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

People's Bank
No: 75,
Sir Chittampalam A.Gardiner Mawatha,
Colombo 02.

Plaintiff

-Vs-

S.C. Appeal 04/2015
SC/HCCA/LA NO: 239/2012
SP/HCCA/TA/12/2007 (F)
SP/HCCA/MA/49/2007 (F)
D.C. Tissamaharama DR/01/97

Mahavidanage Simpson Kularatne
No:622, Tangalle Road,
Meddewatta, Matara.

Defendant

AND

People's Bank
No: 75,
Sir Chittampalam A.Gardiner Mawatha,
Colombo 02.

Plaintiff-Appellant

-Vs-

Mahavidanage Simpson Kularatne
No:622, Tangalle Road,
Meddewatta, Matara.

Defendant-Respondent

AND NOW BETWEEN

Mahavidanage Simpson Kularatne
No:622, Tangalle Road,
Meddewatta, Matara.

Presently at

No.6B 1-1
Colonel Sunil Senanayake Mawatha,
Pitakotte.

Defendant-Respondent-Petitioner/ Appellant

-Vs-

People's Bank
No: 75,
Sir Chittampalam A.Gardiner Mawatha,
Colombo 02.

Plaintiff-Appellant-Respondent

Before: Buwaneka Aluwihare, PC. J,
Priyantha Jayawardana, PC. J, and
Murdu N.B.Fernando, PC. J.

Counsel: W.Dayaratne, PC with Ms. D.N. Dayaratne for the
Defendant-Respondent -Appellant.
Rasika Dissanayake for the Plaintiff-Appellant-Respondent

Argued on: 02.04.2018

Decided on: 15.09.2020

Murdu N.B. Fernando, PC. J.

The Defendant–Respondent–Petitioner ("the defendant/appellant") came before this Court being aggrieved by the Judgement of the Civil Appellate High Court of the Southern

Province Holden in Tangalle (the "High Court"). By the said Judgement the High Court upheld the appeal of the Plaintiff-Appellant-Respondent ("the plaintiff bank/respondent") and set aside the Judgement entered by the District Court of Tissamaharama dismissing the plaint filed against the defendant.

This Court on 12-01-2015 granted Leave to Appeal on three questions of law. The said questions of law are as follows: -

(i) Have their Lordships of the Civil Appellate High Court failed to address their minds to the fundamental issue of whether the Plaintiff-Respondent's plaint was in conformity with the mandatory provisions of section 4(1) of the Debt Recovery (Special Provisions) Act No 2 of 1990 as amended by Act No 9 of 1994 which was raised as a preliminary objection by the Defendant-Petitioner?

(ii) Have their Lordships of the Civil Appellate High Court also failed to consider that the Defendant-Petitioner had been given overdraft facilities on the undertaking given by the Plaintiff-Respondent that he would be given a pledge loan and that the monies due on the overdraft would be set off against the pledge loan?

(iii) Have their Lordships of the Civil Appellate High Court failed to consider that the said pledge loan was not given due to the fault of the Plaintiff-Respondent and therefore, a cause of action has not accrued to the Plaintiff-Respondent to institute action against the Defendant-Petitioner?

Let me, now advert to the facts of this case in brief.

The defendant was a customer and an account holder at the Tissamaharama branch of the plaintiff bank. The defendant operated a current account and in the course of banking transactions presented cheques and deposited money to this account. The plaintiff bank honoured the cheques presented by the defendant and the current account became over drawn.

The defendant failed to pay back the over drawn sum and the plaintiff bank on 11-09-1997 instituted action against the defendant in terms of the Debt Recovery (Special Provisions) Act No 02 of 1990 as amended by Act No 09 of 1994 ("the Act") and annexed two cheques issued by the defendant and the statement of account to its plaint.

On 24-02-1998 the learned District Judge being satisfied of the conditions referred to in section 4(2) of the Act, issued decree nisi as prayed for by the plaintiff bank and directed the defendant to appear before court on 08-07-1998 and show cause as to why the said decree nisi should not be made absolute.

The defendant did not file a statement of objections on the said date but moved for time and thereafter on 08-12-1998, filed a statement of objections and raised the following preliminary objections namely, (i) the sum stated in the plaint did not fall within the definition of "debt" as set out in section 30 of the Act, (ii) there was no written agreement, (iii) in any event overdraft facilities were obtained in anticipation of obtaining a pledge loan. Thus, the defendant pleaded that he had a clear and concise defence and sought unconditional leave to appear in the case and/or to file an answer under section 6(2) (c) of the Act. The defendant also stated that the provisions of section 6(2)(a) and 6(2)(b) of the Act need not be resorted to and only prayed that the decree nisi issued by court should not be made absolute. It is observed that the defendant did not move for dismissal of the plaint at this juncture.

Thereafter an inquiry was held and the parties made submissions. On 25-11-1999, the learned District Judge made Order granting the defendant unconditional leave to appear and file answer upon the basis that there was a matter to be considered. In the said Order the learned District Judge categorically stated that no order is made on the preliminary objections raised since the defendant did not move for dismissal of the plaint and only sought unconditional leave to appear and defend this action and therefore granted the defendant unconditional leave to appear and show cause and gave a date to file answer as prayed for by the defendant.

The journal entries indicate that subsequent to the said Order, an application made to amend the plaint was not permitted and the case proceeded as a regular action upon the consensus of the parties. On 11-10-2001, two years after obtaining leave to appear and show cause, the defendant filed answer with a cross claim for damages and the case was set down for trial as a regular action. Thereafter, the application made to file replication by the plaintiff bank was disallowed by court and trial was taken up, admissions recorded, issues raised and the evidence of a bank official and the defendant were led. On 17-09-2007, the District Court

delivered judgement dated 08-08-2007 and dismissed the plaint and the cross claim of the defendant.

Being aggrieved by the said judgement the plaintiff bank appealed to the High Court. On 17-05-2012 the High Court delivered its judgement in favour of the plaintiff bank and set aside the judgement of the District Court and made absolute the decree nisi dated 24-02-1998 issued by the District Court.

The defendant is now before this Court against the said judgement of the High Court having obtained leave to appeal on three questions of law referred to earlier.

In the said background, let me now advert to the 1st question of law to be determined by this Court with regard to the plaint filed being not in conformity with the mandatory provisions of section 4(1) of the Act.

In the first instance I wish to advert to the provisions of the relevant law, the Debt Recovery (Special Provisions) Act of No 2 of 1990 as amended by Act No 9 of 1994 since the case in issue revolves around recovery of a 'debt' and the 'due process' to be adhered to, under the relevant law. In my view, the provisions of the above referred section 4(1) cannot be looked at or considered in isolation or in a vaccum and should be viewed from the perspective of the Act in its entirety.

This Act in its preamble states that it is an Act to provide for the regulation of the procedure relating to debt recovery by lending institutions. This legislation was brought into operation together with many other laws and amendments to existing laws in the early 1990s, for the manifestation of the economic development of the country and for the financial stability and efficient working of the lending institutions and also for the expeditious recovery of debts due and owing to a lending institution.

Thus, the key word in this legislation is 'lending institution' and 'debt'. A lending institution may resort to the provisions of the Act, if the lending institution could satisfy court that the transactions referred to in the plaint, falls within the definition of 'debt'.

Undoubtedly, People's Bank, the plaintiff bank in this appeal, is a lending institution which has recourse to the Act and filed this action against the defendant, a defaulting borrower, for recovery of money due and owing to the bank.

The next matter to be ascertained is whether the transaction referred to in the plaint falls within the definition of 'debt'. The main contention of the defendant before the District Court and the first issue raised by the defendant at the trial was with regard to the definition of the term 'debt'.

This action was filed in the District Court of Tissamaharama in 1997, after the Debt Recovery (Special Provisions) Amendment Act No 9 of 1994 was enacted which brought in significant amendments to the principal enactment, specifically to sections 4 and section 30, the interpretation section of the principal enactment.

Section 4 (1) of the Act as amended reads as follows:-

> "The institution suing shall on presenting the plaint, file with the plaint an affidavit to the effect that the sum clamed is lawfully due to the institution from the defendant, a draft decree nisi, the requisite stamps for the decree nisi and for service thereof and shall in addition, file in court, such number of copies of the plaint, affidavit, instrument, agreement or document sued upon, or relied on by the institution, as is equal to the number of defendants in the action."

In section 30, the word "debt" as amended is defined as follows:-

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

The term 'debt' as defined above is very wide and covers many situations, the material factor been that the sum of money should be 'ascertainable' at the time of institution of the action and alleged by a lending institution to have arisen from 'a banking, lending, financial or other allied business activity' of the institution. This term 'debt' has been

considered by the Appellate Courts on many an instance and given a wide meaning to include ‘overdrafts’ and ‘guarantees’ as well.

In **Kiran Atapattu Vs Pan Asia Bank Ltd [2005] 2 SLR 276** at page 279 the Court of Appeal held whether one calls the sum borrowed ‘an overdraft or a loan’ if it is capable of being ascertained it falls within the meaning of ‘debt’ under section 30 of the Debt Recovery (Special Provisions) Act preponing the theory that what is material is the sum being capable of being ascertained at the time of institution of the case.

Similarly, in **Dharmaratne Vs People’s Bank [2003] 3 SLR 307** a case filed under the Debt Recovery Act, the Court of Appeal held that an ‘overdraft’ falls within the definition of ‘debt’ as the overdraft arises from a transaction relating to banking. In that case the contention of appellant, that the ‘overdraft’ was not a ‘debt’ or a ‘loan’ was rejected by the Court of Appeal.

In **Eassuwaran and others Vs Bank of Ceylon [2006] 1 SLR page 365** a case decided by this Court, Raja Fernando J (with S.N. Silva, CJ and Thilakawardena, J. agreeing) held that a ‘guarantee’ provided by the appellants falls within the definition of ‘debt’ and a lending institution could have recourse to the provisions of the Debt Recovery (Special Provisions) Act No 2 of 1990 as amended. In this case the contention that the provisions of the Act applies only to a ‘fixed term loan’ and not to any ‘credit or overdraft facility’ and that if the ‘debt’ was a ‘credit facility or an overdraft facility’, the provisions of the Debt Recovery (Special Provisions) Act No 2 of 1990 as amended does not apply was overruled by this Court.

Thus, from the above referred judicial decisions, it is amply clear that an ‘overdraft’ falls within the four corners of the Act subject to the other pre-requisites therein been fulfilled.

In the instant appeal, there was no dispute and indeed it was an admission recorded that the defendant operated a current account and enjoyed banking, including ‘overdraft facilities’ of the People’s Bank. The position of the plaintiff bank was that the defendant failed to re-pay the money due and owing to the bank on the ‘overdraft facility’ obtained and therefore the bank resorted to recover the said ‘debt’, the unpaid and dishonoured facilities

granted to the defendant, expeditiously, by filing plaint under the Debt Recovery (Special Provisions) Act.

Institution of an action under this Act (vide section 3) is by presenting a plaint. section 4(1) provides that the plaint should be filed together with

(i) an affidavit to the effect that the sum claimed is lawfully due to the lending institution from the defendant;

(ii) a draft decree nisi; and

(iii) requisite stamps for the decree nisi and for service thereof.

In the instant appeal it is apparent that the plaintiff bank filed a plaint, an affidavit sworn to the effect that the sum was lawfully due, a draft decree nisi and requite stamps for service, in accordance with the provisions of section 4(1) of the Act.

The said sub-section goes onto state, that the institution suing **in addition file in court, such number of copies of the plaint, affidavit, instrument, agreement or document sued upon or relied upon by the institution, as is equal to the number of defendants in the action.**

In the instant appeal, the plaint indicates that an affidavit, two cheques, a statement of account of the defendant's current account among other documents were annexed to the plaint.

The submission of the defendant before this Court, on the first question of law raised was that 'an instrument, agreement or document' was not annexed to the plaint and thus the mandatory provisions of section 4(1) of the Act had not been complied with by the plaintiff bank.

Thus, the crux of the issue to be determined is whether annexing 'an instrument, agreement or document' is mandatory and whether the 'instrument, agreement or document' annexed in the instant appeal i.e the two cheques and the statement of accounts, fulfills the requirement of section 4(1) of the Act and whether the sum claimed falls within the definition of 'debt', the latter been the principal contention of the defendant before the trial court and the High Court.

This question as stated earlier cannot be looked at in isolation or in a vacuum or in a water tight compartment. It cannot be considered by a piecemeal approach. It has to be visualized in the perspective of the Act in its entirety and taking the Act as a whole.

Hence prior to examining the said question in detail, I wish to advert to certain facts of this case and the provisions of the Act which are undisputed.

Vide section 4(2) of the Act, upon presentation of the plaint together with annexures before a court, if the court is satisfied, that the 'instrument, agreement or document' produced in court appears to be properly stamped, and not open to suspicion by any alteration or erasure or other matter on the face of it, and not be barred by prescription, **the court being satisfied of the contents contained in the affidavit shall enter a decree nisi**.

In the instant appeal the District Court being satisfied of the contents contained in the affidavit, the plaint and the annexures filed in court, issued an order nisi, which was duly served on the defendant in terms of section 5 of the Act.

Section 6(1) of the Act, goes on to state, that in an action instituted under this Act, the defendant shall not appear or show cause against the decree nisi, unless he obtains leave of the court to appear and show cause. Thus in this instance, the defendant filed a statement of objections and sought permission of court to appear and show cause.

Vide section 6(2) of the Act, the next step to be followed, upon the defendant filling an application for leave to appear and show cause supported by an affidavit which deals specifically with the plaintiff's claim and clearly and concisely state 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 is for the Court to grant, leave to appear and show cause against the decree nisi, under three instances which are enumerated in section 6(2) of the Act as (a)(b) and (c).

Whilst sub-section (a) speaks of the defendant paying into court the full sum mentioned in the decree nisi; sub-section (b) speaks of the defendant furnishing such security as the court may consider reasonable and sufficient to satisfy the sum mentioned in the decree nisi in the event of it being made absolute. In both these instances, the defendant on its own volition takes the initiative to make good the sum prayed for and obtains leave to appear and show cause.

In **sub-section (c) of section 6(2) a court being satisfied on the contents of the affidavit filed that it discloses 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**, the defendant is granted leave to appear and show cause against the decree nisi issued by court.

In the instant appeal, the *District Court granted leave to appear unconditionally in terms of section 6(2)(c) of the Act which on the face of it is not in accordance with the provisions of the Act* and the plethora of judicial pronouncements made in respect of this subsection. These decisions would be discussed in detail later on in this judgement.

It is undisputed that the defendant in his statement of objections filed by virtue of section 6(1) of the Act, did not move for dismissal of the plaint. The defendant only moved court to grant leave under section 6(2)(c) unconditionally and to file an answer. The defendant adverted to in his statement of objections that it is not necessary to resort to section 6(2)(a) and (b) of the Act and further adverted since the two cheques annexed to the plaint were issued by the defendant in the normal course of day to day banking transactions the defendant had with the plaintiff bank and the sums mentioned in the cheques had already been discounted against the defendant's account and honoured by the bank also in the normal course of banking transactions, the two cheques does not fall within the definition of a 'debt'. The District Court upon filling of the statement of objections granted the defendant leave to appear and show cause unconditionally against the decree nisi and also permitted the defendant to file an answer. This fact too is undisputed.

Vide **section** 7 of the Act, the next step to be followed upon granting of leave to appear is for a **defendant to show cause against the issuance of order nisi by court, by proceeding to trial under summary procedure as laid down in sections 384 to 387 and 390 to 391 of the Civil Procedure Code where the right to begin as well as the burden of proof is on the defendant and the plaintiff only has a right to reply**.

In the appeal before us, the said summary procedure where the right to begin as well as the burden of proof was on the defendant was not followed. It is undisputed that the trial court completely deviated from the stipulated provisions and resorted to regular procedure with the consent of the parties. The District Judge made order in the journal entry that the regular procedure would be adopted and directed the defendant to file an answer.

Upon filling answer, the trial was conducted under regular procedure and the learned District Judge pronounced judgement dismissing the plaint and holding that the instant case ought to have been determined not on the regular procedure but on summary procedure as laid down in the Act. The District Court also held that though the defendant obtained overdraft facility that the plaintiff bank had failed to discharge the burden of proof which was on the plaintiff bank that the 'overdraft' obtained by the defendant was based on a written agreement and that the sum prayed for was a 'debt' and therefore the plaint filed did not fall within the purview of the Debt Recovery (Special Provisions) Act.

Upon appeal, the High Court reversed the decision of the District Court placing reliance on numerous decisions of the Court of Appeal and the fact that the defendant in the statement of objections and in the answer admitted obtaining the 'overdraft facility' and such fact was recorded at the trial as an admission. The learned Judges of **the High Court held that the 'overdraft facility' falls within the definition of 'debt' and in this application the learned District Judge was in error in dismissing the plaint on a mere technicality after holding that the 'overdraft facilities' were obtained by the defendant.**

The High Court also held that the District Court has followed the correct procedure in issuing the order nisi, but by granting leave unconditionally and conducting the show cause inquiry as a trial in the regular procedure, the District Court has acted contrary to the provisions of the Act. The High Court went on to hold that the correct procedure to be followed under the Act was the summary procedure, where the burden of proof is on the defendant and set aside the judgement of the District Court and made absolute the decree nisi issued by the District Court in the first instance.

Upon the said background the defendant/appellant came before this Court. The 1st question of law raised as enumerated earlier is in respect of section 4(1) of the Act and the plaint filed. If I may advert to the 2nd and 3rd questions of law at this juncture, it is in respect of the defence raised by the defendant in the answer and the cross-claim i.e the 'overdraft' obtained by the defendant ought to have been set-off against another facility, requested by the defendant from the plaintiff bank, namely a 'pledge loan to purchase paddy' which the defendant a rice miller, in the normal course of his banking transactions obtained from the plaintiff bank.

The above stated 2nd and 3rd questions of law also highlighted the factual position i.e the defendant anticipating the pledge loan overdrew his account. In this instance, releasing of the pledge loan was delayed. Therefore, the defendant alleged that the account had to be overdrawn not due to his fault but due to the fault of the plaintiff bank and thus a cause of action had not accrued to the plaintiff bank to institute this action against the defendant.

It is observed that the defendant's main contention before the lower court was that the 'overdraft' obtained did not fall within the definition of 'debt' and therefore resorting to the provisions of the Debt Recovery Act was erroneous.

However, the main submission of the defendant before this Court, was that the mandatory provisions of section 4(1) of the Act were not followed. i.e there was no 'agreement' annexed to the plaint and the court ought to have rejected the plaint in limine. Thus, it appears that the defendant had abandoned the contention referred to above that an 'overdraft' does not amount to a 'debt'.

Notwithstanding the above, in the light of the facts of this case, I wish to look at section 4(1) of the Act once again. It envisages when presenting a plaint, to file with the plaint an affidavit, a draft decree nisi and relevant stamps for service of documents. It also envisages in addition, to file in court sufficient number of copies of the plaint, affidavit, 'instrument, agreement or document' sued or relied on by the lending institution as is equal to the number of defendants. Thus with the plaint only an affidavit, decree nisi and stamps, should be presented. The 'instrument, agreement or document' sued or relied upon should be filed in court with sufficient copies to serve on the defendants.

In the instant appeal, it is apparent that the provisions in section 4(1) of the Act were adhered to by the plaintiff bank. To the plaint filed before the District Court was annexed an affidavit, a decree nisi, required stamps, two cheques and a statement of the defendant's current account.

Vide section 4(2) of the Act the court has to be satisfied that the documents annexed to the plaint are properly stamped where it is required to be stamped and be not open to suspicion by reason of any alteration or erasure or other matter on the face of it and not be barred by prescription. It is observed that when presenting the plaint, the plaintiff bank had annexed to the plaint the required documents including the two cheques and the statement of

accounts of the defendant being the ‘instrument, agreement or document’ relied upon by the plaintiff bank to prosecute this case and prima facie complied with the said threshold provisions.

The learned District Judge being satisfied of the plaint presented and the contents of the affidavit that the sum claimed was a ‘debt’ lawfully due to the plaintiff bank and also that necessary copies of the annexed ‘documents’, namely the two cheques and the statement of account had been filed in court and the said documents did not have any infirmities referred to in section 4(2) of the Act as discussed earlier entered decree nisi against the defendant.

Thus, this Court cannot falter the District Court in entering decree nisi in the first instance. The plaintiff bank has filed the required documents referred to in section 4(1) of the Act. The affidavit filed by the plaintiff bank has clearly referred to the fact that the sum claimed was lawfully due to the plaintiff bank. There were no infirmities as stated in section 4(2) of the Act in the said documents. The learned Judge being satisfied of same has acted in terms of the provisions of section 4(2) of the Act. At this point of time, a defendant has no status before court and cannot object to issuance of a decree nisi which is a statutory duty cast on the court.

As discussed earlier the Appellate Courts have determined that an ‘overdraft’ falls within the four corners of the Debt Recovery Act and an ‘overdraft’ falls within the definition of a ‘debt’. The plaint presented was upon the basis that the defendant overdrew his account and did not re-pay the overdrawn sum as signified by the two cheques and the statement of account. The said two cheques and the statement of account were the ‘instrument, agreement or document’ relied upon by the plaintiff bank to sue the defendant. At the point of presenting the plaint what is material is for a court to be satisfied upon the affidavit and the ‘instrument, agreement or document’ presented before it, that the sum claimed is a ‘debt’ lawfully due to the plaintiff bank and the ‘instrument, agreement or document’ annexed to the plaint is in conformity with the threshold provisions of section 4(2) of the Act for a court to issue a decree nisi, an ex-parte order against a defendant. The plaintiff bank had prima facie complied with the said provisions and due process had been followed. Hence, the submission of the appellant that the plaint was not in compliance with the mandatory provisions of section 4(1) as a written agreement was not annexed and thus should have been rejected in limine by the District Court cannot be accepted by this Court.

The next point I wish to consider is whether the District Court ought to have rejected the plaint at the next opportune moment, i.e. when the defendant challenged that the plaint was not in conformity with the provisions of section 4(1) of the Act. The defendant only gets an opportunity to challenge a decree nisi issued by court in the first instance, only when he receives summons and is granted permission and/or leave to appear and show cause against the decree nisi already issued.

As discussed earlier under section 6(2) of the Act, three avenues are open for a defendant to appear and show cause. In the instant case, the court upon the application of the defendant granted unconditional leave to appear and show cause under section 6(2)(c) of the Act.

Thus, the issue I wish to consider now is whether the procedure adopted by the learned District Judge, in granting unconditional leave to appear under section 6(2)(c) of the Act is in accordance with the law and whether the defendant has followed the due process to come before the trial court.

The learned Judges of the High Court in its judgement analysed in depth the course of action followed by the District Court under section 6(2) of the Act and came to the conclusion that granting unconditional leave to appear was not in accordance with the provision of the Act and the judicial pronouncements pertaining to same. I cannot see any reason to reject such proposition for the reasons that would be discussed later in this judgement.

In such a situation, **having obtained leave not in accordance with the law and contrary to the provisions of the Act, can a defendant challenge a plaint filed**? This question in my view is a fundamental issue that this Court will have to determine prior to answering the first question of law with regard to conforming to the mandatory provisions of section 4(1) of the Act. In my view, the defendant should first comply with the law and then only he could complain against violation of the due process of the law.

The learned Judges of the High Court in its judgement came to the finding that the learned District Judge correctly considered the threshold provisions of section 4(1) and 4(2) of the Act and issued the order nisi against the defendant. This was the first Order made by the trial court pertaining to this matter. The second order made by the trial court was granting

leave and the 3rd Order was dismissing the plaint. The High Court went onto hold that in respect of the second and third Orders the learned judge the learned trial Judge acted in violations of the provisions of the Act i.e when granting unconditional leave under section 6(2)(c) and dismissing the plaint on a mere technicality after holding that the defendant obtained overdraft facility and hence set aside the judgement of the District Court.

The learned Judges of the High Court in my view correctly relied on the dicta in the Court of Appeal case of **Perera Vs People's Bank 1994(2) SLR 344** and held in this instant case that granting of unconditional leave to appear and permitting the defendant to file answer was not in accordance with the provision of section 6(1) and 6(2)(c) of the Act. The said Judges after analysing the evidence led also held that in any event the defendant had not disclosed a defence which was prima facie sustainable or triable for a court to grant leave to appear and show cause against the decree nisi issued by court against him.

The learned High Court Judges went on to hold that the District Court by its judgement had frustrated the intention of the Legislature which enacted the Debt Recovery Act by relying on a mere technicality that the overdraft admittedly obtained by the defendant, did not fall within the definition of 'debt' and thus the defendant had got an opportunity of not repaying the 'debt' and the interest thereon legally due and owing to the bank.

The learned Judges of the High Court also adverted to the case of **Kiran Atapattu Vs Pan Asia Bank Ltd [**referred to earlier] wherein it was held whether one calls the sum borrowed an 'overdraft' or a 'loan' if it is capable of being ascertained, then it falls within the meaning of 'debt' and held that the 'overdraft' obtained by the defendant in the instant case amounted to a 'debt'.

The High Court in its judgement referred to three other cases of the Court of Appeal, namely, **People's Bank Vs Lanka Queen International (Pvt) Ltd [1999] 1 SLR 233; Ramanayake Vs Sampath Bank [1993] 1 SLR 145** and **Mercantile Credit Ltd Vs Jayathilake [1993]2 SLR 418** where the provisions of the Debt Recovery (Special Provisions) Act were critically analyzed. The principles laid down in the said cases discussed below, have evolved to form the backbone of debt recovery and trite law and I see no reason to depart from the ratio of the said cases.

In **People's Bank Vs Lanka Queen International (Pvt) Ltd** [supra], the court held that the Debt Recovery (Special Provisions) Act provides for a special procedure for recovery of debts by lending institutions and that according to section 4(1) of the Act, a plaint and an affidavit has to be filed and all that is required to be sworn or affirmed to in the affidavit are words to the effect that 'the sum claimed is justly due to the institution from the defendant'. The Court of Appeal analyzing section 6(2) as amended further stated, that it is mandatory for the defendant to file an application for leave to appear and show cause supported by an affidavit which would deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied on to support it. Commenting further, the Court of Appeal held that the said section does not permit unconditional leave to defend a claim and the minimum requirement under section 6(2)(c) is for the furnishing of security.

In **Ramanayake Vs Sampath Bank** [supra], the Court of Appeal discussed the ambit of section 6 of the Act and specifically with regard to section 6(2)(c) of the Act the Court held it does not permit a defendant unconditional leave to appear on objections which are technical in nature and if a defendant is granted leave unconditionally to show cause against the decree nisi on these types of technicality and evasive denials then the purpose of the Act will be brought to naught. The Court also held that in order to obtain leave, a plausible defence with a triable issue should be disclosed by the defendant in its affidavit and if the defendant has failed to disclose such a defence and raised only a technical objection then leave to appear can be granted only on terms either under section 6(2)(a) and 6(2)(b) of the Act and not under section 6(2)(c) of the Act.

In **Mercantile Credit Ltd Vs Jayathilake** [supra], the Court of Appeal held that where the defendant fails to satisfy court that there is an issue in a question in dispute which ought to be tried as provided for in section 6(2)(c), the decree nisi should be made absolute.

Thus, I am of the view that the High Court having analysed the legal position pertaining to section 6 (2)(c) of the Act as discussed in the cases referred to above, correctly held that the District Judge was in error in granting unconditional leave to the defendant to appear and file answer. Similarly, the High Court was correct when it held that the technical objections raised by the defendant negates the intention of the Legislature.

It is observed that the dicta of the above refereed cases had been further developed and buttressed with the passage of time.

In **National Development Bank Vs Chrys Tea (Pvt) Ltd [2000] (2) SLR 206**, the legal principles referred to earlier were re-iterated and the Court of Appeal held that the Debt Recovery (Special Provisions) Act was specifically introduced by the Legislature to quicken the process of the recovery of 'debt' by lending institutions based upon a special procedure.

In **Zubair Vs Bank of Ceylon [2002]2 SLR 187** too the Court of Appeal held that in debt recovery matters, it would not be correct for the courts to hold against the intention of the Legislature on technicalities.

Similarly in a more recent case, **Seneviratne Vs Lanka Orix Leasing Co. Ltd [2006] (1) SLR 230** the Court of Appeal analysed the legal provisions pertaining to section 6(2)(c) of the Act and held that when the defendants have failed to raise a prima facie sustainable defence in its affidavit or a plausible defence which ought to be tried by court, the defendants are not entitled to unconditional leave on defences based on mere technical objections and evasive denials which have no strength to stand on their own. The court went onto hold that section 6(2)(c) does not permit unconditional leave to defend the claim and that the minimum requirement is furnishing security determined by court and the court can exercise its discretion in determining the amount of security, if the defendant discloses a sustainable defence.

The Debt Recovery Act as discussed is a Special Provisions Act designed and enacted comparatively recently by the Legislature for a particular purpose, namely to regulate and expedite the procedure relating to debt recovery of lending institutions and in my view a court should strive to achieve the said objects in interpreting the provisions of the Act. It is not right or correct for a court to hold against the intention of the Legislature in determining matters coming under the purview of the Act.

If I may repeat myself, whilst section 4(2) of the Act provides for a court being satisfied of the contents of the affidavit to mandatorily issue a decree nisi, section 6(1) of the Act provides that a defendant will not appear or show cause against the decree nisi unless he obtains leave in the manner provided for in section 6(2)(a), (b) or (c). Undoubtedly, in this appeal the defendant obtained leave unconditionally without furnishing any security and not

in the manner provided under section 6(2)(c) of the Act. Thus in my view, the defendant has obtained unconditional leave in violation of the due process of the law. Hence, he should not have been permitted to show cause against the decree nisi issued by the District Court. The defendant should first of all comply with the due process of the law. Thereafter he can complain against the breach of any provision of the law, mandatory or otherwise.

If I may put it in simpler terms, to show cause against the decree nisi, the defendant came before court with soiled fingers and without adhering to the proper procedure and I am of the view that the defendant is estopped and should not be permitted to challenge the plaint filed at a later stage with regard to a threshold issue. Similarly, the defendant who is before court having violated the due process rule, should not be permitted to raise technical objections pertaining to the provisions of the Act, particularly to section 4(1) which lays down a statutory function to be performed by a judge. The intention of the defendant in pursuing these objections is very clear. It is to defeat the very purpose of this piece of legislation brought into existence for a specific reason. Thus, I hold that the High Court correctly considered the objects of this Act when it set aside the judgement of the District Court which dismissed the plaint.

Further, I am inclined to accept that in the instant case, the Judges of the High Court have correctly analysed the legal provisions pertaining to a 'debt' and correctly held that a mere technicality should not defeat the purpose of the Act. I see no reason to disturb the said finding and the Order of the High Court in making 'absolute' the decree nisi already granted by the District Court.

For completeness, let me advert to the contention of the defendant that upon a plain reading of the provisions of section 4(1) of the Act it is mandatorily to file an 'agreement, instrument or document' with the plaint in the District Court. The submission of the defendant was essentially an 'agreement, instrument or document' pertaining to an overdraft sued upon or relied on by the plaintiff bank should be filed in court and the failure to file same in court would render the plaint prima facie defective on the basis that a mandatory requirement had not been followed and in such an instance where a written agreement is not annexed to a plaint, a District Judge cannot issue a decree nisi on a defendant.

However, in the instant appeal, to the plaint was annexed two cheques and a statement of account of the defendant was annexed to the plaint being the 'agreement, instrument or

document' which the plaintiff bank considered sufficient to prosecute this case. Thus, prima facie the provisions in section 4(1) were fulfilled. Whether the plaintiff bank would succeed in its claim upon the defences raised by a defendant is secondary. The section envisages the court to be satisfied that the said provisions have been fulfilled prior to issuance of a decree nisi. Hence, I cannot accept the contention of the defendant that essentially a "written agreement" should be filed and that the two cheques and the statement of account filed with the plaint (which the plaintiff bank considers to be sufficient to prosecute the case) cannot be construed or does not fall within the ambit of an 'agreement, instrument or document.

If the case of the defendant is that he has cause to show against the decree nisi issued or that the said 'agreement, instrument or document' annexed to the plaint does not disclose a cause of action against him, the defendant is free to do so after obtaining leave to appear from court in the manner provided and specifically following the due process of law stipulated in section 6(2) of the Act i.e. under sub-section (a) by paying to court the full sum mentioned in the decree or under sub-section (b) by furnishing security as to the court may appear reasonable and sufficient to satisfy the sum mentioned in the decree or **under sub-section (c) if the court is satisfied on the contains 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.**

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.

Vide-section 6(2) of the Act the defendant could adhere to one of the three avenues open to him and challenge the decree nisi issued by court stating that an 'agreement' was not annexed and/or the documents annexed does not come within the definition of 'debt' and/or any other defence he wishes to take up.

The challenge to the decree nisi by a defendant referred to above should be proved at a trial. Section 7 of the Act provides for the manner and mode of holding a trial. The relevant

procedure for the conduct of the trial is succinctly laid down in sections 384 to 387,390 and 391 of the Civil Procedure Code. According to the said provisions, summary procedure should be adhered to and the right to begin and the burden of proof is on the defendant to establish his defence, whether it pertains to a written agreement not annexed to the plaint or an overdraft does not come within the definition of 'debt' or any other defence, the defendant relies upon.

In the instant case, contrary to the provisions of the Act, the District Court granted the defendant unconditional leave to appear i.e leave to appear was granted without any conditions, not even following the minimum criterion rule laid down by judicial authority of furnishing security at the discretion of court. Furthermore, the court conducted a trial where the right to begin and the burden of proof was reversed. The plaintiff bank had to establish its case and the defendant was given a mere right to reply in violation of the specific provisions of the Act.

Thus in my view, the course of action followed by the District Court in granting unconditional leave and holding a trial under regular procedure was contrary to the due process and the provisions of the Act and especially sections 6(1), 6(2) and 7 of the Act, and the High Court quite rightly by its judgement set aside the said District court judgement and made absolute the decree nisi issued by the District Court. I see no reason to disturb the judgement of the High Court upon the said judgement too.

I would also wish to consider this matter from another perspective. Whether a defendant having obtained leave in accordance with the provision of the Act, could thereafter raise a preliminary objection pertaining to the legality of the plaint filed and thereby challenge the decree nisi issued by a learned District Judge. In my view a defendant cannot resort to such a course of action. Certainly, a defendant could show cause in accordance with the provisions of the Act. If the defendant succeeds in showing cause, vide section 11 of the Act the decree nisi will be discharged and the case dismissed. The defendant may be awarded compensation if it appears to the court that the decree nisi had been obtained by a plaintiff by willful suppression or non-disclosure of any relevant fact. Thus, the Debt Recovery Act in very clear terms provides relief for a defendant who has been unnecessarily brought before court by an over zealous plaintiff. Thus, if the defendant in the instant case succeeded in showing cause he could have got the decree nisi discharged and the case dismissed and may

have even be awarded compensation. Upon the said perspective too, I cannot see any reason to disturb the impugned judgement of the High Court.

In the instant appeal, the defendant when seeking recourse under section 6(2)(c) of the Act and did not move to dismiss the plaint. Having obtained leave to appear unconditionally in violation of the provisions of the Act, the defendant thereafter filed an answer together with a cross-claim for damages in a sum of Rs. 500,000/= against the plaintiff bank, successfully objected to a replication been filed by the plaintiff bank and proceeded to trial on the regular procedure also in violation of the provisions of the Act. The District Court as stated earlier dismissed the plaint and the cross claims of the defendant.

The learned Judges of the High Court in their judgement emphasized that the defendant having failed to move for dismissal of the plaint at the appropriate time thereafter acquiesced and participated at the trial and thus, the defendant cannot resort to challenge the course of action followed by the District Court in issuing the decree nisi on a mere technical ground.

If at the stage of moving court to obtain leave to appear, the defendant prayed for dismissal of the plaint in limine, based upon preliminary objections this case may have taken a different turn. Even having failed to move for dismissal of the plaint in the first instance, if the defendant went through a summary trial as provided under section 7 of the Act and satisfied the burden of proof that was on him, the defendant may have succeeded in obtaining an order in his favour. In such a background and having obtained leave unconditionally, I am not inclined to accept the submission of the defendant that in appeal having obtained leave to appear unconditionally the defendant could raise a preliminary objection pertaining to the mandatory provisions of section 4(1) of the Act, after acting in complete disregard of the due process of the law. Hence upon the said perspective too, I see no reason to interfere with the impugned judgement.

Therefore, in view of the reason more fully dealt above and annalysed in detail, the 1st question of law raised before this Court is answered in the negative.

The 2nd and 3rd questions of law raised before this Court are upon the factual basis that the High Court has failed to consider the defence relied on by the defendant, viz that the defendant was given overdraft facilities by the plaintiff bank on the understanding that the

defendant would be given a pledge loan and that the monies due on the overdraft would be set off against the pledge loan and that the pledge loan was not granted to the defendant by the plaintiff bank on time, and thus in such a background a cause of action had not accrued to the plaintiff bank to institute action against the defendant.

Upon reading of the judgement of the High Court it is manifestly clear, that the High Court correctly considered the defence pertaining to the pledge loan viz-a-viz the overdraft and came to the finding that the said defence was not a tenable, prima facie sustainable defence which a court could have considered in granting leave to appear under sub-section 6(2)(c) of the Act. I see no reason to interfere with the said finding. Further, the wording of the said two questions of law also give credence to the fact that the defendant in fact obtained an overdraft from the plaintiff bank which is the pith and substance and the root cause of action upon which this instant case was filed.

In the said circumstances, the 2nd and 3rd questions of law raised before this Court are also answered in the negative.

In deciding this appeal, I have been mindful of the intention of the Legislature and the judicial pronouncements of the Appellate Courts. The said pronouncements bear ample testimony to the fact that our courts have analyzed and applied the provisions of the Act and have strived to achieve the fundamental objects of the Act, especially the expeditious recovery of debts, without interfering with the procedure and stultifying or nullifying the purpose of the Act.

In the instant appeal, the plaintiff bank obtained decree nisi from the District Court in February 1998. The High Court made the decree nisi absolute in May 2012, 14 years after decree nisi was obtained. Thus, the procedure adopted by the District Court has stultified the objectives of the Debt Recovery (Special Provisions) Act and the intention of the drafters. In the process the defendant has been enriched and had reaped the benefit of the sum overdrawn for almost 25 years. The District Court granted unconditional leave for no apparent reason violating the provisions of the Act and the due process of the law. There was no plausible defence, nor a real or triable question for the District Court to grant leave to appear, leave alone unconditional leave. The technical objections raised by the defendant with regard to an ‘overdraft’ not falling within the definition of a ‘debt’ as well as the plaint not been in conformity with the mandatory provisions of section 4(1) of the Act is untenable.

The High Court correctly analyzed and considered the relevant judicial authorities and the law and set aside the judgement of the learned District Judge and directed that the decree nisi issued be made absolute.

For the forgoing, I see no reason to interfere with the said judgement of the High Court. I hold that the High Court correctly analyzed the legal provisions that an 'overdraft' comes within the term 'debt' as defined in section 30 the interpretation section of the Act and that the plaint filed by the plaintiff bank in the District Court of Tissamaharama is in conformity with the provisions of the Debt Recovery (Special Provisions) Act as amended.

For the reasons adumbrated, I answer all three question of law raised before this Court in the negative and dismiss the appeal.

I uphold the judgement delivered by the Civil Appellate High Court of the Southern Province holden in Tangalle dated 17-05-2012 setting aside the judgement of the District Court dated 08-08-2007 delivered on 17-09-2007 and also making absolute the decree nisi dated 24-02-1998 issued by the District Court of Tissamaharama.

The appeal of the Defendant-Respondent-Appellant is dismissed with costs fixed at Rs. 50,000.00

The appeal is dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.

I agree

Judge of the Supreme Court