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

In the matter of an appeal from the Judgment of the High Court of the Western Province in the exercise of its Civil Jurisdiction in case No: CHC/113/08/MR dated 24th September 2010.

Lionair (Private) Limited,
Colombo Airport,
Ratmalana.

DEFENDANT-APPELLANT

SC CHC APPEAL No. 43/2010
HC Colombo No. 113/08 MR
Nature Money
Value 132, 523, 149/86

-Vs-

Ceylinco Leasing Corporation Limited.,
No. 97, Hyde Park Corner,
Colombo 02.

PLAINTIFF-RESPONDENT

BEFORE	**:**	Hon. N.G. Amaratunga J, Hon. S. Marsoof, P.C. J, and Hon. K. Sripavan J.
COUNSEL	**:**	Chandaka Jayasundere with Tharindu Rajakaruna for the Defendant-Appellant I.S. de Silva with D. Perera for the Plaintiff-Respondent
ARGUED ON	**:**	26.2.2013
WRITTEN SUBMISSIONS ON	**:**	26.3.2013
DECIDED ON	**:**	05.8.2013

SALEEM MARSOOF J:

This is an appeal against the decision of the High Court of the Western Province holden in Colombo exercising civil jurisdiction and hearing actions of a commercial nature (hereinafter referred to as the Commercial High Court) dated 24th September, 2010. By the said judgment, the Commercial High Court upheld the claim of the Plaintiff-Respondent, Ceylinco Leasing Corporation Ltd. (hereinafter sometimes referred to as "Ceylinco Leasing") for the aggregate sum of Rs. 132,523,149.86, allegedly due on 12 causes of action, each of which was pleaded as a separate loan granted by it to the Defendant-Appellant, Lionair (Pvt) Ltd. (hereinafter sometimes referred to as "Lionair") as prayed for in the plaint.

Ceylinco Leasing sued Lionair to recover outstanding payments on loans allegedly granted by it to Lionair. In its plaint dated 3rd April 2008, Ceylinco Leasing referred to a Strategic Alliance Agreement (P-1) dated 24th September 2003 entered between Ceylinco Capital Investment Co (Pvt) Ltd., (hereinafter referred to as "Ceylinco Capital"), Ceylinco Lionair (Pvt) Ltd., (hereinafter referred to as "Ceylinco-Lionair") and Lionair (Pvt) Ltd., to which Ceylinco Leasing was not a party. Ceylinco Leasing claimed that pursuant to the said

Strategic Alliance Agreement, it granted financial assistance to Lionair by way of 12 loans, the particulars of which it provided under 12 separate causes of action, and annexed to the plaint copies of 12 promissory notes, all issued by Lionair on separate dates in the year 2004, all of which were at the subsequent trial produced in evidence marked P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24. After Lionair filed its answer dated 28th August 2008, in which it admitted the aforesaid Strategic Alliance Agreement and explained that if any financial assistance was provided to it as contemplated by the said Agreement, such assistance was provided by Ceylinco Capital and not by Ceylinco Leasing. In the said answer, Lionair denied that any legal obligation or contractual liability exists between Ceylinco Leasing and Lionair, or that any cause of action had accrued as averred in the plaint.

The case went to trial on 2 admissions and 58 issues, the first 50 of which were raised on behalf of Ceylinco Leasing. Lionair raised issues 51 to 57, wherein it put in issue whether the aforesaid Strategic Alliance Agreement was a contract between Ceylinco Leasing and Lionair; whether the 12 promissory notes pleaded were enforceable in law; whether the said notes were issued for valuable consideration; whether the letters of demand marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25 were consistent with the law relating to bills of exchange; and whether the plaint and the documents annexed to it complied with the provisions of the Bills of Exchange Ordinance No. 25 of 1927, as subsequently amended. Ceylinco Leasing responded with 2 consequential issues 58(a) and 58(b), of which issue 58(a) raised the question whether since Ceylinco Leasing "has not instituted action based on the promissory notes, will the provisions of the Bills of Exchange Ordinance not apply to this case?"

The Evidence

The only witness to testify at the trial was the Assistant Managing Director of Ceylinco Leasing, Paththini Kuttige Meril Titus Nonis, whose evidence-in-chief was contained in an affidavit dated 17th March 2009. In his affidavit, he has referred to the Strategic Alliance Agreement (P-1) dated 24th September 2003 entered between Ceylinco Capital, Ceylinco Lionair and Lionair, and stated that at the request of Lionair, Ceylinco Leasing, which was a member of the "Ceylinco group of companies", agreed to provide financial facilities to Lionair, and accordingly, on 14th March 2004, it granted Lionair, at the latter's request, a loan of Rs. 7,865,000.00 taking as security a promissory note dated 14th March 2004 (P-2), which is reproduced below:

LIONAIR *P-2*

PROMISORY NOTE
RS. 7,865.000/- (Capital)

No. PN/12M/0303/019

Issued Date : 14th March, 2004
Due Date : On Demand

LIONAIR (PVT) LTD., of Asian Aviation Centre Colombo Airport Ratmalana, do promise to pay Ceylinco Leasing Corporation Ltd. of 283, R.A. De Mel Mawatha, Colombo-3, a sum of Rupees Seven Million Eight Hundred and Sixty Five Thousand plus interest computed at 20% p.a. only on Demand upon presentation and surrender of this note at our office.
Sgd./
For and on behalf of
LIONAIR (PVT) LTD.

Nonis further stated in the said affidavit that a demand for payment on the aforesaid promissory note was made by the letter of demand dated 22nd September 2006 (P-3) sent by Ceylinco Leasing to Lionair, which letter of demand is reproduced below:

CEYLINCO LEASING CORPORATION LIMITED *P-3*

22nd September 2006.
Lion Air (Pvt) Ltd
Asian Aviation Centre
Colombo Airport
Ratmalana.

Dear Sir,

We Ceylinco Leasing Corporation Limited, of No. 283, R.A. De Mel Mawatha, Colombo 03 state as follows:
On or about 14th March 2004 you signed and delivered to Ceylinco Leasing Corporation Limited a Promissory note bearing reference No. PN/12M/0303/019 for a sum of Rupees Seven Million Eight Hundred and Sixty Five Thousand (Rs. 7,865,000.00) together with interest thereon at the rate of 20% per annum from the date of the said promissory note to be payable on demand.

We hereby demand from you and you are hereby demanded for the payment to Ceylinco Leasing Corporation Limited of the aforesaid sum of Rupees Seven Million Eight Hundred and Sixty Five Thousand (Rs. 7,865,000.00) together with interest thereon at the rate of 20% per annum from the date thereof within a period of 14 days from the date of these presents.

Yours faithfully,
Sgd./
CEYLINCO LEASING CORPORATION LIMITED

Nonis stated in his affidavit that as on 20th February 2008, a sum of Rs. 14,062,189.04 was due from Lionair on the said loan, and as Lionair had failed and neglected to pay the said sum of money or part thereof, a cause of action accrued to Ceylinco Leasing to recover the said sum of money from Lionair with further legal interest. Nonis, has set out in the said affidavit, in a similar manner, the particulars of all sums of money allegedly granted as loan by Ceylinco Leasing to Lionair, which it was alleged constituted the remaining 11 causes of action on the basis of which the action was instituted for the recovery of an aggregate sum of Rs. 132,523,149.86 with legal interest thereon. Nonis has annexed to the said affidavit all promissory notes issued by Lionair marked P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24, which were similar except for the dates and the amounts, and all letters of demand issued by Ceylinco Leasing dated 22nd September 2006 and marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25, which only differed in regard to the amount demanded.

The affidavit of Nonis was received in evidence and treated as the examination-in-chief of the witness, who was present in court and testified on 12th June 2009. The learned Judge of the Commercial High Court permitted the leading of further evidence by way of examination-in-chief, after which he was cross-examined by learned Counsel for Lionair, which cross-examination was continued on 16th September 2009, and thereafter re-examined by learned Counsel for Ceylinco Leasing on the same day. It is significant to note that during his cross-examination, Nonis was pressed to clarify what the underlying transactions based

on which the promissory notes were issued, and whether it was a contract in writing or an unwritten contract, and he responded by saying that he was unaware of the details which are known only to the legal division of Ceylinco Leasing, but he had always insisted on a request letter for granting a loan. He was then asked why he was not producing a single of those request letters, whereupon he produced, with the permission of court, a request letter dated 5th December 2003 (P-27). The said request letter marked P-27 is reproduced below:-

LIONAIR *P-27*

To : Executive Director – CLCL

From : Chairman – Lionair (Pvt) Ltd.

Subject : Payment in advance – Rs. 2.4 M

Date : 05/12/2003

I kindly request to arrange an advance payment of Rs. 2.4M at the rate of 20% interest until June 2004 where Purchase Agreement of Lionair aircraft to be scheduled to take place.

Promissory Note and Letter of Guarantee is enclosed herewith.
Sgd./
Kumar Arichandran Rutnam

Nonis also produced in evidence marked P-28, a loan schedule showing the breakdown of the aforesaid sum of 132,523,149.86 alleged to be outstanding on all these transactions, which is reproduced below:

P-28

PN No.	Period			Rate	Bal. Rs.	Bal. As at 20/02/2008 Rs.	Days	Interest as at 20/02/09
	From	To						
PN/12M/0303/019	14.Mar.04	20.Feb.08	ON DEMAND	20.00%	7,865,000.00	7,865,000.00	1438	6,197,189.04
PN/12M/0303/020	25.Mar.04	20.Feb.08	ON DEMAND	20.00%	7,865,000.00	7,865,000.00	1427	6,149,783.56
PN/12M/0303/021	30.Mar.04	20.Feb.08	ON DEMAND	20.00%	3,025,000.00	3,025,000.00	1422	2,357,013.70
PN/12M/0303/026	25.Apr.04	20.Feb.08	ON DEMAND	20.00%	3,025,000.00	3,025,000.00	1396	2,313,917.81
PN/12M/0303/027	10.May.04	20.Feb.08	ON DEMAND	20.00%	1,573,000.00	1,573,000.00	1381	1,190,308.49
PN/12M/0303/030	11.Jun.04	20.Feb.08	ON DEMAND	20.00%	14,520,000.00	14,520,000.00	1349	10,732,865.75
PN/12M/0303/022	26.Mar.04	20.Feb.08	ON DEMAND	20.00%	4,620,000.00	4,620,000.00	1326	3,609,928.77
PN/12M/0303/023	29.Mar.04	20.Feb.08	ON DEMAND	20.00%	10,291,667.00	10,291,667.00	1423	8,024,680.63
PN/12M/0303/024	06.Apr.04	20.Feb.08	ON DEMAND	20.00%	10,291,667.00	10,291,667.00	1215	7,979,566.47
PN/12M/0303/028	25.May.04	20.Feb.08	ON DEMAND	20.00%	4,400,000.00	4,400,000.00	1366	3,293,369.86
PN/12M/0303/029	05.Jun.04	20.Feb.08	ON DEMAND	20.00%	2,640,000.00	2,640,000.00	1355	1,960,109.59
PN/12M/0303/031	15.Jun.04	20.Feb.08	ON DEMAND	20.00%	4,950,000.00	4,950,000.00	1345	3,648,082.19
Total					**75,066,334.00**	**75,066,334.00**		**57,456,815.86**

At the end of the testimony of Nonis, the learned Judge of the Commercial High Court granted a further date for Ceylinco Leasing to call its other witnesses, but on 3rd March 2010 Ceylinco Leasing intimated to court that it was not intended to call any further witnesses to testify on its behalf, and closed its case reading in evidence the documents marked P-1 to P28. Learned Counsel for Lionair then indicated that he will not call any evidence on behalf of Lionair.

The Judgment of the Commercial High Court

The learned Judge of the Commercial High Court pronounced his judgment on 24th September 2010, whereby he answered all issues in the case in favour of Ceylinco Leasing, and held that Ceylinco Leasing has proved its case on a balance of probabilities. He awarded Ceylinco Leasing relief as prayed for in the plaint.

In arriving at his conclusion, the learned High Court Judge, very rightly, treated the Strategic Alliance Agreement (P-1) as a part of the background facts, but noted in particular that as stated in the recitals at the commencement of the said Agreement, Ceylinco Capital had agreed to be the strategic partner of Lionair, and had agreed in clause 1(d) of the said Agreement to "facilitate or provide assistance in procuring the necessary financial resources for the day to day operations of Lionair". He was, of course, conscious of the fact that the party before court is Ceylinco Leasing and not Ceylinco Capital, but considered that the existence of the Strategic Alliance Agreement with Ceylinco Capital would not only explain the conduct of Lionair, but also the conduct of Ceylinco Leasing with respect to the transactions of loan, which were in issue in the case.

From the judgment of the Commercial High Court, it is abundantly clear that the court rightly characterised the action as a regular action to recover outstanding amounts on 12 loans, and not as one in which certain promissory notes were put in suit. The promissory notes were regarded as constituting evidence of the underlying loan transactions in connection with which, the said notes had been tendered as security, and the fact that 2 Directors of Lionair had signed the said notes was treated as an additional piece of evidence that established the existence of the loan transactions and tended to tilt the scale in favour of Ceylinco Leasing. The following passage from page 4 of the judgment constitutes, in my opinion, the essential reasoning of the Commercial High Court:-

> නඩුවේ පිළිගැනිම්වල දී මෙකී පොරොන්දු නෝට්ටු විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරු දෙදෙනෙකු අත්සන් කර ඇති බව ද පිළිගෙන ඇත. මෙම කරුණු අභියෝගයට ලක් කරමින් විත්තිකාර පාර්ෂවය සාක්ෂි කියා පෑමක් නැත. විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරු අත්සන් කර, පොරොන්දු නෝට්ටු දීම තුළින් පැමිණිල්ල කියා පාන ලෙස ණය සැපයූ බවටත් ඒ සඳහා පොරොන්දු නෝට්ටු දුන් බවටත් වැඩි බරින් පිලිගත හැකිය. එසේ නොවන්නට පොරොන්දු නෝට්ටු සඳහා විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරුන් අත්සන් කරතැයි සිතිය නොහැක. එකී පොරොන්දු නෝට්ටු අගනා ප්‍රතිඥාවක් මුල්කර ගෙන නොදුන් ඒවා වී නම්, සාක්ෂි කැඳවා එය පැහැදිම විත්තියේ වගකීමකි. විත්තිය එසේ කර නැත. ඒ අනුව පැමිණිල්ලේ සඳහන් ලෙස නඩු නිමිති 12ට අදාළව ණය මුදල් දුන් බවත් එය සුරැකීමට පොරොන්දු නෝට්ටු ලබාගත් බවත් වැඩි බරින් පිළිගත හැකි බව පෙනී යයි. එකී පොරොන්දු නෝට්ටුවල ලබා දෙන ණය මුදලට අදාළ පොළිය ද සටහන් කර ඇත. එවැනි පොළියක් සඳහා එකගතාවයක් නොවී නම්, විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරුන් එකී පොරොන්දු නෝට්ටු වලට අත්සන් කරතැයි සිතිය නොහැක. විත්තිය සාක්ෂි කැඳවා එයට වෙනස් තත්ත්වයක් පෙන්වා සිටින්නේ නැත. ඒ අනුව පැමිණිල්ලේ දක්වා ඇති ඒ ඒ නඩු නිමිත්ත යටතේ හිමි මුදලට දක්වන පොළි සඳහා ද පැමිණිල්ල හා විත්තිය අතර එකගතාවයක් වූ බව වැඩි බරින් තීරණය කළ හැක.

The Commercial High Court has also considered the question as to whether payment was demanded from Lionair prior to filing action. Court took note of the fact that all letters of demand produced in evidence marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25 demanding payment within 14 days, were sent on the same date, namely 22nd September 2006, and considered the causes of action to have accrued on the expiry of 14 days from 22nd September 2006. Court also concluded that since the action was filed within 3 years from the accrual of the causes of action, no question of prescription arose, and took note of the fact that learned Counsel for Lionair had indicated in his written submissions that he would not pursue that line of defence.

Submissions of Counsel on Appeal

It was common ground that the action from which this appeal arises is simply a regular action for the recovery of money outstanding on 12 loans with interest thereon and not an action by way of summary procedure instituted in terms of Section 703 of the Civil Procedure Code. Hence, as learned Counsel for Ceylinco Leasing has submitted, it is not necessity to establish that the procedures laid down in the Bills of

Exchange Ordinance such as presentment of the promissory notes for payment and / or issuing notice of dishonour have been complied with.

Learned Counsel for Lionair, has submitted at the hearing before this Court that though Ceylinco Leasing had, in its plaint, pleaded that it has advanced to Lionair 12 separate sums of money by way of loan in pursuance of a Strategic Alliance Agreement (P-1) dated 24th September 2003, Ceylinco Leasing was not a party to the said Agreement and therefore it has no relevance with respect to the alleged causes of action said to be disclosed in the plaint. He has also submitted that all the 12 causes of action set out in the plaint, were based on 12 promissory notes which were alleged to have been provided as security for prepayment of 12 loans. He pointed out that the evidence led by Ceylinco Leasing did not establish the existence or the terms of the alleged loan transactions, and that the respective letters of demand sent on behalf of Ceylinco Leasing to Lionair were entirely based on the promissory notes without any reference to any loan transactions. He has stressed that no party suing on transactions of loan could hope to succeed without proving the terms of the loan, in particular, the duration of the loan and agreed rate of interest, and the fact the repayment of the loan had been demanded, if in particular the loan was not for a fixed term.

Learned Counsel has further submitted that the only witness called on behalf of Ceylinco Leasing, Paththini Kuttige Meril Titus Nonis, knew nothing about the existence or otherwise of any underlying transaction of loan apart from the 12 promissory notes, and invited the attention of Court to the following passage of his testimony (page 175 of the brief) which shows that he had believed that the action was in fact instituted to put the said promissory notes in suit:-

ප්‍ර: මෙම නඩුවේ පැමිණිලිකාර සමාගම විත්තිකරුට එරෙහිව නඩු පවරා ඇත්තේ පොරොන්දු, නෝට්ටු මතද?

(අධිකරණයෙන්:-

ප්‍ර: තමාගේ නඩු නිමිති පදනම් කරගෙන තිබෙන්නේ පොරොන්දු, නෝට්ටු මතද?

උ: පොරොන්දු, නෝට්ටු මත.

ප්‍ර: වෙනත් කිසිම ගිවිසුමක් මත නොවේ, මේ නඩුව පදනම් වී තිබෙන්නේ, පිළිගන්නවාද? පොරොන්දු, නෝට්ටුට අමතරව පැමිණිලිකාර සමාගම හා විත්තිකාර සමාගම අතර වෙනත් ගිවිසුමක් තිබුණාද?

උ: පොරොන්දු, නෝට්ටු මත.

ප්‍ර: ඒ හැර වෙනත් ගිවිසුමක් මත නොවේ?

උ: නැහැ.

ප්‍ර: ඔබගේ දිවුරුම් ප්‍රකාශයේ පැ.1 ලෙස ලකුණු කර ඇති උපාය මාර්ගික එකගතා ගිවිසුමට පැමිණිලිකාර සමාගම පාර්ශවකරුවෙක් නොවේ?

උ: නැහැ.

In these circumstances, learned Counsel for Lionair has emphasized that the learned High Court Judge has erred in law in failing to consider whether there was sufficient evidence in support of the case of Ceylinco Leasing. In particular, he submitted that the learned Judge has erred in law in failing to consider the fact that Ceylinco Leasing had not even proved its allegation that any money had been lent to Lionair. He stressed that it is wholly untenable that Ceylinco Leasing, which is a well known and established company would have lent money to Lionair, without any acknowledgement of receipt or record of the said sum whatsoever, and that the failure of Ceylinco Leasing to produce any such proof should have been taken into consideration by the learned High Court Judge. He further submitted that the learned High Court Judge fell

into grave error in inferring from the available evidence that on a balance of probabilities 12 transactions of loan existed and in assuming that they were on the same terms as those set out in the 12 promissory notes annexed to the plaint, particularly in the light of the above-quoted testimony of Nonis.

Learned Counsel for Lionair further submitted that the assumption of the learned High Court Judge that a demand made on the promissory notes could also be considered to be a demand made on the agreement was altogether contrary to law. Learned Counsel has in this context referred us to the decision of this Court in *Seylan Bank Limited v. Intertrade Garments (Private) Limited* [2005] 1 SLR 80 where it was held that the cause of action in cases where money is payable on demand, arise only when the demand is made, and submitted that Ceylinco Leasing has failed to establish that any cause of action has arisen on the basis of loan as it has not furnished any evidence that the repayment of any of the loans (apart of the amounts of any of the promissory notes) was demanded and refused. Learned Counsel for Lionair has also referred us to the decision of the Court of Appeal in *L.B. Finance Ltd v. Manchanayake* [2000] 2 SLR 142, and submitted that, on a parity of reasoning, a demand on a promissory note issued as security cannot be deemed to be a demand on the underlying loan transaction.

Learned Counsel for Lionair has stressed that for the learned High Court Judge to arrive at the findings that he did, there should have been proper and cogent evidence presented by Ceylinco Leasing to that effect. He submitted that in the absence of such evidence, the learned High Court Judge could not have arrived at the above findings even on the basis of a balance of probabilities. He also invited the attention of Court to Section 114 of the Evidence Ordinance read together with illustration (f) thereof, which allows a court to presume that "the evidence which would be and is not produced would if produced be unfavourable to the person who withholds it." In conclusion, he submitted that the learned High Court Judge erred in law in holding that Ceylinco Leasings had proved its case on a balance of probabilities, without fully considering the implications of Ceylinco Leasing's failure to produce evidence which, having regard to the natural course of business would have been available to it.

Learned Counsel for Ceylinco Leasing responded to these submissions by emphasising that the case of Ceylinco Leasing from the date of pleading remained unchanged, that the monies sought to be recovered were due on 12 loans granted to Lionair, and the promissory notes marked P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24 were tendered only to establish that the underlying loan transactions were to the same tenor as evidenced by the said promissory notes. He submitted that at the commencement of the trial, issues were raised by Ceylinco Leasing on the same basis, namely that the Ceylinco Leasing lent and advanced to Lionair 12 distinct sums of money, and that the said loans were secured by the said promissory notes. He submitted further that it was in order to dispel any doubt in this regard that issue 58 (a) was suggested by Counsel for Ceylinco Leasing, raising the question as to whether the provisions of Bills of Exchange Ordinance would apply to this case given that Ceylinco Leasing "has not instituted this action based on the promissory notes", which question was answered by the learned High Court Judge in its favour. He emphasised that this case was instituted as an action by way of regular procedure and not by way of summary procedure, for recovering the moneys lent and not to put the promissory notes in suit.

Referring to the evidence led in the case, learned Counsel for Ceylinco Leasing conceded that as pointed out by learned Counsel for Lionair, witness Nonis had, in the course of his testimony at page 175 of the brief, erroneously stated that the action was instituted on the basis of promissory notes, but he invited the attention of Court to the subsequent proceedings appearing at pages 186 and 187 of the brief, wherein the witness had sought to correct himself. He pointed out that in his testimony, Nonis has clarified that he was not personally aware of the basis on which the action had been instituted, and stressed that Nonis had stated that he only knew that monies were advanced by Ceylinco Leasing to Lionair and that this is

evidenced by the promissory notes that had been issued by Lionair as security for repayment of the loans. He also submitted that witness Nonis has stated in evidence that he was not aware whether there was a written contract or not, and was only aware that certain amounts of money had been advanced to Lionair after obtaining the promissory notes. He submitted that the totality of the evidence clearly established that the action was based on unwritten contracts of loan entered between Ceylinco Leasing and Lionair.

Adverting to the wording of the letters of demand marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25, learned Counsel for Ceylinco Leasing submitted that it is not the format of the said letters of demand that should determine whether the action was filed on the basis of the promissory notes or not, and submitted that it is clear from the pleadings and the issues in the case that the action was instituted on the basis of money lent and advanced and that the promissory notes in question were only evidence of the loan transactions. Learned Counsel for Ceylinco Leasing submitted further that as the learned Judge of the High Court had determined, there was no evidence of any loan agreement in writing between the parties but only evidence of oral agreements to grant the loans sought to be recovered.

Learned Counsel for Ceylinco Leasing submitted that the learned Judge of the High Court has carefully considered in his judgement all matters which had been raised by the Counsel for Lionair, and has also carefully analysed the evidence and come to a finding of fact that the promissory notes were relevant only as proof of the existence of the loans and their terms. He relied on decisions in *Fradd v. Brown & Co. Ltd.* 18 NLR 382 (SC) 20 NLR 282 (PC), *Abdul Sathar v. Bogtstra* 54 NLR 102 (PC), *Alwis v. Piyasena Fernando* (1993) 1 SLR 119 (SC) for the proposition that an appellate court will not interfere with the findings of fact arrived at by a trial judge, unless the finding is perverse and not supported by evidence, and submitted that Lionair has not been able to demonstrate that the findings of the Commercial High Court are perverse or unreasonable. He emphasised that a fairly large sum of money had been advanced, and not only has Lionair failed to deny the receipt of such loans, but it has also not thought it fit to give any evidence to controvert the evidence adduced on behalf of Ceylinco Leasing. In these circumstances, he submitted that the appeal should be dismissed with costs.

Pleading and Proving the Essential Elements of Loans

This appeal raises questions regarding the essential elements of recoverable loans, in particular how they should be pleaded and proved. Roman-Dutch law which governs such loans, *simpliciter*, contemplate two broad types of loans, namely, loans for use (*commodatum*) and loan for consumption such as loan of money (*mutuum*). This case concerns the latter category of loan, which is defined by Wille's *Principle of South African Law*, (9th Edition by Francois du Bois) Chapter 31, pages 948-949 as a "contract in terms of which one person ('the lender') agrees to deliver something, or things that can be consumed by use to another person ('the borrower') *for a certain period of time* or to achieve a particular purpose with the intention that the borrower become the owner." Walter Perera in his work, *The Laws of Ceylon* (2nd Edition) at page 619, describes such a loan as "a contract whereby one of the parties gives over or delivers to the other property or dominion of a certain sum of money, or quantity of things which perish by use, the latter binding himself to return as much of the same kind or species."

It is an essential characteristic of such a loan that the borrower is bound subsequently to return to the lender, in the case of money lent, a sum of money equal to that lent, or, in the case of other fungibles, objects of the same kind, quality and quantity. The terms of the contract, in particular the duration of the loan and the agreed interest, if any, are therefore of paramount importance. Walter Perera, in his *The Laws of Ceylon* at page 619, observes that the contract of "*mutuum* is contracted not only by express words, but also tacitly by implication; so that when there is a doubt, *mutuum* is considered to have been contracted from the mere fact that mention has been made of money received." He also cites *Censura Forensis* 1.4.4.4

for the proposition that "where a large sum of money has been given to any one without mention being made of the reason, *the presumption in case of doubt is that it has given on loan for consumption*".

As regards the borrower's duty to return whatever is borrowed, Wille (*supra*) page 950, notes citing Grotius 3.10.6; Van der Keessel 3.10.6; Voet 12.1.19 that the borrower "must return the equivalent *at the time agreed on.* If no such time has been fixed, the borrower is not bound to return the equivalent immediately, but *only on expiration of a reasonable period in the circumstances, after notice*". K. Balasingham, in his *Institutes of the Laws of Ceylon*, Volume 2, Part 1 at page 287 citing the same authorities as does Wille, observes that from this contact, "which is unilateral or only on one side, arises an action to the lender or his heirs against the borrower or his heirs to return a like sum of money, or quantity of the thing lent and of the same quality, and *this after the expiration of the time limited by the contract*, or if no time has been fixed then after a reasonable time to be determined by the judge."

From the above, it becomes obvious that the plaintiff in any action for recovery of loan has to establish clearly the terms of the loan, particularly its duration, and if no specific period of time is agreed upon for the return of the money or other thing loaned, that a reasonable time has elapsed after the advance of the loan, and a notice has been issued to the borrower demanding the return of the loan. With regard to interest, unless the rate of interest is expressly or by implication agreed upon by the parties, the lender is entitled to the return of only the sum of money or the quantity of other thing lent in the same quality. Particulars of all these terms have to be pleaded and proved. The failure to set out particulars of the cause of action or causes of action sued upon might give rise to difficulties in framing necessary issues of fact or even result in the dismissal of the action (*Narendra v. Seylan Bank Limited* [2003] 2 SLR 1).

As already noted, In the action from which this appeal arose, Ceylinco Leasing has sought to recover certain sums of money allegedly advanced as loan to Lionair, and the promissory notes marked in evidence tend to corroborate the testimony of Nonis that such moneys were in fact received by Lionair. Ceylinco Leasing has also led in evidence the letters of demand issued demanding payment of the money specified in each of the promissory notes. It is this form of letter of demand that probably prompted Lionair to characterise the action as one on promissory notes, and to contend that since certain imperative provisions of the Bills of Exchange Ordinance had not been complied with, and since there is no evidence of the terms of the loans or separate letters of demand claiming the return of the money advanced as loan, the action should have been dismissed by the Commercial High Court.

In this connection, the subsequent clarifications made by witness Paththini Kuttige Meril Titus Nonis in the proceedings at pages 186 to 187 of the brief, extracts from which are reproduced below, are of great relevance:

ප්‍ර: ගිය දින ප්‍රශ්න කළා මෙම නඩුව ඔබගේ පැමිණිලිකාර සමාගම විසින් ගොනු කරන ලද්දේ කුමන පදනමක් මතද කියා. එවිට ඔබ කිවා විශේෂිතවම මෙම නඩුව ගොනුකර ඇත්තේ පොරොන්දු, නෝට්ටු මත කියා. පිළිගන්නවාද?

උ: මට මේ නිවැරදි කිරීම් කිරීමට ඉල්ලා සිටිනවා. මොන පදනම යටතේ ගොනු කර තිබෙනවාද කියා දන්නේ නැහැ. ගියවර මම සාක්ෂි දුන්නේ ඒ ගැන දැනීමක් නැතිව. මම තාමත් දන්නේ නැහැ හරියට මේ දෙකේ වෙනස මොන පදනමක් මතද, මේ නඩුව ගොනුකර තිබෙන්නේ කියා. මම දන්නේ සල්ලි දී තිබෙන්නේ සෙලින්කෝ ලීසිං සමාගම ලයන් එයාර් සමාගමට. ඒ අනුව පොරොන්දු, නෝට්ටු ඒ සමාගමෙන් ලැබී තිබෙනවා.

ප්‍ර: ඔබ මේ ගරු අධිකරණයට දිවුරුම් ප්‍රකාශ මගින් හෝ වාචික සාක්ෂි මගින් කොතනක හෝ ඔප්පුකර තිබෙනවාද යම්කිසි මුදලක් විත්තිකාර සමාගමට ලබා දී තිබෙනවා කියා?

උ: ඔව්.

ප්‍ර: මොනවායින්ද ඔප්පු කර තිබෙන්නේ?

උ: සෙලින්කෝ ලිසිං සමාගමට සල්ලි දුන් ප්‍රමාණයට ඒකට සාක්ෂියක් වශයෙන් ප්‍රෙමිසිරි නෝට්ටු ලයන් එයාර් සමාගමෙන් ලබාගෙන තිබෙනවා.

ප්‍ර: එවිට පැමිණිලිකාර සමාගම විසින් කුමන පදනමක් මතද සල්ලි ටික දුන්නා කියන්නේ, ලිඛිත ගිවිසුමක් තිබුනාද? වාචික ගිවිසුමක් තිබුනාද? අර්පන ලිපියක් තිබුනාද?

උ: මම දන්නේ නැහැ ඒ සම්බන්ධව මොන වගේ ගිවිසුමක් තිබුනාද නැද්ද කියලා. අධ්‍යක්ෂ මණ්ඩලයක් දුන් උපදෙස් මත මෙම සල්ලි ලයන් එයාර් සමාගමට ලබා දුන්නා. එවිට පිළිගැනීමක් හැටියට ලබා දුන්නා.

ප්‍ර: සුරැකුමක් හැටියට නොවෙයි, පිළිගැනීමක් හැටියට?

උ: රික්වෙස්ට් ලෙටර්ස් ඉල්ලා තිබෙනවා මේ සල්ලි ලබා දෙන්න.

ප්‍ර: තමන් දිවුරුම් ප්‍රකාශ ඉදිරිපත් කර තිබෙනවා? ඔය කියන රික්වෙස්ට් ලෙටර්ස්?

උ: මම හිතන්නේ නැතිව ඇති.

ප්‍ර: මම ඔබට යෝජනා කරනවා කිසිඳු එකක් ඉදිරිපත් කර නැහැ කියා. දැනට ඔබ විසින් මෙම අධිකරණයේ සාක්ෂි වශයෙන් ඉදිරිපත් කර තිබෙන පැ.1 කියන ලේඛණය සහ ඉතිරි ලේඛණ පොරොන්දු, නෝට්ටු සහ ඒ මත ඔබ කියනවා කියන ඒන්තරවාසි තමයි ඉදිරිපත් කර තිබෙන්නේ?

උ: ඔව්.

(අධිකරණයෙන්:-

මෙය හරස් ප්‍රශ්ණ වලින් මතුවන ලේඛනයක් බැවින් එය ලකුණු කිරීමට ඉඩ දෙමි.

ලයන් එයාර් සමාගම විසින් 2003.12.05 වන දින විත්තිකරු විසින් පැමිණිලිකාර සමාගමට ඉදිරිපත් කර ඇති මුදල් ඉල්ලා ඇති ලේඛනය පැ.27 වශයෙන් ලකුණු කරනවා. දෙමිලියන භාර ලක්ෂයක මුදලක් ඉල්ලා තිබෙනවා.

It appears from these extracts that witness Nonis has very clearly stated in evidence that the fact that the loans as pleaded were in fact advanced to Lionair is evidenced by the promissory notes issued by Lionair, which were for the identical amounts as the loans. When questioned whether the loan transaction was in writing, and if so what documents were involved, Nonis stated that request letters were obtained from Lionair prior to the grant of the loans, but he was not certain whether copies of those request letters were in fact tendered with his affidavit. When learned Counsel for Lionair insisted that such request letters should have been tendered, the witness moved to produce a request letter dated 5th December 2003, and the learned High Court Judge permitted to be marked in evidence as P-27 despite the fact that it was not listed, presumably in terms of Section 175(2) of the Civil Procedure Code. This document reveals that the Chairman of Lionair did request an advance payment of Rs. 2.4 million at the rate of 20% interest from the Executive Director of Ceylinco Leasing, and also that with the said letter of request, a promissory note and a letter of guarantee was tendered.

Although no additional information regarding this particular loan has been furnished to Court and the amount of the loan requested by P-27, namely Rs. 2,400,000.00, does not tally with any of the alleged loans for the recovery of which the action was filed, it clearly cuts across the case of Lionair that it did not have any loan transaction with Ceylinco Leasing, as in terms of the Strategic Alliance Agreement (P-1) dated 24th September 2003 it looked exclusively to Ceylinco Capital for financial assistance. This then, along with the

failure on the part of Lionair to call any evidence to counter the case presented by Ceylinco Leasing, makes it more probable that witness Nonis was truthful both in his affidavit and his testimony in court in regard to the grant of the loans sued upon.

It is significant that witness Nonis has testified that simultaneously with the grant of the said loans, promissory notes produced in evidence as P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24 were issued by Lionair under the hand of two directors of the said company, and that the terms of the loan and the promissory note were identical. It is also clear from the affidavit and testimony of Nonis that, the loan was repayable when demanded and that the agreed rate of interest was 20 per cent, and that the said promissory notes embody in full the terms of each such contract of loan. In these circumstances, in my opinion, there is no necessity to call in aid the presumption adverted to by Walter Perera on the authority of *Censura Forensis* 1.4.4.4, nor is there any need, in these circumstances, to adduce any further evidence of the terms of the contract, nor can such evidence be led in view of Section 91 of the Evidence Ordinance, No. 14 of 1895, as subsequently amended.

An important matter that needs to be considered is whether the Roman Dutch law principles enunciated above should give way to the provisions of the Bills of Exchange Ordinance and the rules of the common law of England which may become relevant in terms of Section 98(2) of the said Ordinance. Fortunately, there is a great deal of commonality between the Roman Dutch law, which is our residuary law, and the principles of English common law in this regard, and the latter principles are not only consistent with Roman Dutch law but also accord with common sense.

A crucial question that arises in this context is whether a lender, as in this case, who sues to recover certain loans granted by him in respect of which the borrower has executed promissory notes as well, can sue on the original consideration if the promissory notes cannot be proved or enforced. Although we have not been referred to any Sri Lankan decisions that deal with the question, it is noteworthy that the question was addressed in *In re Romer and Haslam* (1893) 2 Q.B. 286 at page 296 by Lord Esher M.R. (with Bowen LJ and Kerr LJ, concurring) in the following manner:

> It is perfectly well-known law, which is acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it. *Such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity*, and it is surprising that there can be at the present day any doubt as to the business result of such a transaction.(*Emphasis added*)

An illustrative case in which the facts were very similar to the one at hand, is the decision of a Full Bench of the High Court of Rangoon in *Maung Chit and Anr. v Roshan N.M.A Kareem Oomer & Co.* AIR 1934 Rangoon 389. In this case, which was an action for the recovery of sums of Rs. 300 and Rs. 100 given as loan, and the evidence showed that on each occasion when the loan was made, the borrower executed a promissory note payable on demand for the amount of the loan and interest thereon at 3 per cent *per mensem*. The lender sought to recover the amount due on the promissory notes or in the alternative a like sum for money lent. At the trial, the learned Judge found that the promissory notes were not duly stamped, and therefore were inadmissible in evidence under the Indian Stamp Act (2 of 1899, &. 35). A decree was passed in favour of the lender on the alternative claim for the amount of the loans without interest, and pursuant to a revision application filed by the borrower, the Full Bench of the Rangoon High Court had to consider the following question: “When a creditor sues on a claim for money in respect of which the debtor has executed a promissory note, under what circumstances can the creditor sue for the original consideration if the promissory note cannot be proved?”

Page CJ (with Baguley J, Sen J, Leach J, and Dunkley J concurring) in dismissing the revision application, observed in paragraphs 4 of the judgment that from the English and Indian authorities the legal position is clearly as follows:-

> It is *prima facie* to be presumed (although the presumption is rebuttable) that the parties to the loan transaction have agreed that the promissory note or other negotiable instrument given and taken in such circumstances shall be treated as conditional payment of the loan; the cause of action on the original consideration for money lent being suspended during the currency of the negotiable instrument, and if and so long as the rights of the parties under the instrument subsist and are enforceable; but *the cause of action to recover the amount of the debt revives if the negotiable instrument is dishonoured or the rights thereunder are not enforceable.* On the other hand the cause of action on the original consideration is extinguished when the amount due under the negotiable instrument is paid or if the lender by negotiating the instrument or by laches or otherwise has made the bill his own, and thus must be regarded as having accepted the negotiable instrument in accord and satisfaction of the borrower's liability on the original consideration.(*Emphasis added*)

The legal position would be different if a promissory note or other negotiable instrument is given by the borrower to the lender as the sole consideration for the loan, or if the promissory note or other negotiable instrument is accepted as an accord and satisfaction of the original debt. In such a situation, the lender is restricted to his rights under the negotiable instrument, by which he must stand or fall, in the one case the note or bill is itself the original consideration, and in the other the original debt has been, liquidated by the acceptance of the negotiable instrument. *See, Goddard & Son v. Q'Brien* (1882) 9 Q.B.D. 37, *Day v. McLea* (1889) 22 Q.B.D. 610. It is clear from the evidence that the action from which this appeal arose is one which falls on the other side of the line, as there is nothing to suggest that the promissory notes were considered by the parities as the sole consideration for the loans, and the general presumption in these cases is to the contrary. In my view, the learned High Court Judge did not err in concluding that in this state of facts and the law, Ceylinco Leasing was entitled to sue Lionair on the loans, despite the simultaneous issue by Lionair of the promissory notes, which in fact embodied the terms of the contracts of loan.

Finally, it has to be considered whether the letters of demand marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25 which were all based on the corresponding promissory notes, and make no mention of the underlying contracts of loan, are adequate to perfect the causes of action on which the action has been filed. Witness Nonis has stated in his affidavit and testified to the effect that the loans in question were all payable on demand, but apart from the aforesaid letters of demand, was unable to produce any evidence of any notice requiring the repayment of the loans in question.

In this context, it is necessary to emphasise that even though the provisions of the Bills of Exchange Ordinance and the principles of the English common law, may have applied to the action had it been instituted based on the promissory notes, as the action from which this appeal arises was filed to recover money advanced as loan, which is clearly governed by the principles of Roman Dutch law as the residuary law of Sri Lanka, the question as to whether all essential ingredients of the action have been established has to be decided by reference to that law. In regard to the question whether the Roman Dutch law requires a demand to be made by the lender prior to filing action to recover the item loaned, Wille's *Principle of South African Law*, (9th Edition by Francois du Bois) Chapter 31, page 950, citing Grotius 3.10.6; Van der Keessel 3.10.6; Voet 12.1.19 clarifies that the borrower is bound to "return the equivalent *at the time agreed on*", but if there be no express or implied agreement as regards the duration of the loan, "the borrower is not bound to return the equivalent immediately, but *only on expiration of a reasonable period in the circumstances, after notice*". Balasingham's *Institutes of the Laws of Ceylon*, Volume 2, Part 1 at page 287 does not even insist on a notice being issued, and states that if no time has been fixed for the return of the loan, then the action may be instituted "after a reasonable time to be determined by the judge."

In my opinion, the aforesaid letters of demand, which required Lionair to pay Ceylinco Leasing the sum of money specified in the relevant promissory notes "together with interest thereon at the rate of 20% per annum from the date thereof within a period of 14 days from the date of these presents" may reasonably be construed as notice to return the money lent, it being in evidence that the promissory notes in question were executed simultaneously with the grant of the loans. I also hold that the action was instituted after the expiry of a reasonable period from the date of the said letters of demand, and that the learned Judge of the Commercial High Court was fully justified in holding in favour of Ceylinco Leasing.

Conclusion

For the foregoing reasons, I have no hesitation in affirming the judgment of the High Court dated 24th September, 2010, and dismissing the appeal filed by Lionair (Private) Limited. In all the circumstances of this case, I hold that Lionair (Private) Limited shall pay Ceylinco Leasing Corporation Limited the costs of this appeal fixed at Rs. 100,000.00.

JUDGE OF THE SUPREME COURT

N.G. AMARATUNGA J

JUDGE OF THE SUPREME COURT

K. SRIPAVAN J

JUDGE OF THE SUPREME COURT