IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Seylan Bank PLC,
(formerly Seylan Bank Limited)
No. 90, Galle Road,
Colombo 03.
Having branch at No. 315-317,
Old Moor Street,
Colombo 12.

Plaintiff

SC Appeal No. 237/2014
SC/HCCA/LA: 447/14
HCCA/A/No.12/14
Case No. DDR/69/13

Vs.

Mohamed Rasheed Mohamed Farook,
No. 185, Old Moor Street,
Colombo 12.

Defendant

AND NOW

In the matter of an application under sections 754(2) and 757 of the Civil Procedure Code read together with section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

Seylan Bank PLC,
(formerly Seylan Bank Limited)
No. 90, Galle Road,
Colombo 03.
Having branch at No. 315-317,
Old Moor Street,
Colombo 12.

Plaintiff-Appellant

Vs.

Mohamed Rasheed Mohamed Farook,
No. 185, Old Moor Street,
Colombo 12.

Defendant-Respondent

AND NOW

In the matter of an appeal under section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

Seylan Bank PLC,
(formerly Seylan Bank Limited)
No. 90, Galle Road,
Colombo 03.
Having branch at No. 315-317,
Old Moor Street,
Colombo 12.

Plaintiff-Appellant-Appellant

Vs.

Mohamed Rasheed Mohamed Farook,
No. 185, Old Moor Street,
Colombo 12.

Defendant-Respondent-Respondent

Before	:	Priyantha Jayawardena PC, J Vijith K. Malalgoda PC, J Yasantha Kodagoda PC, J
Counsel	:	Palitha Kumarasinghe PC, with Nuwan Rupasinghe for the plaintiff-appellant-appellant Murshid Maharoof with Shaib Ahamed for the defendant-respondent-respondent
Argued on	:	14th of September, 2020
Decided on	:	29th of November, 2021

Priyantha Jayawardena PC, J

This is an appeal from a judgment of the High Court of the Western Province holden in Colombo exercising civil jurisdiction (hereinafter referred to as "the Civil Appellate High Court"), which dismissed an interlocutory appeal preferred against an order of the District Court of Colombo, granting leave to appear and show cause against the decree *nisi* under section 6 of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

Facts of the case

The plaintiff-appellant-appellant (hereinafter referred to as "the plaintiff bank") had instituted action in the District Court of Colombo against the defendant-respondent-respondent (hereinafter referred to as "the defendant") under the said Act, and pleaded that the defendant had requested for an overdraft facility of up to Rs. 13 million on his current account. Further, he had furnished a letter of guarantee dated 19th May, 2005, issued by Ceylinco Profit Sharing Investment Corporation Limited (hereinafter referred to as "the guarantor company"), which is a sister company of the plaintiff bank, as security for the said facility. In the said letter of guarantee, the guarantor company stated that the defendant had deposited a sum of Rs. 13 million with the guarantor company, and the said letter of guarantee was issued against the said deposit.

Thereafter, the plaintiff bank had entered into an agreement with the defendant on the 20th of May, 2005, to grant an overdraft facility of up to Rs. 13 million at an interest rate of 15% per annum.

It was further pleaded that the defendant had subsequently requested to enhance the said overdraft limit. Accordingly, the plaintiff bank had agreed to enhance the limit of the said facility and entered into another agreement with the defendant on the 9th of June, 2005, subject to the condition that any sum drawn in excess of Rs. 13 million would be charged at an interest rate of 30% per annum.

It is pertinent to note that the enhanced amount of the said overdraft facility is over and above the guarantee furnished by the defendant, and he did not furnish any additional security to obtain the enhanced facility.

Thereafter, the defendant had utilized the said facility from time to time and, as at the 30th of July, 2010, he had overdrawn his current account up to a sum of Rs. 18,527,978/66.

Hence, the plaintiff bank had sent letters of demand to the defendant and the guarantor company demanding payment of the said overdrawn sum together with interest. However, neither the defendant, nor the guarantor company, had settled the overdrawn sum and interest, or any part thereof. Further, the guarantor company had subsequently become defunct.

After the application for a decree *nisi* was supported by the plaintiff bank, the learned Additional District Judge had entered a decree *nisi* against the defendant for a sum of Rs. 18,527,978/66 as prayed for in the said plaint, and the same was served on the defendant.

On the date of decree *nisi* returnable, the defendant had filed an application supported by an affidavit under section 6(2) of the said Act seeking, *inter alia*, leave to 'file answer' unconditionally.

In the said application, the defendant pleaded that he had invested a sum of Rs. 13 million with the guarantor company, which was a sister company of the plaintiff bank. Accordingly, he had tried to withdraw the said investment. However, the guarantor company had informed him that it was unable to release the said money as it was facing a financial difficulty at the time. As an alternative, the guarantor company had agreed to arrange for the defendant to obtain a loan from a company within the group. As the defendant already had banking facilities with the plaintiff bank, the guarantor company had agreed to issue a guarantee in order for the defendant to obtain the said overdraft facility of up to Rs. 13 million from the plaintiff bank.

It was further stated that the guarantor company had agreed to pay the monthly interest from the said deposit directly to the plaintiff bank, and therefore he would be absolved of any liability towards the plaintiff bank in respect of the said overdraft facility.

Thereafter, an inquiry had been held under section 6(2) of the said Act, and the learned Additional District Judge held, *inter alia,* that the **defendant had failed to disclose a defence which is *prima facie* sustainable. However, the defendant was granted leave to 'file answer' upon him paying into court a sum of Rs. 800,000/- or furnishing security sufficient to satisfy the said sum.**

Being aggrieved by the said order of the learned Additional District Judge, the plaintiff bank had filed an interlocutory appeal to the Civil Appellate High Court.

Having heard submissions of both parties, the Civil Appellate High Court had dismissed the appeal of the plaintiff bank, on the basis that the failure by the plaintiff bank to recover the debt due to it from the money held on lien by the guarantor company, which was a sister company of the plaintiff bank, and suing the defendant without making the guarantor company a party to the action, was a pure abuse of the provisions of the said Act.

Further, being aggrieved by the said judgment of the Civil Appellate High Court, the plaintiff bank had filed an application for leave to appeal in this court, and leave to appeal was granted on the following questions of law;

"a) Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in holding that the learned trial judge could have granted leave to appear and show cause <u>without security</u> against decree nisi entered in an action under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

b) Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that if the Respondent has failed to establish "<u>a prima facie sustainable defence</u>", the Court has no jurisdiction to grant the Respondent leave to appear and show cause in terms of sections 6(2)(c) and 6(3) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

c) Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that the District Court

*has no jurisdiction to permit the Respondent to file "**Answer**" in view of provisions of section 7 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?*

d) *Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in reversing findings on factual matters made by the Learned Additional District Judge, in absence of any legal challenge to such findings by the Respondent, by way of Appeal or Revision?*

e) *Does the circumstances of this case warrant the Plaintiff to file action under the Debt Recovery Law?"*

Submissions of the plaintiff bank

At the hearing of the instant appeal, learned President's Counsel for the plaintiff bank submitted that in terms of the judgments delivered in *People's Bank v Lanka Queen Int'l Private Limited* (1999) 1 SLR 233 and *Kiran Atapattu v Pan Asia Bank Limited* (2005) 3 SLR 276, the court has no jurisdiction to grant 'unconditional leave' to appear and show cause against the decree *nisi* in terms of section 6(2)(c) of the said Act.

Further, learned President's Counsel submitted that in view of the finding of the learned Additional District Judge that the defendant had failed to disclose a *prima facie* sustainable defense, the court has no jurisdiction under section 6(2)(c) of the said Act to grant the defendant leave to appear and show cause against the decree *nisi* upon furnishing security which is not sufficient to satisfy the sum mentioned in the decree *nisi* entered by court.

In support of the above contention, he cited *National Development Bank v Chrys Tea (Pvt) Ltd and Another* (2000) 2 SLR 206 at 209 which held;

> *"It is to be observed that 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.*
>
> *...*
>
> *If the Court had acted under section 6(2)(c) then prior to ordering security which is not sufficient to satisfy the sum mentioned in the decree nisi the Court must first come to the conclusion that the Court is satisfied on the contents of the affidavit filed by the respondents that they disclose a defence which is prima facie sustainable."*

[Emphasis added]

Moreover, learned President's Counsel submitted that the District Court cannot grant leave to 'file answer' as the said Act applies the summary procedure for trials and therefore, there is no provision to file answer.

Furthermore, it was submitted that after the said order was delivered by the learned Additional District Judge, the defendant had filed an answer setting up a claim in reconvention, which is contrary to the provisions of the said Act.

It was further submitted that the defendant did not file an application for leave to appeal challenging the finding of the learned Additional District Judge with regards to the lack of a *prima facie* sustainable defence. However, the Civil Appellate High Court had held, *inter alia*, that *'this was a case where the trial judge could have granted leave to appear and defend the action without security'.*

Submissions of the defendant

Learned counsel for the defendant submitted that though the Civil Appellate High Court held that *'this was a case where the trial judge could have granted leave to appear and defend the action without security'*, it neither reversed the said finding of fact by the learned Additional District Judge, nor varied the conditions upon which leave to appear and show cause against the decree *nisi* was granted.

Furthermore, learned counsel submitted that the plaintiff bank had suppressed documents and misrepresented the true nature of the transaction in order to obtain the decree *nisi.* However, it is pertinent to note that there is no finding to that effect either by the District Court, or the Civil Appellate High Court, and therefore the matter cannot be considered at this stage of the appeal.

It was further submitted that section 6(2) of the said Act does not require a defendant to specifically use the words 'leave to appear and show cause' when making an application to court. Therefore, when the defendant prayed for 'leave to file answer' in the prayer of the application filed under section 6(2) of the said Act, he intended to obtain 'leave to appear and show cause'.

Moreover, it was submitted that the defendant had filed an answer setting up a claim in reconvention, after the order was made by the learned Additional District Judge and the plaintiff bank had filed an application for leave to appeal in the Civil Appellate High Court. Therefore, such a matter does not require consideration in the instant appeal.

Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in holding that the learned trial judge could have granted leave to appear and show cause without security against decree *nisi* entered in an action under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

In order to consider the above question of law, it is necessary to examine section 6 of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

Requirement to obtain leave from the court

Section 6(1) of the said Act states;

> "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."
>
> [Emphasis added]

Accordingly, a defendant is not entitled to appear and defend the suit as of right. The above section has made it mandatory for a defendant to obtain leave from court to appear and show cause against the decree *nisi* entered by court.

Procedure to obtain leave from court

The procedure for a defendant to obtain leave from court to appear and show cause against the decree *nisi* is set out in section 6(2) of the said Act.

Section 6(2) of the said Act, as amended, states;

> "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]

Accordingly, the phrase *"upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit"* in the above section requires a defendant to file an application for leave to appear and show cause, supported by an affidavit, on the date of decree *nisi* returnable, in order to obtain leave from court to appear and show cause against the decree *nisi* served on him.

Requirement to make an application in writing

The words *"upon the filing by the defendant of an application"* requires the defendant to make an application for leave to appear and show cause in writing, and file it in court, along with a supporting affidavit and other relevant documents (if any). A defendant, or lawyer appearing on his behalf, is not entitled to make an oral application for leave to appear and show cause.

The above view was discussed in *People's Bank v. Lanka Queen Int'l Private Limited* (1999) 1 SLR 233 at 239, where the Court of Appeal held;

"[…] Therefore, 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."

[Emphasis added]

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. The court will only consider the plaint filed by the plaintiff, the application

filed by the defendant, supporting affidavits and the documents produced by both parties (if any) when making an order under section 6 of the said Act.

However, it is pertinent to note that if the case proceeds to trial, the parties are permitted to adduce fresh oral and/or documentary evidence, subject to the procedure laid down in section 7 read with section 19 of the said Act.

Requirement to file an affidavit

Prior to the amendment of section 6(2) of the principal Act, there was an ambiguity as to whether an affidavit was required in support of all applications made under the said section, or only an application seeking leave to appear and show cause against the decree *nisi* under section 6(2)(c) of the principal Act.

Section 6(2) of the principal Act stated;

> "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 plaintiff's claim and state clearly and concisely what the defence is and what facts are relied on as supporting it."
>
> [Emphasis added]

However, the Debt Recovery (Special Provisions) (Amendment) Act, No. 9 of 1994, amended section 6(2) of the principal Act to, *inter alia*, clear the said ambiguity and make it mandatory for the defendant to file an affidavit in support of every application made under the said section.

The effect of the amendment of section 6(2) of the principal Act was discussed in *People's Bank v Lanka Queen Int'l Private Limited* (supra at 237) where the Court of Appeal held;

"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."

[Emphasis added]

Contents of an application and the affidavit under section 6(2) of the said Act

Section 6(2) of the said Act states;

*"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, […]."*

[Emphasis added]

The phrase *"application for leave to appear and show cause supported by affidavit"* requires the facts averred by the defendant in his application, to be supported by an affidavit. Particularly, since the summary procedure is applicable to the said Act, and affidavits are admissible to prove or disprove the facts averred by the parties.

Further, the word 'shall' in the phrase *"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"* has made it mandatory for the application and affidavit of the defendant to comply with the requirements set out in the said phrase.

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.

Duty of the court under section 6(2) of the said Act

The phrase *"after giving the defendant an opportunity of being heard"* in section 6(2) of the said Act requires the court to give the defendant an opportunity of being heard, if he has made an application in terms of the said section. Principles of natural justice require all parties to be heard on the matter before a decision is made. Therefore, the plaintiff cannot be prevented from participating in such an inquiry. Particularly, since the decree *nisi* was entered at the instance of the plaintiff.

Moreover, the word 'shall' has been used twice in section 6(2) of the said Act. Where a word is used more than once in an Act, principles of interpretation require such a word to be given the same meaning wherever it appears, unless there are compelling reasons to give different interpretations to the same word depending on the context in which it has been used in the Act.

Earlier in this judgment, it was stated that the word 'shall' used in the phrase *"application for leave to appear and show cause supported by affidavit which <u>shall</u> deal specifically with the plaintiff claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it"* in section 6(2) of the said Act, should be given a mandatory meaning.

Therefore, the word 'shall' used in the phrase *"The court <u>shall</u> […] grant leave to appear and show cause against the decree nisi"* in section 6(2) of the said Act, should also be given a mandatory meaning, as there are no compelling reasons to give two different interpretations to the same word used in the said Act. Accordingly, if the defendant makes an application **in terms of the said section**, it is mandatory for the court to grant leave to appear and show cause against the decree *nisi* subject to the terms set out therein.

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. Hence, it is not possible to make an order combining the terms stated in two or more of the said sub-sections.

A similar view was expressed in *Ramanayake v. Sampath Bank Ltd and Others* [1993] 1 SLR 145 at 152 where the Court of Appeal held;

> *"The court has to decide which of the alternatives under section 6(2)- whether (a), (b) or (c)- is to be followed when granting leave. The court has to exercise its discretion judicially in the matter. The court must briefly examine the facts of the case before it, set out the substance of the defence, and disclose reasons in support of the order."*
>
> [Emphasis added]

Further, the said order should stipulate a time within which the defendant must fulfill the conditions imposed (if any) prior to appearing and showing cause against the decree *nisi* entered by court.

Moreover, the court is required to give reasons for the order made under section 6(2) of the said Act. However, since such an order is made before leading evidence in the case, it is not necessary to give lengthy and comprehensive reasons which might result in allegations that the trial judge has prejudged the case.

Scope of section 6(2)(c) of the said Act

Section 6(2)(c) of the said Act states;

> "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]

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 phrases *"on such terms as to security" "framing and recording of issues" "or otherwise as the court thinks fit"* set out the terms upon which the court can make an order granting leave to appear and show cause against the decree *nisi* under section 6(2)(c) of the Act.

When interpreting provisions of an Act, it is necessary to give a meaning to every word or phrase used in the Act, as far as possible. The legislature is presumed not to waste its words and therefore, the court must avoid interpreting legislation in a manner which would render a word or phrase of the Act devoid of any meaning or application.

The above view was expressed in *N. S. Bindra's Interpretation of Statutes*, 9th edition, at 196 and 197, which states;

> *"As far as possible, full meaning must be given to every word of a statute. No word should be regarded as superfluous unless it is not possible to give a proper interpretation to the enactment, or the meaning given is absurd or inequitable. A court should not be prompt to ascribe and indeed should not, without necessity or some sound reason, impute to the language of a statute, tautology or superfluity. In other words, although surplusage or even tautology is not an uncommon feature in legislative enactments, the ordinary rule is that a statute is never supposed to use words without a meaning. It is a well-settled principle of construction that words in a statute are designedly used, and an interpretation must be avoided, which would render the provision either nugatory or part thereof otiose. No part of a provision of*

a statute can be just ignored by saying that the legislature enacted the same not knowing what it was saying. We must assume that the legislature deliberately used that expression and it intended to convey some meaning thereby. It is not to be assumed that the legislature has used words meaning nothing."

[Emphasis added]

Accordingly, the phrases *"on such terms as to security," "framing and recording of issues" "or otherwise as the court thinks fit"* in section 6(2)(c) of the said Act, should be interpreted to give distinct meanings.

The phrase *"on such terms as to security"* should be interpreted to confer power on the court to exercise its discretion and decide the quantum of security, in an amount less than the sum mentioned in the decree *nisi*, to be furnished by the defendant as a condition precedent to appearing and showing cause against the decree *nisi* entered by court.

The above view was expressed in *National Development Bank v. Chrys Tea (Pvt) Ltd and Another* (2000) 2 SLR 206 at 209 where the Court of Appeal held;

"It is to be observed that 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.

...

If the Court had acted under section 6(2)(c) then prior to ordering security which is not sufficient to satisfy the sum mentioned in the decree nisi the Court must first come to the conclusion that the Court is satisfied on the contents of the affidavit filed by the respondents that they disclose a defence which is prima facie sustainable."

[Emphasis added]

However, in a case 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) of the said Act, 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.*

Further, 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.

Moreover, 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.

Accordingly, I am of the view that 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.

In *Ramanayake v. Sampath Bank Ltd and Others* (supra at 152) the Court of Appeal considered section 6(2)(c) of the principal Act and expressed a similar view;

> *"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."*
>
> [Emphasis added]

However, in *People's Bank v. Lanka Queen Int'l Private Limited* (supra at 237 and 238) the Court of Appeal held;

> *"This section does not permit unconditional leave to defend the case as the defendant-respondent has requested from the District Court. The minimum requirement according to subsection (c) is for the furnishing of security.*
>
> *…*
>
> *[…] Thus, it is imperative that before the court acts on section 6(2)(c) it has to be satisfied;*
>
> *i. with the contents of the affidavit filed by the defendant;*
> *ii. that the contents disclose a defence which is prima facie sustainable; AND*

iii. determine the amount of security to be furnished by the defendant, ***AND*** *permit framing and recording of issues or otherwise as the court thinks fit."*

[Emphasis added]

Further, in *Mahavidanage Simpson Kularatne v. People's Bank* (SC Appeal No. 04/2015) SC Minutes dated 15th September, 2020, the majority of the Supreme Court held;

> *"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."*
>
> [Emphasis added]

In the case of *People's Bank v. Lanka Queen Int'l Private Limited* (supra at 238) the court held "*determine the amount of security to be furnished by the defendant,* ***AND*** *permit framing and recording of issues or otherwise as the court thinks fit."* As such, the District Court is required to order security that the defendant should furnish, and in addition, frame and record issues or otherwise as the court thinks fit.

However, the word 'and' does not appear between the phrases *"on such terms as to security"* and *"framing and recording of issues or otherwise as the court thinks fit"* in section 6(2)(c) of the said Act. Therefore, I am unable to agree with the judgment in *People's Bank v. Lanka Queen Int'l Private Limited* (supra), as a court should not read additional words into an Act, in the absence of clear necessity.

The above view was expressed in *Maxwell on The Interpretation of Statutes*, 12th edition, at 33 which states;

> *"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersey said:*

> *"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.""*
>
> [Emphasis added]

Further, I am unable to agree with the majority judgment of *Mahavidanage Simpson Kularatne v People's Bank* (supra) as a distinct meaning from the phrase *"on such terms as to security"* has not been given to the phrase *"or otherwise as the court thinks fit"*. Accordingly, the phrase "*or otherwise as the court thinks fit*" in section 6(2)(c) of the said Act has become superfluous.

Due to the foregoing reasons, I am of the opinion 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.

Scope of section 6(2)(a) of the said Act

Section 6(2)(a) of the said Act states;

> "upon the defendant paying into court the sum mentioned in the decree *nisi*; or"

Accordingly, the court may order the defendant to pay into court the sum mentioned in the decree *nisi* as a condition to appear and show cause against the decree *nisi* under section 6(2)(a) of the said Act. Such an order enables the defendant to deposit the said sum and participate at the trial, whilst protecting the interests of the plaintiff.

However, as stated above, the court is required to make an order either under sections 6(2)(a) or (b) of the said Act, only if the court is not satisfied that the defendant has disclosed a *prima facie* sustainable defence in terms of section 6(2)(c) of the said Act.

Scope of section 6(2)(b) of the said Act

Section 6(2)(b) of the said Act states;

> "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"
>
> [Emphasis added]

Where the defendant is unable to pay into court the sum mentioned in the decree *nisi*, the court may consider all the facts and circumstances of the case, and alternatively grant leave to appear and show cause against the decree *nisi* upon the defendant furnishing security which appears to the court reasonable and sufficient to satisfy the sum mentioned in the decree *nisi* under section 6(2)(b) of the said Act.

The difference between sections 6(2)(a) and (b) of the said Act was discussed in *People's Bank v. Lanka Queen Int'l Private Limited* (supra at 238) where the Court of Appeal held;

> *"[…] The difference between this provision [b] and the (a) above is that instead of paying the full sum mentioned in the decree nisi, it will be sufficient for the defendant to furnish security, such as banker's draft, and then defend the action."*

Section 6(3) of the said Act

If the defendant fails to appear in court upon service of the decree *nisi*, or having appeared, his application for leave to appear and show cause is refused by court for non-compliance with the requirements set out in section 6(2) of the said Act, or because the defendant did not fulfill the conditions imposed by the court in the order made under section 6(2) of the said Act, the court shall make the decree *nisi* absolute under section 6(3) of the said Act.

Section 6(3) of the said Act states;

> "Where the defendant either fails to appear and show cause or having appeared, his application to show cause is refused, the court shall make the decree nisi absolute. For this purpose, the judge shall endorse the words "Decree nisi made absolute" (or words to the like effect) upon the decree nisi and shall date and sign such endorsement:
>
> Provided that a decree nisi, if it consists of separate parts, may be discharged in part and made absolute in part and nothing herein enacted shall prevent any order being made by consent of the plaintiff and the defendant on the footing of the decree nisi."
>
> [Emphasis added]

Judgment of the District Court

After an *inter partes* inquiry held under section 6(2) of the said Act in respect of an application made by the defendant to obtain leave to appear and show cause against the decree *nisi*, the learned Additional District Judge held, *inter alia*, that the defendant had admitted that he obtained an overdraft facility, and had not challenged the sum claimed by the plaintiff bank.

Further, it was held that although the defendant had claimed that he deposited a sum of Rs. 13 million with the guarantor company, the materials filed by him did not disclose that he had settled the money lent by the plaintiff bank. Hence, the learned Additional District Judge had come to a finding that the defendant had failed to disclose a defence which is *prima facie* sustainable.

Notwithstanding the said finding, the learned Additional District Judge had granted leave to 'file answer' upon paying into court a sum of Rs. 800,000/- or furnishing security equivalent to the said sum.

Judgment of the Civil Appellate High Court

Being aggrieved by the said order of the District Court, the plaintiff bank had preferred an interlocutory appeal to the Civil Appellate High Court on the following grounds;

"a) Whether the learned District Judge erred in law allowing the defendant to file answer?

b) Whether the learned District Judge erred in law ordering the defendant to deposit a sum of Rs. 800,000/- as security when he himself found that there was no prima facie case made out?"

It is common ground that neither party contested the finding of the learned Additional District Judge with regard to the defendant failing to disclose a defence which is *prima facie* sustainable. Accordingly, the said finding was neither a ground urged before the Civil Appellate High Court, nor the Supreme Court. Therefore, the correctness of the said finding is not considered in the instant judgment.

After hearing the appeal, the Civil Appellate High Court had dismissed the said interlocutory appeal. However, in the judgment it was stated as a passing remark, that the failure by the plaintiff bank to recover the debt due to it from the money held on lien by the guarantor company, which was a sister company of the plaintiff bank, and suing the defendant without making the guarantor company a party to the action, was a pure abuse of the provisions of the said Act.

In this regard, it is pertinent to note that in banking law, the recovery procedure is governed by the agreement the bank enters into with the principal debtor and guarantor. Hence, I am not inclined to agree with the said remarks made by the Civil Appellate High Court.

Further, the finding of the learned Additional District Judge with regard to the defendant failing to disclose a defence which is *prima facie* sustainable, was neither considered nor set aside by the Civil Appellate High Court, as it was not an issue urged by the parties before the Civil Appellate High Court. Thus, without setting aside the said finding of the learned Additional District Judge, the court cannot make an order under section 6(2)(c) of the said Act. Further, it should only make an order either under sections 6(2)(a) or (b) of the said Act.

However, the learned judges of the Civil Appellate High Court had held that the trial judge could have granted leave to appear and show cause against the decree *nisi* without security. As discussed earlier, such an order can be made under section 6(2)(c) of the said Act only if the defendant has disclosed a defence which is *prima facie* sustainable.

Thus, in view of the finding by the learned Additional District Judge that the defendant has failed to disclose a defence which is *prima facie* sustainable, the learned judges of the Civil Appellate High Court have erred in law in stating in the judgment that the trial judge could have granted leave to appear and show cause against the decree *nisi* without security under the said Debt Recovery (Special Provisions) Act, as amended.

Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that the District Court has no jurisdiction to permit the Respondent to file "Answer" in view of provisions of section 7 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

Section 7 of the Civil Procedure Code as amended states that the procedure of an action may be either "regular" or "summary". Further, section 8 of the said Code states that unless the law specially provides for the summary procedure, every action shall commence and proceed under the regular procedure.

In an action filed under the **regular procedure**, the court will issue summons on the defendant in the first instance. If the defendant appears on the day specified in the summons, either in person or by a registered attorney, and he does not admit the plaintiff's claim, he must file an answer or move for time to file answer.

The requisites of an answer are contained in section 75 of the said Code. Accordingly, if the defendant wishes, he may set up a claim in reconvention against the plaintiff in terms of section 75(e) of the said Code. If a claim in reconvention is set up in the answer, the plaintiff is allowed to file a replication to answer the claim in reconvention under section 79 of the said Code.

However, the primary purpose of summary procedure is to provide a speedy and expeditious method of disposing cases. Therefore, the summary procedure set out in the said Code does not contain a provision for the defendant to file an answer. Hence, the question of setting up a claim in reconvention against the claim of the plaintiff would not arise in an action filed under the summary procedure.

The procedure applicable to an action filed under the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended, is set out in section 7 of the said Act.

Section 7 of the said Act states;

> "If the defendant appears and leave to appear and show cause is given the provisions of sections 384, 385, 386, 387, 390 and 391 of the Civil Procedure Code (Chapter 101) shall, *mutatis mutandis*, apply to the trial of the action."

It is pertinent to note that the sections referred to above are found in Chapter XXIV of the Civil Procedure Code which deals with the summary procedure. Hence, section 7 of the said Debt

Recovery (Special Provisions) Act has specifically provided that the summary procedure will be the applicable procedure for an action instituted under the said Act. Accordingly, the regular procedure has no application to an action filed under the said Act, and therefore it is not possible to file answer under Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

With regard to the instant case, section 6(2) of the said Act requires the defendant to obtain leave of court to appear and show cause against the decree *nisi* entered by court. However, the defendant had made an application under section 6(2) of the said Act, and prayed *inter-alia* for the court to;

(a) dismiss the plaint,
(b) set aside the decree *nisi* entered by court, and
(c) grant unconditional leave to file answer.

[Emphasis added]

Therefore, instead of seeking 'leave to appear and show cause against the decree *nisi'* in the said prayer, the defendant had prayed for unconditional 'leave to file answer'. However, on a careful consideration of the totality of the application made by the defendant, it is apparent that he intended to obtain leave to appear and show cause against the decree *nisi* entered by the District Court.

Drafting of pleadings is a special skill of lawyers. Thus, it is the duty of the lawyer who drafts the pleadings that are filed in court to ensure that the said pleadings are in conformity with the relevant procedural laws. A shortcoming of a lawyer in drafting the pleadings should not deprive a litigant obtaining redress from court, unless any prejudice is caused to the other party. The duty of courts is to administer justice, and the duty of a lawyer is to assist the court in the administration of justice.

Referring to technical objections raised by a party to prevent the court from granting redress to a litigant, Abrahams C.J. observed in *Vellupillai v The Chairman, Urban District Council* 39 NLR 464 at 465, "This is a Court of Justice, it is not an Academy of Law."

In the instant appeal, the plaintiff bank was aware that the procedure set out in the said Act does not contain a provision to file answer. Therefore, the plaintiff bank was not misled or prejudiced by the above said prayer in the application made by the defendant.

Thus, I am inclined to agree with the finding of the learned judges of the Civil Appellate High Court that the objection raised by the plaintiff bank with regards to the defendant seeking 'leave

to file answer' instead of 'leave to appear and show cause against the decree *nisi'* is purely a technical objection, and therefore cannot be sustained.

However, the learned Additional District Judge had erred in law in making an order under section 6(2) of the said Act by granting the defendant leave to 'file answer'. During the course of the hearing of this appeal, it was submitted by the parties that after the order was delivered by the Additional District Judge, the defendant had filed an answer setting up a claim in reconvention. Therefore, as there is no such provision to file answer in a case instituted under the said Debt Recovery (Special Provisions) Act, as amended, the District Court should reject the answer filed by the defendant and proceed with the trial in terms of section 7 of the said Act.

Accordingly, the questions of law on which leave to appeal was granted are answered as follows;

a) **Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in holding that the learned trial judge could have granted leave to appear and show cause <u>without security</u> against decree *nisi* entered in an action under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?**

   Yes. However, in an appropriate case, the court may grant leave to appear and show cause against the decree nisi without security, under section 6(2)(c) of the said Act.

b) **Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that if the Respondent has failed to establish "a *prima facie* sustainable defence", the Court has no jurisdiction to grant the Respondent leave to appear and show cause in terms of sections 6(2)(c) and 6(3) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?**

   Yes, the learned judges of the Civil Appellate High Court had erred in law in not considering the finding of the learned Additional District Judge that the defendant had failed to establish "a *prima facie* sustainable defence". Hence, the court has no jurisdiction to grant the defendant leave to appear and show cause in terms of sections 6(2)(c) of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

However, such a finding does not trigger section 6(3) of the said Act. The said section will apply only if there is no proper application made by the defendant in terms of section 6(2) of the said Act.

c) **Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that the District Court has no jurisdiction to permit the Respondent to file "Answer" in view of provisions of section 7 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?**

Yes. There is no provision in the aforementioned Act to file answer. Particularly, since the said Act states that the applicable procedure is the summary procedure.

In view of the foregoing answers, the remaining questions of law need not be considered.

Accordingly, I set aside the judgment of the learned judges of the Civil Appellate High Court dated 1st August, 2014, and the order of the learned Additional District Judge dated 3rd February, 2014.

I further direct the learned Additional District Judge to reject the answer filed by the defendant, and grant leave to appear and show cause against the decree *nisi* either under sections 6(2)(a) or (b) of the said Act.

Subject to the above, appeal is allowed.

I order no costs.

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