heavily weighted in favour of the lender, for there are provisions that amply safeguard the rights of the debtor, as well. In the application of the Act, it is the duty of the Court to strike the correct balance between the conflicting interests of the parties. I shall examine in that light the rationale for the requirement to deposit security in order to proceed with the challenge to the decree *nisi*.

The rationale is simple. If the defendant makes out a *prima facie* sustainable defence, the discretion with regard to the terms on which leave should be granted is with the learned District Judge. However, where the defendant fails to make out a *prima facie* sustainable defence, the Act mandates that security be deposited, whether it be money or otherwise, and that it be sufficient to satisfy the sum of money specified in the decree *nisi*. The intention of the Legislature in requiring a security is therefore to ensure that if the defendant fails in his or her bid to prevent the decree *nisi* being made absolute, the plaintiff must be able to immediately access the security, with Section 13 of the Act providing that a decree absolute shall be deemed to be a writ of execution issued to the fiscal in terms of Section 223(3) of the Civil Procedure Code.

I am however mindful that where the Defendants have pledged an immovable property as security for the underlying credit facility, which is readily realisable by resorting to

parate execution in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, but the Plaintiff has chosen instead to invoke the provisions of the Act, and especially in the absence of an explanation by the Plaintiff as to why it cannot pursue the security already available, it is inherently unfair and unreasonable to direct the Defendants to furnish further security which to the Court may appear reasonable and sufficient to satisfy the sum mentioned in the decree *nisi*. To hold otherwise would mean that the Plaintiff would have access to two securities, very much in excess of the sums of money due to it, leaving the Defendants at the mercy of the Plaintiff in the event of the decree *nisi* being made absolute. This certainly could not have been the intention of the Legislature.

The learned Counsel for the Plaintiff presented two arguments as to why the property already mortgaged could not have been considered as security for the purposes of Section 6(2)(b).

The first was that Section 6(2) provides that the Court shall grant leave to appear and show cause against the decree *nisi* upon the defendant **furnishing** such security, and that the use of the word 'furnishing' contemplates a new security as opposed to a security which has already been given. I am not in favour of taking such a restrictive view for the reason that the discretion with regard to the adequacy of the security must always remain with the Court. In exercising such discretion, the Court shall bear in mind the wording in paragraph (b) – i.e., "*security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute;*". This discretion must not be interfered with, especially in a case such as this, where there already is a security.

The second argument of the learned Counsel for the Plaintiff was based on Sections 16 and 17(3) of the Act, which specifically mandates the Court to direct the tendering of cash or a guarantee from a bank for the satisfaction of the entire claim. It must be noted that Section 16 applies when further proceedings in the District Court are stayed by the Court of Appeal upon an application for leave to appeal from an order made in the course of any action and that Section 17(3) applies where leave to appeal to this Court is granted against a decree absolute. It was the position of the learned Counsel that similar words in the

statute should be interpreted similarly and for that reason, the security that is contemplated by Section 6(2)(b) must also be cash or a bank guarantee.

I cannot agree with this argument for two reasons. The first is that while Section 6(2)(b) confers upon the Judge the discretion to decide on the type of security, with the requirement being that such security be reasonable and sufficient for satisfying the sum mentioned in the decree *nisi*, neither Section 16 nor Section 17(3) gives any such discretion to the Court. Instead, both Sections specifically set out the type of security to be deposited thereunder. The second is that the stage at which security is ordered under Sections 16 and 17 is much later than when an application is made under Section 6(2)(b), and by which time there is already a finding with regard to the liability of the borrower.

I am therefore not in agreement with the said two arguments of the learned Counsel for the Plaintiff.

Conclusion

In the above circumstances, I am of the following view:

(a) Where a defendant has already pledged an immovable property as security for the same loan that is sought to be recovered through the action filed under the Act and the defendant moves that leave to appear and show cause be granted by accepting the said property as security, the learned District Judge must consider if such security is adequate for the purposes of Section 6(2)(b) and whether it is reasonable and sufficient for satisfying the sum mentioned in the decree *nisi*;

(b) However, this is subject to one crucial condition, that being that the onus of satisfying the learned District Judge that the security already in place is reasonable and sufficient to satisfy the sum mentioned in the decree *nisi* shall always be with the defendant;

(c) In this appeal, the Defendants completely failed in that regard in spite of the Plaintiff having pleaded the mortgage bond in its plaint. The Defendants also had the duty of demonstrating to the District Court and the High Court that the value of the property

is sufficient to cover the amount of the decree *nisi* or at least a part thereof. This is critical, as how else would the learned Judges know the value of the security already offered? Had that material been placed before the District Court or even the High Court, it would have enabled the Court to decide whether the said security is reasonable and sufficient for satisfying the sum mentioned in the decree *nisi*;

(d) Although the Defendants did raise the issue currently before us in the High Court, it was a half-hearted attempt, and was subject to the same infirmities that I have referred to in the previous paragraph. Hence, it cannot be said that the High Court erred in law when it failed to consider the adequacy of the security already mortgaged to the Plaintiff for the purposes of Section 6(2)(b).

I would therefore answer the question of law raised in this appeal in the negative. The Order of the District Court delivered on 21st February 2019 and the judgment of the High Court dated 15th July 2020 are affirmed. This appeal is accordingly dismissed, with costs fixed at Rs. 100,000.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT