

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

*In the matter of an appeal in terms of section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against a judgment pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.*

S C Appeal (CHC) No. 43/2012

HC Colombo (Civil) 276/2007/ MR

1. Chandra Gunasekera,  
No. 29,  
Albert Crescent,  
Colombo 07.

**2<sup>ND</sup> DEFENDANT - APPELLANT**

-Vs-

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

**PLAINTIFF - RESPONDENT**

Diyagama Mudiyanseelage Duminda  
Gunasekera,  
No. 20,  
Albert Crescent,  
Colombo 07.

Chandima Jayasanka Govinna,  
No. 46/4,  
1<sup>st</sup> Lane,  
Nidharshana Mawatha,  
Galavilawatta,  
Homagama.

**DEFENDANT - RESPONDENTS**

**Before:      Buwaneka Aluwihare PC J**

**Prasanna Jayawardena PC J**

**P. Padman Surasena J**

**Counsel:** Harsha Soza PC with Rajindh Perera for the 2<sup>nd</sup> Defendant -  
Appellant.

Kushan D' Alwis PC with Kaushalya Nawarathne and Gihini  
Yapa for the Plaintiff - Respondent.

Argued on:      26 - 03 - 2019

Decided on: 11 - 10 - 2019

**P Padman Surasena J**

The Plaintiff - Respondent (hereinafter sometimes referred to as the Plaintiff) filed the plaint relevant to this case in the Provincial High Court of the Western Province against three Defendants who are the 2<sup>nd</sup> Defendant - Appellant (hereinafter sometimes referred to as the Appellant or the 2<sup>nd</sup> Defendant), and the Defendant - Respondents (hereinafter sometimes referred to as the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant respectively).

The said plaint has been filed on the basis that a cause of action has arisen against the said Defendants to recover a sum of Rs. 10, 000,000 (Ten million Rupees) from them together with interest thereon. It is the position of the Plaintiff that the Defendants are obliged in law to pay the said sum of money upon a guarantee bond dated 29-11-1994 produced marked **P 5**. The said guarantee bond is a personal guarantee executed by the Defendants in favour of the Plaintiff for the money due to the Plaintiff bank from Wang Lanka Apparels (Pvt) Ltd.

The Plaintiff has taken steps to recover this money from the Defendants as the said Wang Lanka Apparels (Pvt) Ltd has defaulted the amount of money payable by it to the Plaintiff.

After the conclusion of the trial, learned Provincial High Court Judge had held<sup>1</sup> that the Plaintiff bank is entitled to the judgment against the 2<sup>nd</sup> Defendant as prayed for in paragraphs (a) and (b) of the prayer to plaint.

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<sup>1</sup> By his judgment dated 26<sup>th</sup> April 2012.

Arguments advanced by the learned President's Counsel for the 2<sup>nd</sup> Defendant - Appellant are twofold. In essence, they are as follows.

- I. The learned High Court Judge has erred when he failed to appreciate the position of the Appellant that no money whatsoever is due to the plaintiff Bank from the Defendants on the guarantee bond referred to above (**P 5**). It was the position of the Appellant that she has paid Rs. 19,400,000 (19.4 million) to the Plaintiff as a full and final settlement of all claims of the Plaintiff bank.
- II. The learned High Court Judge had erred when he had accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from the said Wang Lanka Apparels (Pvt) Ltd. The learned President's Counsel for the Appellant based this argument on the strength of the judgment in the case of Agostinu Vs Kumaraswamy<sup>2</sup>.

At the outset, it must be stated here that the Appellant at no stage has disputed either the execution of the guarantee bond (**P 5**) or her signing as a guarantor in favour of the bank for a total liability of Rs. 10,000,000. Indeed the Appellant has recorded this fact as an admission in the trial.

The Appellant has also not disputed the fact that the Plaintiff bank had granted among other facilities a block loan<sup>3</sup> of Rs. 5,000,000. It is the outstanding unsettled amount of this loan that the Plaintiff has sought to recover in this proceeding.

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<sup>2</sup> 59 LLR 132.

<sup>3</sup> Item No. 2 in the letter dated 29-08-1994 produced marked **P 7**.

The Appellant while admitting that there were several credit facilities granted in favour of the borrowing company, has taken up the position in the trial that all monies due to the Plaintiff bank from the said borrowing company Wang Lanka Apparels (Pvt) Ltd have been settled consequent to a settlement reached between the said parties. It is therefore the position of the Appellant that she was not liable to pay any further sum to the Plaintiff bank upon the guarantee bond (**P 5**).

Although the Appellant had relied on many documents, none of those documents point to the fact that the Plaintiff Bank had agreed with the Appellant to include the credit facility of the block loan of Rs. 5000,000/= (which is the subject matter of this case), in the settlement relied upon by the Appellant. Thus, it would suffice for this Court to consider the document produced from the file maintained by the Plaintiff Bank marked **2 V 6**. It would be relevant to note that it was the learned Counsel who appeared for the Defendants who had caused it to be produced when the officer of the Plaintiff Bank was being cross-examined. Closer look at the said document (**2 V 6**) shows clearly;

- i. that the personal guarantee of the directors was in respect of the block loan of Rs. 5000,000/= which is the first facility referred to in the table thereof,
- ii. that the Appellant's endeavor was to get the mortgaged property situated at Ottery estate at Dickoya released out of her personal funds,
- iii. that the Appellant had agreed to settle the aforesaid block loan of Rs. 5,000,000/= in monthly instalments,

- iv. that there was a recommendation for the Plaintiff Bank to accept Rs. 19,388,499.42 as a full and final settlement of the overdraft facility.

Moreover, it is to be noted that the Appellant in the course of answering the questions in cross-examination has stated as follows.

ප්‍ර : මහත්මියට තිබෙනවද එකම ලේඛනයක් හෝ ගරු අධිකරණයට ඉදිරිපත් කරන්න ඔය මිලියන 19.4 ගෙව්වේ ඔය වැන් ලංකා සමාගමෙන් අය විය යුතු සියලුම පහසුකම් සම්බන්ධයෙන් කියලා පෙන්වන්න එක ලේඛනයක් තිබෙනවද ?

උ : ලේඛනයක් නෑ. බැංකුවෙන් කිව්වා.

It could therefore be seen that the repayment of the block loan relevant to this case continued to be outstanding even after the settlement of Rs. 19, 400,000 (19.4 million) by the Appellant. It is to be further observed that it is only to discharge the mortgage bonds produced marked **2V 1** and **2V 2** that the plaintiff has agreed to accept the said payment from the Appellant. Further, it could also be seen that the Plaintiff Bank has requested the Appellant to submit a viable repayment program through the document produced marked **P 12** for the re payment of the balance debt of Wang Lanka Apparels (Pvt) Ltd.

Therefore, it is clear that the plaintiff bank had never agreed to accept the said settlement of 19.4 million by the Appellant as a settlement of the sum of money sought to be recovered upon the block loan relevant to the instant case upon the guarantee bond (**P 5**).

I would now turn to the second argument advanced by the Appellant. It is the argument that the learned Provincial High Court Judge had erroneously accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from the said Wang Lanka Apparels (Pvt) Ltd. In advancing this argument, the learned President's Counsel for the Appellant relied on the judgment in the case of Agostinu Vs Kumaraswamy.<sup>4</sup>

Their Lordships in that case has held that 'the only way of proving entries in a banker's book is by either producing the original or certified copies of the entries therein as prescribed by section 90 C' of the Evidence Ordinance.

In evaluating the above argument, it would be necessary to first identify the document, which must be proved in the instant case. The certificate found at the bottom of the document admitted as evidence (**P 9(a)**) would be useful for the identification of the said document. The said certificate states that it 'is a true extract of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd, as appearing in the books of the People's Bank'.

Thus, the original document which must be proved in the instant case could be identified as 'relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., as appearing in the books of the People's Bank contained in ordinary books of the Bank made in the usual and ordinary course of business kept in the custody of the Bank'.<sup>5</sup>

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<sup>4</sup> Supra.

<sup>5</sup> Vide certificate provided at the bottom of **P 9(a)**.

It would be pertinent at this juncture to refer to some of the provisions contained in the Evidence Ordinance regarding proof of documents.

Section 61 of the Evidence Ordinance provides that 'the contents of documents may be proved either by primary or by secondary evidence'.

Therefore, the above-mentioned document in the instant case may also be proved either by primary or secondary evidence.

Section 62 states that 'primary evidence means the document itself produced for the inspection of the Court.'

In the instant case, the document admitted as evidence (**P 9(a)**) is not the original document itself as reflected in the certificate found at the bottom of it. (Said certificate states that it 'is a true extract of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd, as appearing in the books of the People's Bank'). As the document (**P 9(a)**) is not the original document itself, it is clear in the instant case that the original document itself as per section 62 has not been produced.

Section 64 of the Evidence Ordinance states thus "documents must be proved by primary evidence, except in the cases hereinafter mentioned".

As no primary evidence has been adduced to prove the document relevant to the instant case, the question I must focus on next is whether the relevant document in the instant case, could be proved by secondary evidence.

In the run up to the above exercise it is important to note that some such exceptions referred to in section 64 are found in section 65 of the Evidence Ordinance. For the purpose of the case at hand, section 65(7) would be relevant; it is as follows.

### Section 65

*"Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :-*

1) .....

2) .....

3) .....

4) .....

5) .....

6) .....

7) *When the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection."*

It is interesting to note that section 65 has specifically provided that in case (7) above, evidence could be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.<sup>6</sup>

It must be borne in mind that the block loan of Rs. 5,000,000/= has been released to the borrower in November 1994 and the plaint in this case has been filed in the year 2007. This means that the entries pertaining to this loan account is recorded in the books maintained by the Plaintiff Bank

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<sup>6</sup> Last paragraph of section 65.

over the period commencing from year 1994 to year 2007. If the trial Court has to embark on any exercise of calculation of the remaining current balance (sometimes with varying interest rates) of such complex loan account spanning for such a long period, it would no doubt cause serious inconvenience to Court. This Court has to underscore the cumbersome nature of any such exercise by a trial Court. Such an exercise would clearly be a situation described in section 65(7) of the Evidence Ordinance.

Therefore, I am of the view that it is exactly to cater to that kind of situation that section 65(7) has provided that evidence could be given by any person who has examined such documents as to the general result of such documents. Thus, I take the view that the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., as appearing in the books of the People's Bank contained in ordinary books of the Bank made in the usual and ordinary course of business kept in the custody of the Bank could be proved by secondary evidence.

In the backdrop of the above conclusion, I must next embark on examining the question whether the Plaintiff has proved the aforementioned original document by secondary evidence as per the relevant provisions of the Evidence Ordinance.

Section 63(1) of the Evidence Ordinance states as follows;

*"Secondary evidence means and includes -*

*(1) certified copies given under the provisions hereinafter contained;*

- (2) *copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies;*
- (3) *copies made from or compared with the original;*
- (4) *counterparts of documents as against the parties who did not execute them;*
- (5) *oral accounts of the contents of a document given by some person who has himself seen it."*

As has been stated above, it is the statement of accounts produced marked (**P 9(a)**) which has been produced in Court to prove the original document which could be described as 'relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., as appearing in the books of the People's Bank contained in ordinary books of the Bank made in the usual and ordinary course of business kept in the custody of the Bank'.<sup>7</sup>

Therefore, I would first consider whether the said statement of accounts (**P 9(a)**) is a 'copy made from or compared with the original' document to be proved in this case within the meaning of section 63(3).

Section 63(3) of the Evidence Ordinance states that a copy made from or compared with the original would be secondary evidence.

The Evidence Ordinance itself has provided several illustrations to explain further as to how section 63 must be put to use. The illustration (c) under that section would be relevant to understand the underlying meaning of the provision in section 63(3). It is as follows.

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<sup>7</sup> Vide certificate provided at the bottom of **P 9(a)**.

Illustration (c)

*"A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original".*

When scrutinizing the above illustration in the light of the provision in section 63(3) of the Evidence Ordinance, it could clearly be seen that a copy transcribed from and compared with the original would be secondary evidence within the meaning of section 63(3).

The Chief Manager of the Special Assets Unit of the Plaintiff bank Uttumalebbe Ali Mohomed testifying before the Provincial High Court has confirmed in his evidence that the document marked **P 9(a)** was prepared by him from the entries contained in the ordinary ledgers maintained and kept in the custody of the Bank. It was on that basis that the said witness has certified that the document marked **P 9(a)** is a statement containing true extracts of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd, as appearing in the books of the People's Bank and that such entries are contained in the ordinary books maintained in the usual and ordinary course of business kept in the custody of the Bank.

On the above basis, it is not difficult to conclude that the document **P 9(a)** is a 'copy made from or compared with the original' document to be proved in this case as **P 9(a)** clearly falls within the meaning of section 63(3) of the Evidence Ordinance. Such copy falls under the category of secondary evidence (as per section 63) and hence is admissible under section 65(7) of the Evidence ordinance.

Although the above conclusion is sufficient to hold that the learned Provincial High Court Judge is correct when he accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from Wang Lanka Apparels (Pvt) Ltd, I would proceed to consider whether the document (**P 9(a)**) is also admissible as secondary evidence under section 63(1).

Section 63(1) states thus 'certified copies given under the provisions hereinafter contained'. Section 90 C being a section appearing in the Evidence Ordinance after section 63, would fall within the meaning of the phrase "provisions hereinafter contained" appearing in section 63(1).

Section 90 C states as follows.

*"Subject to the provisions of this Chapter a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."*

Before applying the provisions of the above section to decide on the admissibility of a document under that section, one must be mindful of the fact that the term "certified copy" referred to in this section has been defined in the same chapter (chapter VI). It is as follows.

*"Certified copy" means a copy of any entry in the books of a bank, together with a certificate written at the foot of such copy that it is a true copy of such entry; that such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of*

*business; and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title."*

In the light of the above provisions, I must now examine whether the document **P 9(a)** falls under the above definition of "Certified copy".

It must be observed that the following certificate has been provided in the document (**P 9(a)**) by the Chief Manager of the Special Assets Unit of the Plaintiff bank.

"I, Uttumalebbe Ali Mohomed, Chief Manager - Special Assets Unit do hereby certify that the foregoing statement is a true extract of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., No. 86, Sea Beach Road, Colombo 11 as appearing in the books of the People's Bank and that such entries are contained in one of the ordinary books of the Bank and were made in the usual and ordinary course of business and that such books are still in the custody of the Bank."

The Defendants at no stage have challenged the skills of the Chief Manager of the Special Assets Unit of the Plaintiff bank who has certified to Court that the document (**P 9(a)**) is a document showing the general result of all the entries in the originals consisting of numerous accounts.

Thus, I observe that the document (**P 9(a)**) certified as above by the Chief Manager of the Special Assets Unit of the Plaintiff bank clearly is a certified copy within the meaning of the term "certified copy" referred to in section 90C as defined in chapter VI of the Evidence Ordinance.

Therefore, I am of the opinion that the document (**P 9(a)**) is also a 'certified copy' within the meaning of section 63(1) of the Evidence ordinance and hence becomes secondary evidence which is admissible under section 65(7) of the Evidence ordinance.

For the foregoing reasons, I am of the opinion that the remaining current balance of the loan account pertaining to the case at hand could be proved by the document **P 9(a)** as secondary evidence of the ledgers maintained by the Plaintiff Bank with regard to the loan relevant to this case, both as a certified copy falling under section 63(1) and as a copy falling under section 63(3).

Thus, I am of the opinion that the learned Provincial High Court Judge is correct when he accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from the said Wang Lanka Apparels (Pvt) Ltd.

The judgment in the case of Agostinu vs Kumaraswamy,<sup>8</sup> is silent about the definition of the term "certified copy" referred to in section 90C appearing in chapter VI of the Evidence Ordinance. Although the said judgment states, "The document produced is not a certified copy of the entries in the bankers book; but a statement prepared with the aid of those entries certified by the accountant of the bank", it is not clear as to the exact nature of the document produced in that case. Further, the said judgment is not a judgment where the application of section 63(3) and section 65(7) of the Evidence Ordinance has been considered. In those circumstances, I am of the view that this Court should not incline to accept the argument of the learned President's Counsel for the Appellant on the

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<sup>8</sup> Supra.

strength of the said judgment that it was erroneous for the learned Provincial High Court Judge to have accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from Wang Lanka Apparels (Pvt) Ltd.

Thus, on the balance of probability of the evidence led in this case, I am of the view that the learned Provincial High Court Judge is correct when he had granted the Plaintiff the relief claimed by him in prayers (a) and (b) of the plaint by his judgment dated 26<sup>th</sup> April 2012.

In these circumstances, I affirm the judgment of the Provincial High Court dated 26<sup>th</sup> April 2012 and proceeds to dismiss this appeal with costs.

## **JUDGE OF THE SUPREME COURT**

### **Aluwihare PC J**

I had the benefit of reading the judgment of his Lordship, Justice Padman Surasena. Although I am in agreement with the final conclusion reached by his Lordship, with all due deference, I wish to disagree with the views expressed by his Lordship regarding the admissibility of the document marked P9 (a) and would like to set down my reasons for so doing.

The document marked and produced as P9(a), that was relied upon by the Plaintiff Bank, sets out entries relating to the current account

maintained by the Plaintiff Bank, of Wang Lanka Apparels (Pvt) Ltd during the period stated therein. Being a statement of accounts relevant to the impugned loan transaction, the Plaintiff produced P9 (a) in terms of Section 90C of the Evidence Ordinance (under the Chapter "Banker's Books").

At the hearing of the appeal, the Learned President's Counsel on behalf of the Appellant contended that the Learned Judge of the Commercial High Court misdirected himself regarding the admissibility of P9(a) and his contention being that the said document could not be admitted under the provision of Section 90C. The Learned President's Counsel further contended that the Learned High Court Judge failed to apply the principle laid down in the case of *Agostinu v. Kumaraswamy* **59 NLR 132**, regarding the proof of entries in bankers' books.

I shall deal with the applicability of that case later in my judgment. I wish to, however, at the outset address the circumstances under which documents, that come within the definition of the term "banker's books" as defined in Section 90A, could become admissible.

The "bankers' books" in terms of Section 90A of the Evidence Ordinance (as amended) include, ledgers, day books, cash books, account books and **all other books used in the ordinary business of a bank** and also includes data stored by electronic, magnetic, optical or other means in an information system in the ordinary course of business of a bank.

His Lordship Justice Surasena in considering the admissibility of P9 (a) has referred to the general provisions relating to the admissibility of documents under the Evidence Ordinance, namely Sections 61, 63 and

Section 65 and has held that the document could be admitted as secondary evidence under Section 65 (7) of the Evidence Ordinance.

Analysis of the Evidence Ordinance reveals, that the evidentiary provisions in Chapter VI, ("Banker's Books") are stand-alone provisions relating to documents dealing with bank transactions. Chapter VI is a subject-specific evidentiary regime, which a party to a case can safely rely on to produce documents falling within the meaning of "Banker's books" in section 90A without having to invoke the general provisions contained in the Evidence Ordinance relating to documentary evidence, in particular Sections 61, 63 and 65.

It would, in my view, be pertinent to refer to the historical background of these provisions, so that any ambiguity as to the application of the provisions in Chapter VI could be eliminated. In the scheme of the Evidence Ordinance, the general rule is that the original document must be produced to prove the contents of such document. The Evidence Ordinance, however, provides certain exceptions to that rule. One such exception is 'public documents' and the other is 'banker's books'. The significance in the latter is that unlike public documents, banker's books are private documents. **E.R.S.R. Coomaraswamy (Law of Evidence, Vol II book I, at page 156)** states;

*"[N]evertheless, certain cogent, practical reasons have induced the legislature to equate those private documents to the exceptional position of public documents in the matter of their proof in the Courts and to confer a limited immunity on the bankers."*

The immunity conferred on banker's books is embodied in subsection 3 of Section 130 of the Evidence Ordinance. Although not directly relevant to

the present issue, for the sake of completeness, the provision is reproduced below:

130 (3) - "No bank shall be compelled to produce the books of such bank in any legal proceeding to which such bank is not a party, except as provided by section 90D".

The effect of this provision is that an original of a document, which falls within the meaning of "banker's books" can be produced under Section 90 D; effectively shutting out the mandatory application of the general provisions. The rationale behind this provision is that any document which falls within the meaning of "banker's books" can be proved by producing a **certified copy** as stipulated in Section 90C of the Evidence Ordinance.

The "stand-alone nature" of these provisions can be further gleaned from the wording in Section 90C; which reads,

"Subject to the provisions of this Chapter, '**a certified copy**' of any entry in a banker's book **shall in all legal proceedings be received as prima facie evidence** of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as, **the original entry itself** is now by law admissible, but not further or otherwise." (emphasis added)

Thus, a "**certified copy**" of a document (banker's books) in terms of Section 90C,

- a) Constitutes **prima facie evidence** of the existence of such entry, and
- b) Shall **be admitted as evidence** of the matters stated, **as the original** entry itself.

Furthermore, sub-section (6) of Section 65 which deals with the "*cases in which secondary evidence relating to documents may be given*" removes any conflict between the general provisions relating to admission of documentary evidence and the special provisions referred earlier, affecting the same matter.

Section 65 (6) reads thus;

Secondary evidence may be given [...]

(6) "When the original is a document of which **a certified copy is permitted by this Ordinance** or by any other law in force in Sri Lanka to be given in evidence.

Chapter VI, has its roots in the English Bankers' Books Evidence Act of 1879. Explaining the purpose of the said Act, Bankes LJ in **Waterhouse v. Wilson Baker (1924) AER at 775** stated that the Act was passed in the interest of bankers in order to prevent the interference with their business and needless exposure and trouble, and to facilitate the giving in evidence of relevant material contained in their books. In the case of **Parnell v. Wood (1892) 66 L.T. 670**, Lindley LJ stated that the Act was passed mainly for the relief of bankers and to **avoid inconvenience to them by having to produce books in constant use in their business** (emphasis added).

It is a very likely that Sir Fitzjames Stephen when drafting the Evidence Ordinance for India and then Ceylon was mindful of the provisions of the Bankers' Books Evidence Act of England and decided to incorporate parallel provisions of the said Act in our Evidence Ordinance for; such provisions were lacking, in our jurisdiction at the time.

In his 'commentary on the provisions of the Evidence Ordinance', explaining the evidentiary provisions relating to documentary evidence (page 174-175) Sir Stephen comments "*The provisions in the Act are all made in order to **meet real difficulties which arose in practice in England**, and which must of necessity arise over and over again, and give occasion to litigation unless they are specifically provided for beforehand.*"

These comments taken alongside the provisions in the Evidence Ordinance, clearly fortifies the argument that the provisions in the Banker's Books Chapter of the Evidence Ordinance operate independently of the general provisions contained in the Evidence Ordinance relating to proof of documents, in particular, Sections 63 and 65.

**Argument on behalf of the Appellant with regard to the admission of the document marked, P9 (a):**

It was the contention of the Learned President's Counsel that the impugned document P9(a), was admitted in violation of the principle laid down in the case of *Agostinu v. Kumaraswamy (supra)*.

The only question that arose in that case was, whether entries in the books of a banker have been proved in the manner prescribed in Section 90C of the Evidence Ordinance.

In a brief judgement, Basnayake C.J. held that, "Section 90C does not apply to the **'statements produced'**. **The only way of proving entries in a banker's book** is by either producing the original or **certified copies of the entries therein as prescribed by Section 90C**" (emphasis added).

What was produced in Court in the case of *Agostinu* was a bare statement, without **any certification**, and based on some entries which had been certified by the accountant of the bank. It appears, then, that although the original entries of the bank had been certified by the accountant, the transcription of those entries that was produced in Court carried no certification. Basnayake C.J. correctly held that the statement was inadmissible in as much as it is a mandatory requirement under Section 90C, that what is produced in Court should be certified as stipulated in Section 90A of the Evidence Ordinance.

For clarity, the position in the case of *Agostinu* is reproduced below:

"The **document produced is not a certified copy** of the entries in the banker's book; **but a statement** prepared with the aid of those entries **certified by the accountant** of the bank."

In the instant case, however, as opposed to the facts of the case of *Agostinu*, the document marked P9(a) carries a certification to the effect:

"I, Uttumalebbe Ali Mohamed, Chief Manager-Special Assets Unit do hereby certify that the foregoing statement is a true extract of the relevant entries relating to the current account

No. 205002 of Wang Lanka Apparels (Pvt) Ltd., No. 86, Sea Beach Road, Colombo 11 as appearing in the books of the People's bank and that such entries are contained in one of the ordinary books of the Bank and were made in the usual or ordinary course of business and that such books are still in the custody of the Bank.”

Initially, P9 was marked subject to proof (proceedings of 08.03.2010). Subsequently, however, U. Ali Mohamed, the very officer who placed the certification at the foot of the document P9(a) had given evidence.

According to witness Mohamed, it was he who had the prepared documents P9 and P9(a) with the aid of entries in the ledgers maintained by the Bank. (Proceedings of 5.10.2010)

The above in my view is sufficient compliance with the certification prescribed in Section 90A of the Evidence Ordinance and as such the principle laid down in the case of *Agostinu* is not applicable to the instant case.

I also must point out that the Appellant raised no objection when the document was sought to be admitted in evidence by the Plaintiff Bank, when witness Mohamed testified. Furthermore, every party if it is so desired is afforded an opportunity to have the originals inspected, in terms of Section 90E of the Evidence Ordinance, which right the Appellant could have exercised before the trial Judge.

I am also of the view that this is a fit instance to apply the principle laid down in the case of *L. Edrick De Silva v L. Chandradasa De Silva, 70*

**NLR 169.** In the said case (at page 174) Chief Justice H.N.G Fernando held:

*"But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional "matter before the Court", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted."*

When a party is afforded an opportunity to challenge any evidence produced in Court, and does not exercise that right, it would be reasonable for the Court to infer that the party did not do so, because the party was not capable of challenging the same.

In conclusion, therefore, it is my considered view that P9(a) being a document falling within the meaning of "Banker's books" in Chapter VI, need not be admitted as secondary evidence under any of the instances in section 65 of the Evidence Ordinance, save for subsection (6) of that section. Section 65 is exhaustive and secondary evidence can only be produced in the instances referred to under that section. However, these general provisions stand excluded by section 65 (6) which must be interpreted as cross referring to special regimes within the Ordinance namely, Chapter VI (Banker's Books) and the provisions relating to public documents (Section 74 and Section 78 of the Evidence Ordinance). The reason being, on grounds of evidentiary policy, such documents are elevated to the level of an original.

For the reasons set out above, I reject the contention of the Learned President's Counsel for the Appellant that the document marked and produced as P9(a) was wrongly admitted.

Apart from the foregoing, I agree with the conclusions reached by His Lordship Justice Surasena that the Appeal should be dismissed with costs.

JUDGE OF THE SUPREME COURT

Prasanna Jayawardena, PC, J.

I have had the benefit of reading the draft judgments prepared by my brothers, Surasena J and Aluwihare, PC, J.

I am in respectful agreement with reasoning applied by Surasena J when he held that the sum of Rs.19,400,000/- paid by the defendant-appellant to the plaintiff-respondent bank was only a part-settlement of the amounts due then to the plaintiff-appellant bank from the defendant-appellant and that the plaintiff-respondent bank was entitled to have and maintain this action for the recovery of the balance monies which remained due and owing from the defendant-appellant after the sum of Rs.19,400,000/- was paid. Accordingly, I am in respectful agreement with Surasena J's conclusion that the judgment of the High Court must be affirmed and this appeal be dismissed.

However, I state with the great respect that I am unable to agree with the manner in which Surasena J has analysed the provisions of the law which relate to the admissibility of the document marked "P9(a)".

It appears to me that this document was produced in evidence by the plaintiff-respondent bank as a certified copy of entries in a bankers' book

under and in terms of the provisions of Chapter VI of the Evidence Ordinance, which deal with "Bankers' Books".

In his separate judgment, Aluwihare,PC, J has admirably dealt with the principles applicable to the production of bankers' books and certified copies of bankers' books, under and in terms of the Evidence Ordinance. I am in respectful agreement with the views expressed by Aluwihare J on that subject.

In any event, as determined by both Surasena J and Aluwihare,PC, J, the learned High Court Judge correctly admitted the document marked "P9(a)" in evidence and regarded it as cogent evidence in support of the plaintiff-respondent's cause of action seeking to recover the sum prayed for in the action from the defendant-appellant.

For the reasons set out above, I concur with my brothers that this appeal is to be dismissed, with costs.

JUDGE OF THE SUPREME COURT

