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

In the matter of an application under Articles 127 and 128 of the Constitution read with section 5C of the High Court of the Provinces (Special Provisions Act No. 19 of 1990 as amended by Act No. 54 of 2006, for Leave to Appeal against the judgment dated 17/05/2012 delivered by the High Court (Civil Appeal) of the Southern Province holden in Tangalle in Case No. SP/HCCA/TA/12/2007F

**SC Appeal No. 04/2015**

SC/HCCA/LA No. 239/2012

SP/HCCA/TA/12/2007(F)

SP/HCCA/MA/49/2007(F)

DC Tissamaharama DR/01/97

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

**Plaintiff**

**-Vs-**

Mahavidanage Simpson Kularatne
No. 662, 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. 662, Tangalle Road,
Meddewatta, Matara.

**Defendant – Respondent**

**AND NOW BETWEEN**

Mahavidanage Simpson Kularatne
No. 662, Tangalle Road,
Meddewatta, Matara.

(Presently at)

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

**Defendant – Respondent – Appellant**

**-Vs-**

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

**Plaintiff – Appellant – Respondent**

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

Counsel: W. Dayaratne, PC with D. N. Dayaratne for the defendant – respondent – appellant
Rasika Dissanayake for the plaintiff – appellant – respondent

Argued on: 02nd April, 2018

Decided on: 15th September, 2020

**Priyantha Jayawardena PC, J**

I have had the advantage of reading the draft judgment of my sister judge M.N.B. Fernando, PC, J. and I regret that I am unable to agree with her that the instant appeal should be dismissed.

**Facts of the case**

This is an appeal filed by the defendant – respondent – appellant [hereinafter referred to as the "appellant"] to have the judgment of the Civil Appellate High Court of the Southern Province holden in Tangalle [hereinafter referred to as the Civil Appellate High Court] held in favour of the plaintiff – appellant – respondent [hereinafter referred to as the "respondent bank"] set aside on the basis, *inter alia,* that the respondent bank has failed to comply with section 4(1) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 [hereinafter referred to as the "Debt Recovery Act"] and that the sum set out in the plaint did not come within the definition of "debt" in section 30 of the said Act.

The respondent bank had instituted the action in the District Court of Tissamaharama (hereinafter referred to as the "District Court") by filing a plaint and an affidavit of the Manager of the Tissamaharama branch of the respondent bank under the Debt Recovery Act.

Further, the following documents had been filed in the District Court with the plaint at the time of instituting the action:

(i) photocopy of cheque (bearing no. 078296) of Rs. 207,000/-
(ii) photocopy of cheque (bearing no. 078299) of Rs. 23,450/-
(iii) statement of account of the Current Account bearing No. 2404
(iv) copy of the letter of demand dated 30th April, 1997, and
(v) registered postal article receipt

In the said plaint, the respondent bank had prayed for a decree *nisi* in a sum of Rs.2,275,571.30/-, together with 30% interest per annum on the principal sum of Rs. 1,426,482.20/- and 2% turnover tax and 4.5% defence levy on the interest as at 15th August, 1997.

The District Court had entered a decree *nisi* as prayed for in the plaint by the respondent bank, and had served the said decree *nisi* on the appellant.

Thereafter, the appellant had filed an application for leave to appear and show cause together with an affidavit and sought leave of court to appear in the case unconditionally and show cause.

In the said application, the appellant *inter alia* had stated that the action could not be instituted and maintained in terms of the Debt Recovery Act due to the following reasons:

a) the plaint was contrary to section 4 of the said Act as the instrument, agreement or document on which the action was instituted was not filed in court along with the plaint, and
b) the sum set out in the plaint did not fall within the definition of 'debt' as set out in section 30 of the said Act.

Further, the appellant had contended that he was entitled to obtain unconditional leave to appear and show cause in terms of section 6(2)(b) of the Debt Recovery Act.

Having considered the said application for leave to appear and show cause, the learned District Judge had made an order granting the appellant leave to appear unconditionally and show cause against the decree *nisi* issued by the court.

Thereafter, the respondent bank had sought to amend the plaint by adding a new paragraph and filing two additional documents with the amended plaint. The said documents were two letters sent by the appellant to the respondent bank.

The said new averment had stated, *inter alia,* that:

(a) on 06th May, 1994 the appellant forwarded an application to obtain a pledge loan for a sum of Rs. 1, 200,000/- for the purpose of purchasing paddy,
(b) the respondent bank agreed to grant the said loan and therefore, the appellant signed a bond for the value of Rs. 1, 200,000/- in favour of the respondent bank,
(c) the appellant requested for time to obtain the insurance policy required to obtain the said loan,
(d) during the period until the said pledge loan was granted, the appellant overdrew the said Current Account No. 2404 to purchase paddy,
(e) the said overdraft monies were released to the appellant on the understanding that the said monies would be recovered from the pledge loan when it was granted,
(f) as the appellant failed to produce insurance as security, **the respondent bank refused to grant the said pledge loan to the appellant**,

(g) the appellant requested the respondent bank to calculate the interest on the said overdraft monies at the rate of the pledge loan interest, and

(h) as it refused to accede to the said requirement, the appellant defaulted the payment of the said monies.

However, the appellant had objected to the said proposed amendments to the plaint on the basis that it sought to introduce a new cause of action. By order dated 3rd May, 2001, the learned District Judge had upheld the said objection and rejected the amended plaint.

The journal entry No.29 dated 6th September, 2001 in the appeal brief states that the parties agreed to allow the defendant to file the answer and conduct proceedings under the regular procedure stipulated by the Civil Procedure Code, Ordinance No.02 of 1889, as amended [hereinafter referred to as the "Civil Procedure Code"].

Thereafter, the appellant had filed his answer praying for the dismissal of the plaint and a cross claim of Rs. 500,000/- as damages from the respondent bank for the losses he suffered due to the failure of the respondent bank to release the pledge loan on time.

Subsequently, the respondent bank had sought to file a replication and the District Court had allowed the filing of the said replication subject to a pre-paid cost of Rs.3,500/-. Upon the respondent-bank's failure to pay the said pre-payment within the stipulated time, the District Court had made an order refusing to accept the replication of the respondent bank.

During the course of the trial, the respondent bank had suggested that the said two cheques and a document produced by the appellant marked as 'V1' which was an agreement to grant a Pledge Loan to the appellant constituted the written agreement of the impugned overdraft facility. However, as stated above, the said Pledge Loan was not granted by the respondent bank.

Further, after the conclusion of the trial, in its written submissions filed in the District Court, the respondent bank had submitted that the 'mandate' that the appellant had signed at the time of opening the said current account constituted the written agreement upon which the overdraft facility had been provided to the appellant.

The District Court, delivering the judgment, had held that the action which was filed under the procedure set out in the Debt Recovery Act cannot be converted to an action under the regular procedure, as the respondent bank had invoked the jurisdiction of the court under the Debt Recovery Act.

The learned judge of the District Court had further held that the respondent bank failed to prove that an overdraft facility was granted based on a written request or a written agreement. Thus, the sum claimed by the respondent bank in the plaint does not qualify as a "debt" defined in section 30 the Debt Recovery Act.

Moreover, the District Court had held that the respondent bank failed to comply with section 4(1) of the said Act as it failed to file with the plaint the instrument, agreement or document sued upon or relied on by the respondent bank.

Therefore, the District Court had dismissed the action filed by the respondent bank. Further, the appellant's cross claim had also been rejected by the court.

Being aggrieved by the said judgment of the District Court, the respondent bank had preferred an appeal to the Civil Appellate High Court on the ground, *inter alia*, that the said judgment of the District Court was wrong and contrary to law.

Having heard the parties, the Civil Appellate High Court had allowed the appeal of the respondent bank setting aside the judgment of the District Court and had directed the District Court to make the decree *nisi* absolute.

The Civil Appellate High Court had held that the overdrawn monies and its interest can be calculated based on the two cheques produced along with the plaint and that the 'mandate' between the respondent bank and the appellant at the time of opening the account can be considered a written agreement between the parties.

Therefore, the learned Judge of the Civil Appellate High Court had held that the overdrawn monies fell within the definition of 'debt' under section 30 of the said Act.

Further, the Civil Appellate High Court had held that the granting of unconditional leave to appear and defend the claim was contrary to the provisions of the Debt Recovery Act.

Being aggrieved by the said judgment of the Civil Appellate High Court, the appellant filed an application for leave to appeal and after hearing the parties, leave to appeal was granted by this court on the following substantial questions of law:

"a) Have their Lordships of the Civil Appellate High Court failed to address their minds to the fundamental issue of whether the respondent bank 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 issue was raised as a preliminary objection by the appellant?

b) Have their Lordships of the Civil Appellate High Court also failed to consider that the appellant had been given overdraft facilities on the undertaking given by the respondent bank that he would be given a pledge loan and the monies due on the overdraft facility would be set off from the pledge loan?

c) 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 respondent bank and therefore, a cause of action has not accrued to the respondent bank to institute this action against the appellant?"

**Submissions of the appellant**

The appellant relied on section 4(1) of the Debt Recovery Act and submitted that the Civil Appellate High Court had not considered whether the learned District Judge was correct to dismiss the plaint based on the objection of non-compliance with the requirements in section 4(1) of the said Act.

Further, the appellant submitted that the documents that were filed with the plaint did not disclose a written agreement or promise relating to "debt" as defined under section 30 of the said Act.

It was the contention of the appellant that the respondent bank took several different positions in respect of the objection raised by the appellant stating that the sum of money claimed by the respondent bank does not fall within the definition of "debt" as set out in section 30 of the said Act.

The appellant submitted that the respondent bank took up the following different positions at the trial:

(a) The preliminary objections raised by the appellant were premature,
(b) The respondent bank attempted to introduce a new cause of action by filing an Amended Plaint and annexing two letters written by the appellant in respect of the proposed pledge loan agreement between the parties which was not materialized,
(c) Overdraft facilities were not granted based on written agreements,

(d) The document, produced by the appellant marked as 'V1', was the agreement upon which the action was instituted as required under section 4(1) of the said Act.

(e) 'Mandate' signed by the parties at the time of opening the bank account is the relevant agreement as required under section 4(1) of the said Act.

The appellant submitted that the Civil Appellate High Court had failed to consider that even if the respondent bank treated such mandate as the relevant written agreement, it was not filed with its plaint as required by section 4(1) of the said Act.

It was further submitted that the finding of the Civil Appellate High Court that an overdraft comes within the definition of 'debt' according to section 30 is *per incuriam* in view of the Determination made in respect of the Debt Recovery (Special Provisions) (Amendment) Bill [SC Special Determination No. 23/2003 dated 26.08.2003] which stated:

> "Section 2(1) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term 'debt' is defined in section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt "does not include a sum of money owed under a promise or agreement which is not in writing".
>
> [Emphasis Added]

Citing the above determination, the appellant submitted that overdrawing money from a current account without a promise or agreement in writing does not fall within the definition of 'debt' set out in section 30 of the said Act.

In the circumstances, the appellant moved this court to set aside the impugned judgment of the Civil Appellate High Court dated 17th May, 2012 and affirm the judgment of the District Court dated 06th August, 2007.

**Submissions of the respondent bank**

The respondent bank submitted that the appellant maintained a current account bearing No. 2404 at the Tissamaharama branch of the respondent bank. It was submitted that the appellant had overdrawn monies from the said current account on the understanding that the same will be settled when a pledge loan, for which he had applied, was granted by the respondent bank.

However, the said pledge loan could not be finalised as the appellant had failed to furnish the insurance policy required to obtain the said pledge loan.

The respondent bank submitted that *"[t]hough there was no written agreement between the parties for an overdraft facility as required in section 30 of the Debt Recovery Act No. 02 of 1990, the debtor should not be allowed to escape from liability of repayment of the same*" based on technical objections as the appellant had benefitted from the overdrawn monies.

The respondent bank further submitted that the two cheques filed with the plaint showed that the appellant had withdrawn money from the said current account despite having insufficient funds. Thus, the respondent bank contended that the presenting of the said cheques whilst having insufficient funds in the current account necessarily became an agreement between the parties.

Moreover, the Counsel for the respondent bank submitted that the documents produced at the trial by the appellant, marked as 'V1'to 'V4', constitute the written agreement referred to in section 4(1) of the Debt Recovery Act.

The respondent bank cited the cases of *Dharmarathne v. Peoples Bank* (2003) 3 SLR 307 and *Kiran Atapattu v. Pan Asia Bank Corporation* (2005) 2 SLR 276, to support its contention that the overdraft facility obtained by the appellant falls within the meaning of 'debt' as stipulated in section 30 of the said Act. Further, the respondent bank submitted that the Civil Appellate High Court had correctly held in favour of the respondent bank.

Moreover, the respondent bank submitted that the appellant in his application to the District Court for leave to appear and show cause had admitted that he has overdrawn his current account while failing to establish a prima facie defence against the claim of the respondent bank. Thus, it was submitted that the Order of the District Court granting unconditional leave to the appellant was erroneous and that the decree *nisi* should have been made absolute.

The respondent bank further submitted that when the parties have agreed to dispose the matter under the regular procedure, the learned District Judge cannot decide the case under the Debt Recovery Act.

**Issues to be considered in the instant appeal**

The two main issues that need to be considered in the instant appeal in respect of the first question of law stated above are as follows:

(a) whether it is mandatory or directory to file the instrument, agreement or document sued upon or relied on by the institution along with the plaint under section 4(1) of the Debt Recovery Act, and

(b) if mandatory, whether the respondent bank failed to comply with the said requirement to file the instrument, agreement or document sued upon or relied on by the institution along with the plaint.

In order to consider the said two issues, it is useful to examine the legislative history, the scope and applicability of the Debt Recovery Act.

**Legislative History of the Debt Recovery Act**

The substantive laws relating to banking are governed by, *inter alia,* the Banking Act No.30 of 1988 (as amended), Monetary Laws Act No.58 of 1949 (as amended), Bank of Ceylon Ordinance No. 53 of 1938 (as amended), People's Bank Act No. 29 of 1961 (as amended), and State Mortgage and Investment Bank Law No. 13 of 1975 (as amended). The said Acts stipulate the substantive laws in respect of the rights, duties and powers of parties who are subject to the law of banking.

Prior to 1990, actions for recovery of debts by lending institutions could be instituted under the regular procedure or the summary procedure provided for in the Civil Procedure Code.

However, taking into consideration the delays encountered by lending institutions in recovering debts and the impact of such delays, legislation such as Debt Recovery (Special Provisions) Act No.02 of 1990, Mortgage (Amendment) Act No. 03 of 1990, Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 etc. were enacted to expedite the recovery procedure.

**Scope and Application of the Debt Recovery Act**

The preamble to the Debt Recovery Act states:

> "An act to provide for the regulation of <u>the procedure relating to debt recovery</u> by lending institutions and for matters connected therewith or incidental thereto."
>
> [Emphasis Added]

Further, the said Act states that, *inter alia,* sections 384, 385, 386, 387, 390 and 391 in Chapter XXIV stipulating the summary procedure of the Civil Procedure Code are applicable to actions filed under the Debt Recovery Act. Moreover, by section 16 of the said Act, section 758(7) of

the Civil Procedure Code which is applicable to procedure in respect of applications for leave to appeal was amended. Further, section 19 of the said Act contains a *casus omissus* clause whereby the legislator has made provision to apply the procedure laid down in the Civil Procedure Code if the Debt Recovery Act has not provided for any matter or procedure.

A careful consideration of the Debt Recovery Act shows that it does not contain substantive law. In fact, it only stipulates a special procedure to expedite the recovery of debts due to lending institutions.

**Procedural law v. Substantive law**

Procedural law enables a dispute to be brought to court and it prescribes the procedure that is to be followed in litigation. Further, it contains not only the procedure that the court should follow but also the procedure that should be followed by the parties including what requirements must be satisfied by a party to commence legal proceedings. Thus, the underlying purpose of any procedural law is to ensure the fairness of the legal process for all parties involved in the case.

Substantive law governs the facts and the law applicable to a case and it does not provide a legal procedure to adjudicate on the dispute between the parties. The procedural law is ancillary to the substantive law. However, procedural law and substantive law work together in the administration of justice.

Thus, the requirements stipulated under procedural law should not be disregarded as less important as it ensures the validity of the legal process as a whole. However, it is important to note that whilst certain provisions in procedural law are mandatory, the others are discretionary.

Hence, it is necessary to consider whether the procedure stipulated under section 4(1) of the Debt Recovery Act is mandatory or directory.

**Requirements stipulated in section 4(1) of the Debt Recovery Act**

Section 4(1) of the Debt Recovery Act states as follows;

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

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

Hence, according to the said section, any institution filing action for the recovery of a debt under the said Act is required to file a plaint along with an affidavit stating that the sum claimed in the plaint is lawfully due to the institution from the defendant.

Further, it states that the institution should file a sufficient "number of copies of the plaint, affidavit, instrument, agreement or document sued upon, or relied on by the institution" at the time of presenting the plaint to be served on the defendants.

**Is compliance with section 4(1) of the Debt Recovery Act mandatory or directory?**

In order to consider the above, the intention of the legislator has to be ascertained by examining not only the language used in the said section but also the nature and object of having such a provision in the Act, the consequences of non-compliance and similar provisions used in other legislation etc.

The above view was expressed in '*N.S. Bindra's Interpretation of Statutes'*, 9th ed. at page 913 which states:

*"In determination of the question, whether a provision of law is directory or mandatory, the prime object must be to ascertain the legislative intent from a consideration of the entire statute, its nature, its object and the consequences that would result from construing it in one way or the other, or in connection with other related statutes, and the determination does not depend on the form of the statute. It appears to be well settled that in order to judge the nature and scope of a particular statute or rule, i.e., whether it is mandatory or directory, the purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory".* [Emphasis Added]

Accordingly, the following are considered to determine whether section 4(1) of the Debt Recovery Act is directory or mandatory.

***(a) The duty cast on the District Judge under section 4(2) of the Debt Recovery Act***

As stated above, section 4(1) of the said Act states that the instrument, agreement or document sued upon or relied on by the lending institution has to be filed along with the plaint.

Section 4(2) of the Debt Recovery Act states:

> "(2) *If any instrument, agreement or document is produced to court and the same appears to the court to be* ***properly stamped*** *(where such instrument, agreement or document is required by law to be stamped) and* ***not to be open to suspicion*** *by reason of any alteration or erasure or other matter on the face of it,* ***and*** *not to be barred by* ***prescription****,* ***the court being satisfied*** *of the contents contained in the affidavit referred to in subsection (4),* ***shall enter a decree nisi*** *in the form set out in the First Schedule to this Act in a sum not exceeding the sum prayed for in the plaint* ***together with interest*** *up to the date of payment and such costs as the court may allow at the time at making the decree nisi together with such other relief prayed for by the institution as to the court may seem meet and the decree nisi shall be served on the defendant in the manner hereinafter specified*" [Emphasis Added]

Accordingly, the said section casts a duty on the court to be "satisfied" that the instrument, agreement or document produced in terms of section 4(1) of the said Act is properly stamped, not "open to suspicion by reason of any alteration or erasure or other matter on the face of it" and the action is not barred by "prescription" before entering the decree *nisi*.

The words "court being satisfied", in section 4(2) of the said Act, require an independent judicial mind to examine not only the facts stated in the affidavit but also the instrument, agreement or document presented by the lending institution with the plaint in order to determine whether the aforementioned requirements that are stipulated in section 4(1) have been complied with and a *prima facie* case has been established by the lending institution against the defendant, before entering a decree *nisi* in terms of the said Act.

In addition to the above, in terms of section 4(2) of the Debt Recovery Act, the decree *nisi* entered should state "*a sum not exceeding the sum prayed for in the plaint together with interest up to the date of payment and such costs as the court may allow".*

However, the Debt Recovery Act does not stipulate the method by which a court could ascertain the sum claimed as interest. Thus, in terms of section 19 of the said Act, section 192 of the

Civil Procedure should be applied to calculate the interest prayed for by the lending institution, if any.

Section 192(1) of the Civil Procedure Code states:

> *"(1) When the action is for a sum of money due to the plaintiff, the court may in the decree order interest according to the rate agreed on between the parties by the instrument sued on,* ***or*** *in the absence of any such agreement at the legal rate, to be paid, on the principal sum adjudged from the date of action to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the action, with further interest at such rate on the aggregate sum so adjudged from the date of the decree to the date of payment, or to such earlier date as the court thinks fit*". [Emphasis Added]

Thus, in terms of the said section 192(1), "the court may in the decree order interest according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement at the legal rate, to be paid, on the principle sum …."

In respect of the method of calculating interest, Justice Weeramantry in '*Law of Contracts'* Vol. II at page 933, states:

> "The proper method of calculating interest is to work it out up to the date of commencement of action and from thence to the date of decree at the rate agreed. From the date of the decree, the interest may be awarded on the aggregate amount at the legal rate". [Emphasis Added]

When section 192(1) is read with the definition of "debt" in section 30 of the Debt Recovery Act, unless the interest rate is agreed on by the parties under a promise or agreement which is in writing, a court cannot determine the interest that is due to the lending institution by the debtor under the Debt Recovery Act.

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

Thus, I am of the view that section 4(2) of the Debt Recovery Act has imposed a duty on the court to be "satisfied" that not only the principal sum but also the interest claimed thereon are

lawfully due to the lending institution from the defendant before entering the decree *nisi* based on the documents filed with the plaint in terms of section 4(1) of the Debt Recovery Act.

***(b) Rights of a Defendant under the Debt Recovery Act***

If the court enters a decree *nisi* in terms of section 4(2) of the said Act, it requires the decree *nisi* to be served on the defendant along with the documents that are filed in terms of section 4(1) of the Act.

In view of the above it is necessary to consider, whether non-compliance with the said requirement of serving the defendant the instrument, agreement or document sued upon or relied on by the institution along with the decree *nisi* deprives the defendant of his/her rights or causes any injustice and/or prejudice to the defendant in presenting his/her defence.

'*N.S. Bindra's Interpretation of Statutes'*, 9th ed. at page 909 states:

> *"One of the most important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice, and if it does, then the court would say that the provisions must be complied with and that it is obligatory in its character. Mandatory provisions of a statute cannot be ignored merely on the ground of hardship or as merely procedural".* [Emphasis Added]

Once the decree *nisi* is served on the defendant, the defendant is entitled to make an application under section 6(2) of the said Act for leave to appear and show cause as to why the decree *nisi* should not be made absolute. Such an application requires the defendant to state "clearly and concisely what the defence to the claim is and what facts are relied upon to support it".

Principles of procedural law and natural justice require the parties to be given an opportunity to present their case properly and sufficient time to refute the claims of the opposing party. Thus, applying the maxim of *lex non cogit ad impossibilia* (law does not require to do the impossible), if the instrument, agreement or document sued upon or relied on by the institution is not filed with the plaint and served on the defendant along with the decree *nisi*, it would not be possible for him/her to present his/her defence in accordance with the requirements stipulated in section 6(2) of said Act.

***(c) Similar legislations***

Section 705(1) of the Civil Procedure Code applicable to summary procedure on liquid claims which is similar to the provisions set out in the Debt Recovery Act states as follows:

> *"The plaintiff who sues and obtains such summons as aforesaid must on presenting the plaint, produce to the Court, the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon."* [Emphasis Added]

In view of the above, it is evident that the procedural law has made it imperative to produce the instrument, agreement or document upon which a plaintiff sues to be filed along with the plaint when instituting action.

***(d) Literal interpretation of section 4(1) and other relevant provisions in the Debt Recovery Act***

Section 4(1) of the Debt Recovery Act states that the institution "*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."*

Thus, the word "shall" has been used by the legislator when specifying the documents that are required to be filed with the plaint when instituting action under the said Act.

The general meaning of the word "shall" is imperative in nature unless the context in which the word "shall" has been used suggests otherwise or any provision stipulated in the Act is contrary to the said meaning.

Thus, it is necessary to consider the context in which the word "shall" is used in the said section by examining other provisions in the said Act to determine the intention of the legislator.

In terms of section 2(1) of the Debt Recovery Act, a lending institution can recover a "debt" due to it from a debtor by instituting an action in terms of the procedure laid down by the said Act. The word "debt" has been defined in section 30 of the said Act as follows:

> *""debt" means a sum of money which is ascertained* ***or*** *capable of being ascertained at the time of the institution of the action, and which is in default, whether the same be secured or not, or owed by any person or persons, jointly or severally or as principal borrower or guarantor or in any other capacity, and alleged by a lending*

> *institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution, but* ***does not include*** *a sum of money owed under a promise or agreement* ***which is not in writing****."*
>
> [Emphasis Added]

Thus, the Debt Recovery Act enables a lending institution to recover a "*sum of money which* ***is ascertained or capable of being ascertained at the time of the institution of the action***". Further, it excludes "*a sum of money owed under a promise or agreement* ***which is not in writing***.

In view of the above, it is evident that in order to institute an action under the Debt Recovery Act, the "debt" owed to the lending institution must be ascertainable or capable of being ascertained, at the time of the institution of the action, from a promise or agreement which is in writing.

Thus, in order to ascertain the "sum of money" due to a lending institution from the defendant, prior to entering the decree *nisi* under section 4(2) of the said Act, the said institution is required to produce the said written document in court. In this regard, it is pertinent to note that the words "at the time of the institution of the action" used in the said section means at the time the plaint is filed in court.

When interpreting the provisions of the Debt Recovery Act, it is useful to consider the Determinations made by this court pertaining to the Bills of the said Act.

**Clause 30** of the ***Debt Recovery (Special Provisions) Bill of 1990*** defined a debt as follows:

> *"debt" means a sum of money which is ascertained or capable of being ascertained at the time of the institution of the action, whether the same be accrued or not, or owed jointly or severally, but does not include a promise or agreement which is not in writing"*

In *S.C. Special Determination No. 1/90* [*Debt Recovery (Special Provisions) Bill of 1990*], consequent to an objection raised by the Counsel for the petitioners, the learned Additional Solicitor-General had agreed to amend the said Clause 30 to restrict its application to "debts arising from transactions in the ordinary course of the banking, lending, financial or allied business activities of lending institutions".

Accordingly, this Court has determined, *inter alia,* that the definition of "debt" in the said Bill in Clause 30 is inconsistent with Article 12 of the Constitution as it contained a wide scope and that the said definition "upon being amended in the manner stated by the Additional Solicitor-General would cease to be inconsistent therewith".

Thereafter, the definition of "debt" in Clause 30 of the Bill was amended and section 30 of the Debt Recovery Act was enacted restricting the scope of "debt" in accordance with the said Determination of this court.

Subsequently, in 2003, an amendment to the Debt Recovery Act was proposed. Clause 8 of the said ***Debt Recovery (Special Provisions) (Amendment) Bill of 2003*** intended to repeal the current definition of "debt" in section 30 of the Debt Recovery Act and proposed to substitute a definition which excludes the limitation given to the meaning of debt by repealing the words: "include a sum of money owed under a promise or agreement **which is not in writing**".

In *SC(SD) No. 23/2003* [*Debt Recovery (Special Provisions) (Amendment) Bill of 2003*], this court has determined that the suggested amendment to the definition of "debt" by the said Bill was inconsistent with Article 12(1) of the Constitution and stated as follows:

> *"Section 2(1) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term 'debt' is defined in section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt "does not include a sum of money owed under a promise or agreement which is not in writing".*
>
> *In view of the reservation, the special procedure could be resorted to only in instances where there is a written promise or agreement on the basis of which the sum due is claimed. This is broadly similar to the provision in the summary procedure on liquid claims. The amendment in clause 8 of the Bill, repeals the definition of the term "debt" in section 30. The substituted definition excludes the words referred to above which limits its applicability to money owed under a promise or agreement which is in writing. The resulting position is that* ***the court would not have any written evidence of the commitment on the part of the debtor when it issues decree nisi in the first instance.***

> *We are inclined to agree with the submission of the Petitioners that the (amendment) referred to above would extend the application of the special procedure which is more stringent from the point of the debtor to a wider category of persons and to any transaction had with the lending institution, even in the absence of a written promise or agreement".* [Emphasis Added]

Thus, this court has consistently held that actions instituted under the Debt Recovery Act to recover a debt must be based on a promise or agreement in writing so that "written evidence of the commitment on the part of the debtor" could be *prima facie* established before entering the decree *nisi.*

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

Thus, the legislator in its wisdom has enacted the Debt Recovery Act to expedite the procedure of recovering debts due to lending institutions whilst safeguarding the rights and interests of the debtors by, *inter alia,* making it essential for the lending institution to file the written instrument, agreement or document sued upon or relied on by the institution at the time of presenting the plaint to the District Court.

In actions filed under the Debt Recovery Act, there are at least two parties to the transaction of debt. In such circumstances, the law should not be interpreted to strengthen the interests of one party and deny safeguards provided in the said Act to the other. Thus, in the interests of justice and in accordance with the precepts of procedural law and natural justice, the procedure stipulated in the Debt Recovery Act must be strictly complied with by all parties and stringently interpreted to protect the rights of all parties.

Due to the foregoing reasons, I am of the view that the legislator intended the strict compliance with the requirements stipulated in section 4(1) of the Debt Recovery Act and hence, the requirements set out in the said section are mandatory.

Thus, if there is no written instrument, agreement or document sued upon or relied on by the institution, a lending institution is not entitled in law to institute action under the procedure stipulated in the Debt Recovery Act to recover a debt due to the institution.

In the foregoing circumstances, I am further of the opinion that the filing of the instrument, agreement or document sued upon or relied on by the institution along with the plaint as required by section 4(1) of the Debt Recovery Act is a condition precedent to invoke the jurisdiction of the court.

**Did the appellant bank comply with section 4(1) of the Debt Recovery Act?**

It is common ground that the respondent bank has filed certified copies of two cheques, the appellant's statement of account and the letter of demand, along with the plaint and the affidavit of the Manager of the Tissamaharama Branch, at the time of instituting the action in the District Court.

In the instant appeal, the two cheques filed with the plaint only amount to a sum of Rs.230,450/- whereas the principal sum claimed is Rs.1,426,482.20/-. Further, no written promise or agreement was produced to prove the rate of interest agreed upon by the parties. Hence, the total amount of cheques does not add to the total sum of money claimed as "debt" under the Debt Recovery Act by the respondent bank.

Further, the respondent bank has filed the statement of account in respect of the appellant's current account bearing no.2404 along with the plaint. A lending institution may submit a statement of account in court in terms of section 90C of the Evidence Ordinance, No.14 of 1895, as amended [hereinafter referred to as the "Evidence Ordinance"] for the purposes specified in the said section, but *"not further or otherwise*".

According to the rule of interpretation *expression unius est exclusion alterius* (inclusion of one is the exclusion of the other), a statement of account cannot be used for any other purpose other than the purpose stipulated in the said section, particularly in view of the words "*not further or otherwise*" in the said section.

Thus, the statement of account prepared under and in terms of section 90C of the said Ordinance cannot be considered an instrument, agreement or document within the meaning of section 4(1) read with section 30 of the Debt Recovery Act.

Moreover, Justice Weeramantry in 'Law of Contracts', Vol. I, at page 84 states:

> *An agreement is a manifestation of mutual assent by two or more persons to one another. In simpler terms, therefore, an agreement would mean a state of mental harmony regarding a given matter between two persons, as gathered from their words or deeds. Contract generally connotes among other things an actual or notional meeting of minds, for in general without such a meeting of minds a contract does not come into being. Agreement on the other hand, primarily denotes such acts of parties, is an agreement, while it is, if at all, only one of the requisites of a valid contract.* [Emphasis Added]

In preparation of the statement of account, there is no agreement or consensus between the parties which is an essential element of an agreement. Accordingly, a statement of account issued under section 90C of the Evidence Ordinance cannot be considered an instrument, agreement or document within the meaning of section 4(1) of the Debt Recovery Act.

Further, in the instant appeal, it is pertinent to note that the interest rate for overdrawn monies in the statement of account filed by the respondent bank is referred to in certain places as 32% and in other places as 34%. Further, it is not clear from the said statement of account, the interest rate applicable to some other entries relating to overdrawn monies. However, the respondent bank has claimed interest at an interest rate of 30% in the prayer to the plaint. Thus, in any event, the interest claimed by the plaint by the respondent cannot be ascertained by examining the statement of account filed with the plaint.

The appellant had consistently contended throughout the proceedings before the District Court, High Court and this court that there was no written promise or agreement regarding the alleged overdraft facility. However, the respondent bank has taken up different positions in respect of the same which were referred to earlier in this judgment. Some of the said submissions are reproduced below:

(a) an overdraft facility comes under the scope of "Debt" as defined by section 30 of the Debt Recovery Act,
(b) the 'mandate' signed by a customer with the bank when opening an account constitutes a written agreement,
(c) the two cheques together with the documents produced by the appellant marked as 'V1'-'V4' during the proceedings of the trial constitute the written agreement,

(d) even in the absence of a written agreement, the debtor should not be allowed to escape from his liability to repay the overdrawn monies.

The respondent bank cited the cases of *Dharmarathne v. Peoples Bank* (2003) 3 SLR 307 and *Kiran Atapattu v. Pan Asia Bank Corporation* (2005) 2 SLR 276 and submitted that an "overdraft" facility is a "debt" as defined by section 30 of the Debt Recovery Act.

In the said case of *Dharmaratne v. People's Bank* (*supra*), cited by the respondent bank, the lending institution had filed, *inter alia,* a letter by which the debtor had agreed to pay the amount due from him to the institution along with the plaint. Similarly, in *Kiran Atapattu v. Pan Asia Bank Corporation*, the lending institution had filed with the plaint, *inter alia,* a letter by which the debtor, whilst admitting the borrowing of the principal sum, had requested the lending institution to reduce the rate of interest charged therewith. In the instant appeal, there is no instrument, agreement or document to the said effect. Hence, the said cases have no application to the instant appeal.

Further, the issue pertaining to the instant appeal is not whether an overdraft facility comes within the scope of "debt" as defined in section 30 of the said Act. Rather, it is the inability of the court to ascertain the "debt", as required by section 30 of the said Act, because of the failure of the respondent bank to file the written instrument, agreement or document referred to in section 4(1) of the said Act along with the plaint.

Moreover, the respondent bank had submitted in its written submissions filed in the District Court that the mandate signed by a customer with the bank when opening an account can be considered the written agreement required by section 4(1) of the Debt Recovery Act. However, a mandate is a general agreement between a bank and its customer, and thus, it cannot be construed as an instrument, agreement or document within the meaning of section 4(1) of the said Act.

The respondent bank further submitted that the documents produced at the trial by the appellant, marked as 'V1'to 'V4', constitute the written agreement referred to in section 4(1) of the Debt Recovery Act. However, the document marked as 'V1' is an agreement in respect of a pledge loan that was never finalised. The documents marked as 'V2'-'V4' were correspondence between the parties in respect of the said pledge loan. Thus, the said documents have no relevance to the "debt" in issue in the instant appeal. Further the failure to comply with section 4(1) of the said Act cannot be overcome by relying on the documents filed by a defendant in an action instituted under the Debt Recover Act.

The respondent bank, in its written submissions dated 10th July, 2015 filed in this court, submitted that *"[t]hough there was no written agreement between the parties for an overdraft facility as required in section 30 of the Debt Recovery Act No. 02 of 1990, the debtor should not be allowed to escape from liability of repayment of the same*" based on technical objections as the appellant had benefitted from the overdrawn monies.

Thus, the respondent bank has expressly admitted that there is no written agreement between the parties for an overdraft facility as required in section 30 of the Debt Recovery Act. In fact, the respondent bank failed to produce a written promise or agreement to prove that a sum of money is due from the appellant to the respondent bank even during the trial in the District Court.

Further, the material produced in the District Court only shows that the appellant had overdrawn his current account pending the finalisation of the pledge loan that was requested by him. The principal sum and the interest claimed by the respondent bank in the plaint are not ascertained and cannot be ascertained by the two cheques and the statement of account filed by the respondent bank along with the plaint.

Therefore, the respondent bank had failed to comply with the stipulated mandatory procedure in instituting action under section 4(1) of the Debt Recovery Act. Thus, the decree *nisi* should not have been entered by the learned District Judge in terms of section 4(2) of the said Act.

The respondent bank submitted that the District Court erred in law by granting unconditional leave to appear and show cause to the appellant. However, as stated above, since the respondent bank has failed to comply with the mandatory provision of section 4(1) of the Debt Recovery Act, I am of the view that the requirement of furnishing security stated in section 6(2)(a), (b) and (c) of the said Act has no application.

Further, the respondent bank in its petition of appeal to the Civil Appellate High Court has based the majority of its grounds of appeal on the failure of the District Court to deliver the judgment in terms of the regular procedure despite the agreement of the parties to proceed the case under the regular procedure.

Although some requirements in procedural law can be dispensed with upon the agreement of the parties, mandatory requirements in procedural law cannot be circumvented by the consent of the parties. Thus, a court has no power or discretion to convert an action filed under the summary procedure to a regular procedure. Similarly, a court has no power or authority to

disregard the special procedure stipulated under the Debt Recovery Act and follow the regular procedure in an action filed under the Debt Recovery Act. However, in the instant appeal, the District Court has converted the action filed under the procedure stipulated in the Debt Recovery Act to an action under the regular procedure which is contrary to law.

Further, as the trial has proceeded under the regular procedure, it is not possible to make the decree *nisi* absolute at the conclusion of the trial. Hence, the Civil Appellate High Court has erred in law by directing the District Court to make the decree *nisi* absolute. In any event, the Civil Appellate High Court, by directing the learned District Judge to make the decree *nisi* absolute, has also impliedly accepted the finding of the District Court that an action instituted under the Debt Recovery Act cannot be converted to a regular action which resulted in the dismissal of the action.

In view of the above, the learned District Judge is correct in holding that the plaint should be dismissed for non-compliance with the imperative requirements in section 4(1) of the said Act.

Accordingly, I am of the opinion that the following question of law should be answered in the affirmative, as follows:

> *"Have their Lordships of the Civil Appellate High Court failed to address their minds to the fundamental issue of whether the plaintiff/appellant/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 issue was raised as a preliminary objection by the defendant/respondent/appellant?"*
>
> Yes

In view of the above, it is not necessary to consider the other questions of law to which leave to appeal has been granted by this court.

Accordingly, the instant appeal should be allowed.

In the circumstances, I am of the view that the High Court should have dismissed the appeal for the reasons stated above. Thus, I set aside the judgment of the High Court dated 17th May, 2012 and affirm the judgment of the District Court dated 06th August, 2007.

**Judge of the Supreme Court**