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

In the matter of an appeal to the Supreme Court in terms of Sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Code.

S.C. (C.H.C) Appeal No. 69/2013

S.C.HC.LA. No. 74/2012
Case No. HC (Civil) 4/2010/MR

Shahla Cassim,
No. 14, Sulaiman Avenue,
Colombo 05.
PLAINTIFF

Vs.

Sri Lanka Savings Bank,
No. 110 D.S. Senanayake Mawatha,
Colombo 08.
DEFENDANT

AND NOW BETWEEN

Shahla Cassim,
No. 14, Suleiman Avenue,
Colombo 05.
PLAINTIFF-APPELLANT

Vs.

Sri Lanka Savings Bank,
No.110, D.S. Senanayake Mawatha,
Colombo 08.
DEFENDANT-RESPONDENT

Before: **P. Padman Surasena J**
A.L. Shiran Gooneratne J
Arjuna Obeyesekere J

Counsel: Rozali Fernando instructed by F.J. & G. De Saram for the Plaintiff-Appellant.
Dulna De Alwis with Kamal Dissanayake for the Defendant-Respondent.

Argued on: 08.02.2022

Decided on: 22.09.2023

P. Padman Surasena J:

The Plaintiff-Appellant instituted action relevant to the instant case in the District Court of Colombo against the Defendant-Respondent praying *inter alia,* for Specific Performance of the Agreement of Sale bearing No. 749 dated 28.06.2002 produced marked **P 1** (hereinafter sometimes referred to as the Agreement) and an order directing the Defendant-Respondent to execute a Deed of Transfer to have the land which is the subject matter in the Agreement **(P 1**) transferred to the Plaintiff-Appellant. With the establishment of the Commercial High Court, the proceedings of the case were later transferred to the Commercial High Court.

After the conclusion of the trial, the learned Commercial High Court Judge by his judgment dated 30th May 2013, had concluded that the contract entered into by the parties as per the Agreement of Sale bearing No. 749 dated 28.06.2002 (**P 1**) has come to an end due to the impossibility of performance or frustration. The learned Commercial High Court Judge has further held that the Defendant-Respondent is entitled to receive from the Defendant-Respondent, a sum of Rs. Four Million (Rs.4,000,000/-) which is the sum of money paid as the advance payment by the Plaintiff-Appellant as per the Agreement (**P 1**) with the legal interest thereon since 01.11.2002. Being aggrieved by the judgment of the learned Commercial High Court Judge, the Plaintiff-Appellant has lodged the instant appeal to this Court seeking to set aside the judgment of the Commercial High Court dated 30th May 2013.

Before I proceed any further, let me briefly set out the background facts of the case. The Plaintiff-Appellant on 28th June 2002, had entered into the Agreement of Sale (**P 1**) with Pramuka Savings and Development Bank Ltd. (hereinafter sometimes referred to as Pramuka Bank) to purchase the land (belonging to Pramuka Bank) described in the schedule thereto, for a price of Thirty-Five Million Rupees (Rs.35,000,000/-). At the time of execution of the said Agreement the Plaintiff-Appellant had paid a sum of Four Million Rupees (Rs. 4,000,000/-) as an advance payment. As per the Agreement, the Plaintiff-Appellant had undertaken to pay the remainder on or before 30.10.2002.[1]

On 25.10.2002 the Monetary Board of the Central Bank of Sri Lanka (CBSL) had issued an order directing Pramuka Bank to forthwith suspend its business. CBSL by the said order prohibited carrying out any business transactions by Pramuka Bank with immediate effect. This is evident by the letter dated 25th October 2002 produced marked **V 2(a)**. Subsequently, in the year 2007, by press release dated 31.07.2007 marked **P 13** it is apparent that the Government had established a state bank by the name of 'Sri Lanka Savings Bank Limited' (the Defendant-Respondent in the instant appeal) to take over the business of Pramuka Bank. The order vesting the business of Pramuka Bank in the Defendant-Respondent with effect from 01.08.2007 has been produced marked **P 14.**

The Plaintiff-Appellant claims that by virtue of the vesting order marked **P14** all rights and obligations of Pramuka Bank was assigned to the Defendant-Respondent. It is the position of the Plaintiff-Appellant that all rights and obligations including those under the Agreement of Sale (**P 1**) stand transferred to the Defendant-Respondent as the Defendant-Respondent has become 'the successor and/or permitted assign' of Pramuka Bank in terms of the Agreement of Sale. It was in the above backdrop that the Plaintiff-Appellant had taken up the position that the Defendant-Respondent being the successor of Pramuka Bank must be compelled to carry out the specific performance in terms of Clause 6 of the Agreement of Sale.

The Clause 6 of the Agreement of Sale is as follows.

Clause 6

> *"If upon the Purchaser duly observing and performing the terms and conditions set forth in this Agreement and on the part of the Purchaser to be duly observed and*

[1] Paragraph 5 of the Agreement of Sale bearing No. 749 dated 28.06.2002 (**P 1**).

> *performed and if the Owner shall wilfully refuse to execute a Deed of Transfer in favour of the Purchaser in terms of Paragraph 5 hereof the Purchaser shall be entitled to enforce specific performance of this Agreement, or in the alternative the Purchaser would be entitled to receive his advance of Rs,4,000,000/- together with interest thereon and a further sum of Rs.4,000,000/- not as a penalty but as liquidated damages from the Owner."* [2]

Clause 6, by itself, has subjected the entitlement conferred on the purchaser for the specific performance of the Agreement of Sale to three conditions. These conditions are embedded in Clause 6 itself and could be identified as follows:

i. The Purchaser should have duly observed and performed the terms and conditions set forth in the Agreement.
ii. The owner should have wilfully refused to execute a Deed of Transfer in favour of the Purchaser in terms of Paragraph 5.
iii. The entitlement for the specific performance has not been conferred on the purchaser as of a right as a right to an alternative remedy has also been given to the Purchaser namely, an entitlement to receive his advance of Rs. 4,000,000/- together with interest thereon and a further sum of Rs.4,000,000/- not as a penalty but as liquidated damages from the owner.

As there is a reference to Clause 5 in the second condition above, it would also be necessary to look at Clause 5 of the Agreement of Sale. It is as follows.

Clause 5

> *"The purchase shall be completed on or before the Thirtieth day of October Two Thousand and Two (2002) by the Purchaser tendering the balance purchase price of Rs. 31,000,000/- (Rupees Thirty One Million) of lawful money of Sri Lanka to the Owner and the Owner executing a valid and effectual Deed of Transfer in favour of the Purchaser."*

As regards the third condition, it is the position of the Plaintiff-Appellant that damages in lieu of specific performance would not be adequate as obtaining an alternative land, even if considered as substantially equivalent of the promised performance would not only be difficult

[2] Emphasis is mine.

and inconvenient but also be 'undeniably impossible'. The Plaintiff-Appellant has attributed this to the significant increase of the value of the property within the area, over the time. It is on that basis that the Plaintiff-Appellant has insisted on the specific performance as per Clause 6 of the Agreement of Sale.

Be that as it may, the first condition above is a mandatory condition to be fulfilled by the purchaser. In other words, the availability of the remedy of specific performance in terms of that clause is available only when the Plaintiff-Appellant has fulfilled her obligations by tendering the balance purchase price of 31 million Rupees on or before 30th October 2002. This is because the Plaintiff-Appellant relies on Clause 6 of the Agreement, to seek an order for specific performance against the Defendant-Respondent. Having considered the material adduced in this case, I am of the view that this appeal could be disposed of only by considering at the outset, the question whether the Plaintiff-Appellant has fulfilled her obligations by tendering the balance purchase price of 31 million Rupees on or before 30th October 2002.

Indeed, it is the aforesaid first condition which is couched in the first issue raised jointly by both the Plaintiff-Appellant and the Defendant-Respondent. The said issue No. 01 (in verbatim) is as follows:

a) *Was the Plaintiff ready and willing to complete the sale on or before 30.10.2002 by tendering the balance purchase price of Rs. 31,000,000 to Pramuka Savings and Development Bank Limited?*
b) *Was the same accordingly informed to Pramuka Savings and Development Bank Limited through the plaintiff's Lawyer by letter dated 28.10.2002?*
c) *Did Pramuka Savings Development Bank Limited by writing dated 28.10.2002, fax to Plaintiff's lawyer its reply and confirm their Agreement to proceed with the sale of the said Property?*

As there are three limbs in Issue No. 01 let me first consider its limb (a) i.e., whether the Plaintiff-Appellant was ready and willing to complete the sale on or before 30.10.2002 by tendering the balance purchase price of Rs. 31,000,000 to Pramuka Bank. The Plaintiff-Appellant had sought to prove this fact by stating that by 30.10.2002, she had raised the required funds by selling the property in which her mother had resided and was ready to tender the balance purchase price. The Plaintiff-Appellant had sought to substantiate the above fact by relying on the Deed of Transfer produced marked **P3**.

The Deed of Transfer (**P3**) had been produced in the course of the trial 'subject to proof'. That was because of the objections raised by the Counsel for the Defendant-Respondent both at the time of producing it and at the time of closing the Plaintiff-Appellant's case. In the presence of the issues No. 04 and 05, one can understand the underlying reason behind the afore-stated objection to the Deed of Transfer (**P3**) raised by the Counsel for the Defendant-Respondent. The said issues No. 04 and No.5 (in verbatim) are as follows:

d) In terms of the averments contained in paragraph 9 to the Plaint did the Plaintiff enter into the aforesaid Agreement of Sale No. 749 to the purchase for the said property with the specific intention of using the said property for the Plaintiff's residential purposes?

e) In terms of the averments contained in paragraph 10 of the Plaint, on or about 21.10.2002, were the residential premises owned by the Plaintiff's mother Gulnar Saleem sold in order to raise funds to complete the transaction under the Agreement of Sale No. 749.

The above questions have stood as issues to be answered by the Trial Judge. Before I consider this aspect any further, let me at this stage consider briefly, the applicable law in this regard.

Section 154 of the Civil Procedure Code deals with tender of documents in evidence in the course of a trial. The explanation given at the end of that section would have some relevance with regard to this matter. It is as follows:

Explanation to Section 154 of the Civil Procedure Code.

If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.
If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:-

- *Firstly, whether the document is authentic- in other words, is what the party tendering it represents it to be; and*
- *Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.*

> *The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a prima facie case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.*
>
> *If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document.*
>
> *Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it ; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it.*

Let me at this stage consider whether the Deed of Transfer (**P3**) constitutes legally admissible evidence as against the party who is sought to be affected by it even if it is assumed to be authentic. The Deed of Transfer (**P3**) is a document which is required by law to be attested. Therefore Section 68 of the Evidence Ordinance applies in relation to its proof. According to that section, such document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive, and subject to the process of the court and capable of giving evidence.

The Plaintiff-Appellant has neither called at least one attesting witness to give evidence to establish the proof of the execution of **P3** nor adduced any evidence regarding the availability/non-availability of such witnesses. Such evidence is necessary to ascertain: whether the attesting witnesses are alive or have passed away; whether they could be subjected to the process of the court if they are alive; whether they are capable of giving evidence in Court. Thus, in that sense, the Plaintiff-Appellant has not proved the Deed of Transfer (**P3**) according to section 68 of the Evidence Ordinance.

However, the above conclusion is not complete unless and until section 154A of the Civil Procedure Code is also considered in that regard. This is because that section too would apply for such instance. That section is reproduced below for easy reference.

Section 154A of the Civil Procedure Code.

> 1) *Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, it shall not be necessary to adduce formal proof of*

the execution or genuineness of any deed, or document which is required by law to be attested, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless-

a) in the pleadings or further pleadings in an action filed under regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or

b) the court requires such proof

Provided that, the provisions of this section shall not be applicable in an event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.

2) The provisions of subsection (1), shall mutatis mutandis apply in the actions on summary procedure under this Code.

3) Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance, in any case or appeal pending on the date of coming into operation of this Act –

a)

i. if the opposing party does not object or has not objected to it being received as evidence on the deed or document being tendered in evidence; or

ii. if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence, the court shall admit such deed or document as evidence without requiring further proof;

b) if the opposing party objects or has objected to it being received as evidence, the court may decide whether it is necessary or it was necessary as the case may be, to adduce formal proof of the execution or genuineness of any such deed or document considering the merits of the objections taken with regard to the execution or genuineness of such deed or document.

I observe that during the course of the Plaintiff-Appellant's evidence, when the Plaintiff-Appellant marked and produced the relevant Deed of Transfer bearing No. 1456 attested by

Mohamed Cassim Mohamed Muneer the learned counsel who appeared for the Defendant-Respondent in the Commercial High Court had informed court that the documents P3, P6, P7, P8, P9, P10, P11, P12, P15, and P16 must be marked subject to proof.

However, the Plaintiff-Appellant had not taken any step to prove the Deed marked **P3** (that is the document which is relevant for the instant discussion). Moreover, the learned Counsel for the Defendant-Respondent, when the Plaintiff-Appellant closed his case, had informed court that the said documents (P6, P7, P8, P9, P10, P11, P12, P15, P16 and P17) were not proved in terms of the Evidence Ordinance. The record indicates that the learned Counsel who appeared for the Plaintiff-Appellant had been content only by replying to the aforesaid submission of the learned Counsel for the Defendant by saying:

> *"those documents have already been proved and I make the relevant submissions at the end of the trial."*

Thus, it is clear that the Plaintiff-Appellant according to the applicable law set out above had not taken any step to prove the Deed marked **P3**. This is despite the fact that Defendant-Respondent had objected to **P3** being received as evidence and also objected at the close of the Plaintiff's case to the Deed marked **P3** being read in evidence. Therefore in terms of Section 154A of the Civil Procedure Code, the court cannot admit P3 as evidence without requiring further proof.

Let me now consider whether it is necessary in the circumstances of the case at hand, to adduce formal proof of the execution or genuineness of the Deed marked **P3** in the light of the merits of the objections taken by the Defendant-Respondent with regard to the execution or genuineness of the said deed. In this regard let me first ascertain the extent to which the Defendant-Respondent has challenged the Deed marked **P3** in the course of the trial.
To start with, I observe that the Plaintiff-Appellant answering the questions posed to him in the course of the cross examination, has taken up the following positions:

i. She was not an account holder or a depositor of Pramuka Bank.
ii. She was only a bona fide buyer of the relevant property.
iii. She went to purchase the property through a broker.
iv. She went to the bank with her husband.
v. She cannot remember who she met at the Bank.

vi. She had signed the Sales Agreement in front of two Directors, a Company Secretary and the witnesses who were there.

vii. She was living at Duplication Road which she had to sell, the sale of which she concluded through Deed No. P3.

viii. She is now aware that the Deed No. 1275 dated 27.07.1999 (document P1) has been challenged in another case in court.

ix. The Agreement for Sale was entered into in Colombo at Pramuka Bank in their Board Room in Kolpetty, Colombo 3 and the said agreement was not entered into in Wattala.

x. She got to know the suspension of activities of Pramuka Bank on the morning of 28.10.2002 and she had finished the sale of the House at Duplication Road, coincidentally on the same day.

In my view, the nature of the above positions taken up by the Plaintiff-Appellant clearly cast very serious doubts about the authenticity of the impugned transaction. That is not the only factor. The fact whether the consideration mentioned in the Deed **P3** had in fact passed, is another question which cries out for proof. In this regard, I observe that according to the attestation on **P3** the consideration relevant to the said Deed of Transfer which is Rs.35,140,000 (Rupees Thirty-Five Million Hundred and Forty Thousand) had been paid by the purchaser at the execution of the deed in the following manner:

By cash	Rs. 5,000,000/-
By Pay order Commercial Bank of Ceylon Limited dated 11th October 2002 bearing No. 699679	Rs. 6,000,000/-
By Pay order Nations Trust Bank dated 16th October 2002 bearing Nos. 002356 for 002406 for	Rs. 7,640,000 Rs. 12,000,000
By Pay order Commercial Bank of Ceylon Limited dated 21st October 2002 bearing No. 699708	Rs. 4,500,000
Total	Rs. 35,140,000/=

Thus, it is clear that the major part of the consideration has been paid by three pay orders of banks. It is relevant to note that the Plaintiff-Appellant's evidence reveals some relevant and startling facts in this regard. The said evidence has been quoted below which is self-explanatory.

> *"Q: In other words, the money was found only after the suspension order made on the 25th of October 2002?*
> *A: No, "P3" that Deed showing that we sold our house, was completed on the 21st of October 2002. After that we have got the money.*
> *Q. Your position is you got the money on the 21st of October 2002? How did you get that money, you got it in cash?*
> *A. Rs. 5 million in cash, there was a pay order form Commercial Bank, it is all listed in the Deed. All the monies are here. There are three pay orders and cash.*
> *Q. It was Friday?*
> *A. I don't know the day.*
> *Q. You said that you found the money on the 24th of October 2002?*
> *A. 21st of October 2002*
> *Q. How did you get that money, you got it by way of cheque or cash?*
> *A. We had cash and we had three pay orders.*
> *Q. Pay orders?*
> *A. Yes.*
> *Q. You should have deposited those pay order into your account?*
> *A. They would have been deposited because we had to get all the monies realized for us to complete the transactions on or before the 30th.*
> *Q. I am asking now you got the money as pay orders?*
> *A. Yes.*
> *Q. Are you said that you got on the 21st of October 2002?*
> *A. Yes.*
> *Q. When was it encashed?*
> *A. We were ready and willing to sign on that date on the 28th, we got all these monies and put into the bank, they got it that is why between the 21st, there was a few days to get it all together and we were signing on the 28th, with the money intact.*
> *Q. I suggest to you, you are deliberately lying on this issue?*

A. No, I am not telling lie, I don't have the place to live. My identity card gives the same address.

Q. You were not ready with the money even prior to the date of 25th of October 2002?

A. No, I was ready with the money, I can get the Bank confirmation to say that the monies were all realized, were all deposited and it was ready.

Q. Having failed to complete the transaction on or before the 25th of October 2002, 28th of October 2002, you made all the arrangements to write a…"

A closer look at the above evidence shows that the Plaintiff-Appellant had failed to prove to the satisfaction of Court that the consideration had in fact passed through pay orders as claimed by the Plaintiff.

From the answers the Plaintiff-Appellant had given to the questions posed to him by the learned Counsel who appeared for the Defendant-Respondent during the cross-examination, it is clear that the Defendant-Respondent had very seriously and in an unambiguous manner challenged continuously, the authenticity of the Deed of Transfer **P3** and the actual happening of the whole transaction which the Plaintiff-Appellant had claimed to have happened. The place of Agreement which the Plaintiff-Appellant says is not the place mentioned in the relevant document. The Plaintiff-Appellant merely says it is a typographical error. As has already been revealed, there is no adequate proof that the relevant consideration also has passed.

The Plaintiff-Appellant's assertion that the Deed of Transfer **P3** was executed on the same date that she got to know about the suspension of activities of Pramuka Bank by the Central Bank, is also a strange coincidence. Courts are not bound to believe such fanciful stories however much the witnesses harp on them. Further, such evidence must be evaluated in the light of the other infirmities of the evidence of the Plaintiff-Appellant and the very suspicious background in which this transaction had taken place. These suspicious transactions have been more fully revealed in the course of this judgment in the next few pages.

Additionally, certified copies of the Deed of Transfer **P3** have not been submitted and there is no proof of **P3** having been registered at the land registry. There is also no specific date on which the Purchaser had signed that Deed of Transfer. These factors merely add on to increase the questionable circumstances surrounding **P3**.

Thus, having considered the positions taken up by both parties at the trial in relation to the authenticity of the Deed of Transfer **P 3**, I am of the view that the Plaintiff-Appellant is obliged in law to take necessary steps to ensure that the Deed of Transfer (**P3**) is proved. The Deed of Transfer (**P3**) is a notarially executed document; therefore, in the above circumstances, section 68 of the Evidence Ordinance would apply with regard to the proof of **P3**. That is necessary to prove the fact that the residential premises owned by the Plaintiff's mother Gulnar Saleem was sold in order to raise funds to complete the transaction under the Agreement of Sale No. 749.

As stated in the explanation to Section 154 of the Civil Procedure Code the Plaintiff-Appellant has not proved the authenticity of the Deed of Transfer at **P3** even after the learned Counsel for the Defendant-Respondent had objected to the production of the said document.

For the above reasons, I hold that the Plaintiff-Appellant has failed to prove the Deed of Transfer produced marked **P3** and thereby failed to prove that by 30.10.2002, she had raised the required funds by selling the property in which her mother had resided in Duplication Road and was ready to tender the balance purchase price.

Let me next consider limb (b) of Issue No. 01 i.e., whether the Plaintiff-Appellant has proved that she had informed Pramuka Bank by writing dated 28.10.2002, her agreement and readiness to proceed with the execution of the Deed of Transfer to effect the sale of the said Property.

Plaintiff-Appellant has relied on the letter dated 28th October 2002 which has been produced marked **P4** in the Commercial High Court, to prove that she had fulfilled her obligations as per the Agreement (**P1**) by the deadline i.e., 30.10.2002 (vide Clauses 5 and 6 of the Agreement). It would be necessary to read through this letter to ascertain whether the Plaintiff-Appellant had in fact confirmed her agreement and readiness to complete the sale on or before 30.10.2002 by tendering the balance purchase price of Rs. 31,000,000 to Pramuka Bank. The operative paragraphs of the letter **P4** are reproduced below.

> "*….. I write with reference to the Sales Agreement No.749 dated 28th June 2002 entered into between your bank and my client Mrs. Shahla Cassim of No. 7, Dickmans Lane, Duplication Road, Colombo 5 whereby the bank agreed to transfer the aforesaid property to my client on or before the Thirtieth day October*

Two Thousand and Two, in consideration of a sum of Rupees Thirty Five Million (Rs. 35,000,000/-) of which said sum of Rs. 35,000,000/- a sum of Rs. 4,000,000/- was paid to your bank as an advance by my client on 28th June 2002, the balance sum of Rs. 31,000,000/- to be paid at the time of execution of the deed of transfer.

It was agreed between the parties to execute the deed of transfer on the 28th of October 2002 at 2.30 p.m as per the conversation had with your Assistant General Manager Corporate Secretarial & Legal Mr. Surein J.S Peiris. Subsequently my client came to know through media reports that the Central Bank of Sri Lanka had suspended the business of the bank with immediate effect for a maximum period of sixty (60) days thereby placing a legal impediment on the bank to enter into a valid contract.

I wish to state that my client is willing ready and prepared to fulfill her obligations under the aforesaid Sales Agreement No. 749 and expects to and holds the bank responsible, in turn to fulfil the obligations of the bank under the said Agreement.

My client seeks an early resolution to the problem that has risen by the legal impediment placed on your bank to execute a valid contract and requests you to obtain written permission from the Central Bank of Sri Lanka to complete the said transaction.

My client proposes that in view of the circumstances arisen beyond her control that she has be given written notice by Pramuka Savings & Development Bank/ Central Bank as to the date on which the Central Bank lifts the suspension order on the Pramuka Savings & Development Bank to carry out banking activities and that a mutually agreeable date be fixed to sign and complete the aforementioned transaction and such date for signing be within 3-7 working days after receiving such notice.

My client and I await your urgent and earliest response, and an expeditious resolution of the matter. …. ″

A closer look at the letter **P4** shows that the Plaintiff-Appellant was aware that the Central Bank of Sri Lanka had suspended the business of the Defendant-Respondent with immediate effect at the time she had written **P4**. Moreover, there is only one general sentence stating that she was willing, ready and prepared to fulfill her obligations under the Agreement **P1**. However, the purpose and the focus of the letter cannot clearly be taken as a genuine endeavor to get the proposed transaction completed on or before 30th October 2002 by tendering the balance purchase price to the Defendant-Respondent. Indeed, one cannot find a specific assertion in the letter **P4** to the effect that the Plaintiff-Appellant was ready and willing to complete the sale on or before 30th October 2002 by tendering balance Rs. 31,000,000 to the Defendant-Respondent and complete the transaction. To the contrary, **P4** is a mere request made to the Defendant-Respondent urging it to inform her of the date on which the Central Bank would lift the suspension order and to fix a mutually agreeable date thereafter to sign and complete the proposed transaction within 3-7 working days after receiving such notice. This clearly means that **P4** is not a letter which confirms the Plaintiff-Appellants willingness to complete the proposed transaction on or before 30th October 2002. It also does not inform the Defendant-Respondent that the Plaintiff-Appellant has raised the balance purchase price of Rs. 31,000,000 as per the Agreement. Although the learned Commercial High Court Judge had chosen to answer the limb (b) of Issue No. 01 in the affirmative, having regard to the above facts, I am of the view that the letter **P4** should not have been taken as sufficient proof of limb (b) of Issue No. 01. For the above reasons, I hold that the Plaintiff-Appellant has failed to prove to the satisfaction of Court that she had informed Pramuka Bank by writing dated 28.10.2002, her agreement and readiness to proceed with the execution of the Deed of Transfer to effect the sale of the relevant Property.

Let me next consider limb (c) of Issue No.1 i.e., whether Pramuka Bank by writing dated 28.10.2002, confirmed to the Plaintiff-Appellant, its agreement to proceed with the sale of the said Property.

The Plaintiff-Appellant had sought to prove that she had fulfilled her obligations as per the Agreement **P1** by the deadline (30.10.2002) set out in the Agreement relying on **P4** and **P5**. However, as has been mentioned above, the Plaintiff-Appellant at the time of writing the letter **P4,** was aware of the decision taken by the Central Bank as per the document produced marked **V2 (a)** and **V3**. It is appropriate to reproduce the operative part in **P5**, which is as follows:

"We refer to your fax dated 28th October 2002 on the above subject. We have noted the contents thereon and wish to confirm that the Pramuka Savings and Development Bank Limited agreed to same."

It is to be noted that the Monetary Board of the Central Bank of Sri Lanka (CBSL) on 25.10.2002, had issued an order directing Pramuka Bank to suspend its business. The said order had also prohibited it to carry out any business transactions with immediate effect. This is evident by the letter dated 25.10.2002 marked **V2 (a)**. The following paragraphs of **V2 (a)** would shed further light on the matter. They are as follows:

"2. On the basis of the return on capital adequacy submitted by PSDB for the quarter ending 31st March, 2002 and the examination conducted by officers of the Bank Supervision Department of the books and records of the PSDB, thereafter and the subsequent examination conducted consequent to the return for the month ending 30th September 2002 dated 15.10.2002 and the returns referring to in paragraph 1. I am satisfied that PSDB has a substantial negative net worth and around 80% of the bank's advances are non-performing. Even on the basis of the PSDB's subsequent letter of 21.10.2002, around 75% of the bank's advances are non-performing.

3. According to information obtained in the examinations conducted by the officers of the Bank Supervision Dept. and intimated to the PSDB and its Board of Directors from time to time the extremely weak financial situation of PSDB cannot be considered as a temporary phenomenon, because the deterioration of the financial position of PSDB has been continuing over a considerable period of time.

4. On the basis of the above-mentioned examinations and the information furnished by PSDB, I am satisfied that PSDB is insolvent and is likely to become unable to meet the demands of its depositors, and that its continuance in business is likely to involve loss to the bank's depositors and creditors. I have reported accordingly to the Governor of the Central Bank of Sri Lanka in terms of section 76 M (1) of the Banking Act No. 30 of 1988.

5. Having reviewed the facts and circumstances, the Monetary Board of the Central Bank of Sri Lanka has made an Order in terms of the provisions of the

said section 76 M (1) directing PSDB to forthwith suspend business, and has also directed me to take all measures as maybe necessary to prevent the continuation of business by PSDB.

6. The PSDB is hereby informed of the above-mentioned Order of the Monetary Board of the Central Bank of Sri Lanka and is required, in terms of the said Order, to suspend all its business with immediate effect. Accordingly, the PSDB is prohibited from carrying out any business transaction with immediate effect."

The afore-stated contents of **V2 (a)** would proceed to show that the action taken by the Monetary Board of the Central Bank of Sri Lanka was not a sudden action came as a surprise either to the Board of Directors or to the Secretary of Pramuka Bank. Copies of this communication have been sent not only to all the Directors but also to its secretary. Thus, in as much as the Plaintiff-Appellant was aware of this decision (as revealed by **P4**), the Directors and the Secretary of Pramuka Bank were also aware of the direction given by the Monetary Board of the Central Bank of Sri Lanka to suspend its business and cease to carry out all business transactions with immediate effect. The Agreement (**P1**) between the Plaintiff-Appellant and Pramuka Bank is no doubt questionable as both parties had entered into the said Agreement on the verge of the collapse of Pramuka Bank. Although the Plaintiff-Appellant had given evidence that she was prepared with the remainder of the purchase price by 21.10.2002, the Plaintiff-Appellant has failed to satisfy court as to why she waited until the suspension of the business of Pramuka Bank to make that fact known to the other party.

I also observe that the document marked **P4** by the learned Counsel of the Plaintiff-Appellant had been faxed to Pramuka Bank at 11.30 am.

The letter **P5** has been signed by *'Surein J.S. Peiris Assistant General Manager Corporate Secretarial & Legal'*. The letter **P5** does not assert that the author had any authority by the Board of Directors to communicate what it had communicated. **P5** is dated 28th October 2002 and the communication directing the suspension of the business of Pramuka Bank [**V2 (a)**] is dated 25th of October 2002. Therefore, in any case, neither the Board of Directors nor the author of **P5** could legally have written any such letter. I also observe that **P4** and **P5** are both dated on 28th October 2002; both have been faxed to each other giving no room for the Board of Directors to make a considered decision on the purported decision the Pramuka Bank claims to have been made according to the Plaintiff-Appellant as per **P5**. For those reasons, I

hold that the communication **P5** is not lawful communication and hence has no force or avail in law.

For the above reasons, I hold that the Plaintiff-Appellant has failed to fulfil her obligations under the Agreement of Sale (**P1**).

The law on contract is clear that if one party to a contract fails to fulfil his/her obligation said party would be in breach of the relevant contract. Accordingly, a party in breach of contract would not be entitled to an order for specific performance.

According to Clause 6 of the Agreement, which provides for the specific performance, such remedy is available only where the Plaintiff-Appellant had fulfilled her obligations by tendering the balance purchase price of 31 million on or before 30th October 2002.

In the instant case, the Plaintiff-Appellant has clearly breached her obligations under the Agreement of Sale (**P1**). Therefore, she is not entitled to the remedy of specific performance under Clause 6 of the Agreement.

For the foregoing reasons, I proceed to dismiss this appeal with costs fixed at Rs. 200,000/= payable to the Defendant-Respondent by the Plaintiff-Appellant.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne J

I agree,

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J

I agree,

JUDGE OF THE SUPREME COURT