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 Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006.

SC Appeal No. 234/2017
SC/HC/CA/LA No.378/2016
WP/HCCA/MT/No. 78/2013(F)
DC Nugegoda No. 1291/10/M

People's Bank,
No. 75, Sir Chittampalm A. Gardiner Mawatha,
Colombo 2.

PLAINTIFF

vs.

Jagoda Gamage Nishantha Pradeep Kumara,
No. 8/18, Katuwawala Lane,
Boralesgamuwa.

DEFENDANT

And between

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

PLAINTIFF – APPELLANT

vs.

Jagoda Gamage Nishantha Pradeep Kumara,
No. 8/18, Katuwawala Lane,
Boralesgamuwa.

DEFENDANT – RESPONDENT

And Now Between

People's Bank,
No. 75, Sir Chittampalm A. Gardiner Mawatha,
Colombo 2.

PLAINTIFF – APPELLANT – APPELLANT

vs.

Jagoda Gamage Nishantha Pradeep Kumara,
No. 8/18, Katuwawala Lane,
Boralesgamuwa.

DEFENDANT – RESPONDENT – RESPONDENT

Before: **L.T.B. Dehideniya, J**
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Rasika Dissanayake for the Plaintiff **–** Appellant **–** Appellant

Written Submissions: Tendered on behalf of the Petitioner on 16th August 2019

Argued on: 26th October 2021

Decided on: 12th December 2022

Obeyesekere, J.

The three questions of law that need to be answered in this appeal are centered on (a) Section 85 of the Civil Procedure Code, and (b) whether the evidence that was presented by the Plaintiff – Appellant – Appellant [*the Plaintiff*] was sufficient to satisfy the District Court that the Plaintiff was entitled to the relief claimed by it.

Background facts

The facts of this matter briefly are as follows.

The Plaintiff is a licensed commercial bank incorporated under the provisions of the People's Bank Act No. 29 of 1961, as amended. In August 2010, the Plaintiff had filed a plaint in the District Court of Nugegoda against the Defendant – Respondent – Respondent [*the Defendant*] claiming a sum of Rs. 565,742.56, together with interest at the rate of 35% per annum with effect from 1st November 2008.

The Plaintiff had averred in the said plaint that on 15th March 2007, the Defendant had opened Current Account No. 306-1002-4053-7427 in his name at the Maharagama Branch of the Plaintiff and that the Defendant had maintained and operated the said current account thereafter. A copy of the mandate signed by the Defendant at the time he opened the said account and which contains the terms and conditions relating to the operation of the said current account had been tendered together with the plaint.

The Plaintiff had stated that on 2nd September 2008, the Defendant had made a request to the Maharagama Branch of the Plaintiff that a temporary overdraft facility of Rs. 1,268,000/= repayable within thirty days, be granted to him on the above current account. I must observe that the plaint does not specify if the said request was made in writing, or was an oral request of the Defendant. Be that as it may, the Plaintiff states that it acceded to the said request and honoured the cheque presented by the Defendant, thereby permitting the Defendant to overdraw his current account, subject to the payment of interest at the rate of 35% per annum on the overdrawn sum of money and the settlement of such amount within thirty days.

It had been averred further that even though the Defendant had settled part of the monies withdrawn on 2nd September 2008, he had failed to settle in full the said overdraft facility in spite of the undertaking given by him that the amount overdrawn will be settled within thirty days. Accordingly, as at 1st November 2008, the current account of the Defendant had a debit balance of Rs. 565,742.56. On 30th November 2008, the said current account had been categorised as a non-performing account.

By letter dated 30th July 2009 sent through its Attorney-at-Law, the Plaintiff had demanded that the Defendant pay the aforesaid sum of Rs. 565,742.56, together with interest at the rate of 35% per annum with effect from 1st November 2008. The Plaintiff states that the Defendant failed to respond to the said letter of demand.

It is in this background that the Plaintiff filed the aforementioned action in the District Court of Nugegoda, seeking judgment *inter alia* in a sum of Rs. 565,742.56, together with interest at the rate of 35% per annum with effect from 1st November 2008 until the date of the decree, and legal interest on the sum awarded until payment in full.

Ex-parte trial against the Defendant

Even though summons had been issued on the Defendant on several occasions, the Fiscal had reported that the Defendant was not available at the address specified in the plaint. Acting on an affidavit filed by the Manager of the Maharagama Branch of the Plaintiff that the Defendant is in fact resident at the said address, the District Court had directed that summons be served on the Defendant by substituted service. The Fiscal had thereafter reported to Court that the summons was pasted at the said address. As the Defendant failed to appear even thereafter on the summons returnable date, the District Court had fixed the case for *ex-parte* trial against the Defendant, as provided for by Section 84 of the Civil Procedure Code.

Evidence on behalf of the Plaintiff had been submitted by way of an affidavit of Chandrani Bogoda, the Manager of the Maharagama Branch of the Plaintiff. Although she had reiterated the aforementioned factual matters set out in the plaint, and categorically

stated that the Defendant had been permitted to overdraw his account by a sum of Rs. 1,268,000.00, she had not produced any documents that reflect a request by the Defendant for the said overdraft facility, nor the cheque by which the Defendant had withdrawn the said sum of money.

The Statement of Account pertaining to the aforementioned current account of the Defendant which had been tendered with the plaint was re-tendered with the affidavit. Although the said Statement of Account comprising of a single page confirms that the current account of the Defendant had a debit balance of Rs. 567, 242.56 as at 4th August 2009, and that the balance had come down to Rs. 565,242.56 by 31st October 2009, the entries relating to the current account on the said Statement of Account are limited to those transactions that had taken place from 15th April 2009. It is observed that neither the entry by which the Defendant made the first withdrawal of Rs. 1,268,000 nor the subsequent payments that the Defendant had made in order to reduce the debit balance to Rs. 565,742.56 by 1st November 2008, are reflected in the said Statement of Account.

Judgment of the District Court

The learned District Judge of Nugegoda, by his judgment dated 7th October 2013, had held as follows:

> "පැමිණිල්ලේ ස්ථාවරය වුයේ මෙම නඩුවේ විත්තිකරු විසින් දිවිරුම් ප්‍රකාශයේ 8 වන ඡේදයේ දක්වා ඇති පරිදි රු. 1,268,000 ක තාවකාලික අයිරා පහසුකමක් 2008.09.02 දින හෝ ආසන්න දිනයක අයැද සිටින ලද අතර එම 2008.09.02 දින ගිණුමට අයිරා කරන ලද බවයි. මෙම නඩුවේදි පංගම ගිණුම ආරම්භ කිරීමට අදාල කොන්දේසි හා මැන්ඩේට් පත්‍ර ඉදිරිපත් කර තිබුණත් එසේ **පැමිණිලිකරු කියා සිටින පරිදි 2008.09.02 දින පැමිණිල්ලේ දක්වා සිටින පරිදි ගිණුම අයිරා කළ බව සනාථ කිරීමට මෙම නඩුවේ කිසිදු ලේඛණයක් ඉදිරිපත් කර නැත්තේ ය.** ඒ අනුව පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද කරුණු සනාථ වී ඇති බවට අධිකරණයට සෑහීමට පත් වීමට හැකියාවක් නැත. එබැවින් මෙම නඩුව ගාස්තු රහිතව නිෂ්ප්‍රභා කරමි."

Thus, it is clear that the learned District Judge had dismissed the action due to the failure on the part of the Plaintiff to produce any documents to satisfy Court that the Defendant overdrew his current account on 2nd September 2008.

Appeal to the Provincial High Court

Dissatisfied with the said judgment of the District Court, the Plaintiff had lodged an appeal with the Provincial High Court of the Western Province holden in Mount Lavinia. The position of the Plaintiff before the High Court was that the evidence that had been presented in support of the claim was sufficient to establish that the Defendant had been granted an overdraft facility which was outstanding and that the learned District Judge had erred in dismissing the action.

By its judgment delivered on 28th June 2016, the learned Judges of the High Court had held as follows:

> "*A perusal of the impugned judgment reveals that the learned District Judge has found that* ***no evidence has been made available to prove that such overdraft facility was granted to the Defendant-Respondent on 02.09.2008****. The document marked as P4 [the bank statement] is the only document which shows the arrears in the account of the Defendant-Respondent. However****, a close examination of that document does not reveal that such amount became due upon such overdraft facility granted to the Defendant on that date.*** *It appears that the learned District Judge has found that no evidence has been made available by the Plaintiff to prove that such amount was granted as overdraft facility upon a request made by the Defendant-Respondent as well and it is not clear how that amount became due from the Defendant. Once the Plaintiff pleads that it granted such overdraft facility to the Defendant on a certain date and fell in arrears,* ***the burden rests on the Plaintiff to submit sufficient evidence to substantiate such position irrespective of the fact that trial was held ex-parte****.*
>
> *In those circumstances, I am of the view that there is no sufficient material available to interfere with the findings of the learned District Judge.*" [emphasis added]

Aggrieved by the dismissal of its appeal by the High Court, the Plaintiff invoked the jurisdiction of this Court in terms of Article 128(2) of the Constitution and sought leave to appeal against the said judgment of the High Court. The Defendant failed to appear before this Court, as well, even though notices had been issued on several occasions to the Defendant through the Registrar of this Court.

Questions of law

On 24th November 2017, this Court granted the Plaintiff leave to appeal on the following Questions of Law:

"1) *Did the learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden in Mount Lavinia as well as the learned District Judge of Nugegoda err in law when they failed to evaluate the evidence of the case properly?*

2) *Did the learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden in Mount Lavinia as well as the learned District Judge of Nugegoda misdirect themselves when they held that sufficient evidence has not been disclosed by the Petitioner to prove the grant of the overdraft facility and the amount due in as much as the then Manageress of the Peoples Bank Maharagama in her evidence categorically stated about the same?*

3) *Did the learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden in Mount Lavinia as well as the learned District Judge of Nugegoda misdirect themselves when they did not consider the fact that there is sufficient evidence to prove the Petitioner's case in the affidavit submitted to the District Court*."

The essence of the above questions of law is that there was sufficient evidence before the District Court for it to have arrived at a finding that the Defendant had obtained a temporary overdraft facility and that the said facility has not been settled in full, as pleaded by the Plaintiff, and that both the District Court and the High Court erred in law by failing to evaluate the said evidence in terms of the law.

The principal submission of the learned Counsel for the Plaintiff was that the evidence of the Manager of the Maharagama Branch of the Plaintiff that the Defendant had been permitted to overdraw his current account by a sum of Rs. 1,268,000 and that as at 1st November 2008, a sum of Rs. 565,742.56 was due and payable by the Defendant to the Plaintiff was sufficient for the District Court to have entered judgment in favour of the Plaintiff, especially since this evidence has neither been challenged nor contradicted before the District Court.

Sections 84 and 85 of the Civil Procedure Code

The starting point in considering the above questions of law is Section 84 of the Civil Procedure Code, which reads as follows:

> *"**If the defendant fails to file his answer on or before the day fixed for the filing of the answer**, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed (or the hearing of the action, **and if the court is satisfied that the defendant has been duly served with summons,** or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then **the court shall proceed to hear the case ex parte forthwith**, or on such other day as the court may fix."*

Section 85(1) of the Code, which was introduced by the Civil Procedure Code Act No. 20 of 1977 and the legislative history of which has been traced in **Sirimavo Bandaranaike v Times of Ceylon Ltd** [(1995) 1 Sri LR 22], sets out the burden that must be discharged by a plaintiff once an action has been fixed to be heard *ex parte.*

Section 85(1) reads as follows:

> *"The plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court, **if satisfied that the***

***plaintiff is entitled to the relief claimed by him**, either in its entirety or subject to modification, may enter such judgment in favour of the plaintiff as to it shall seem proper, and enter decree accordingly."*

In **Sirimavo Bandaranaike v Times of Ceylon Ltd** [supra], Mark Fernando, J having considered the submission on behalf of the defendant that Section 85 required the trial Judge be satisfied at least *prima facie* and that this pre-supposed a judicial determination, held as follows [at page 37]:

*"Section 85(1) requires that the trial judge should be "satisfied" that the Plaintiff is entitled to the relief claimed. The Defendant's case is that if in fact he was not satisfied, or if on the evidence he could not reasonably have been satisfied, the error was so serious as to prejudice the substantial rights of the Defendant and to occasion a failure of justice. **The question is whether entering an ex parte default judgment is a mere formality, or whether a hearing and a proper adjudication are necessary**.*

***The plain meaning of the word "satisfied" in section 85(1) is that the trial judge must reach findings on the relevant points after a process of hearing evidence and adjudication**, and that he cannot enter judgment for the plaintiff as a matter of course. It is unnecessary to rely on the Indian decisions cited by Mr. Seneviratne as I find that there are four other independent and compelling reasons for this interpretation: the immediate context of section 85(1), the basic principles of justice underlying the Code, the legislative history of this and similar provisions, and judicial decisions in regard to those provisions.*

*Section 85(2) shows that a judge may award the plaintiff less than what is claimed if in his opinion the entirety of the relief cannot be granted. Obviously such an opinion can only be reached after hearing evidence and **judicially assessing that evidence in relation to the ingredients of the Plaintiff's cause of action**. Further, sections 84, 86 and 87 all refer to the judge being "satisfied" on a variety of matters: in every instance, such satisfaction is after adjudication upon evidence. It must be presumed that the word "satisfied" occurring in several sections in the same Chapter of the Code has the same meaning.*

There is no express provision which empowers a judge to enter an ex-parte default judgment without a hearing and an adjudication on the merits. It would be contrary to the basic principles of the judicial process to interpret the word "satisfied" so as to allow such a power; there is in a democracy no unfettered, absolute, or arbitrary power, even in the judiciary.

I hold that an ex parte default judgment cannot be entered without a hearing and an adjudication." [emphasis added]

In **The Finance Company PLC v Jayakody Arachchige Don Thushara and Others** [SC Appeal No. 05/2012; SC Minutes of 26th January 2017], the plaintiff had entered into an agreement with the 1st defendant for the lease of a motor vehicle. The plaintiff had terminated the said agreement upon the failure on the part of the 1st defendant to pay the monthly rentals and interest specified therein. Having taken steps to sell the said vehicle and credit the sale proceeds against the balance due on the lease agreement, the plaintiff instituted action to recover the balance sum of money due under the said agreement. As in this case, the defendant did not file answer, the case against the defendant was fixed *ex parte* and evidence of the plaintiff was given by way of an affidavit. The learned Trial Judge had dismissed the plaintiff's action, *"primarily, on the ground that, although the Affidavit of the Plaintiff's witness stated that the vehicle had been sold for Rs.1,275,000/- and that the sale proceeds had been applied in reduction of the amount due from the Defendants Respondents, the Plaintiff has not adduced any further details regarding the alleged sale and has not produced any documents relating to the sale."*

On appeal, Prasanna Jayawardena, J held as follows:

*"**There is no doubt that**, as clearly stated in Section 85 (1) of the Civil Procedure Code, **judgment could be entered for the Plaintiff in an ex-parte trial only if the Court is satisfied that the evidence placed before Court establishes that the Plaintiff is entitled to that judgment**. This rule has been emphasized in several decisions including Sirimavo Bandaranaike vs. Times of Ceylon Ltd and Seneviratne vs Dharmaratne [(1997) 1 Sri LR 76]. Therefore, the learned Trial Judge was fully*

entitled to dismiss the Plaintiff's action in the present case, if the evidence placed before the Court at the ex-parte trial was, in fact, not sufficient to establish the Plaintiff's case.

When determining whether or not this burden of proof has been discharged in an ex parte trial, it has to be kept in mind that, ***a Plaintiff who adduces evidence at an ex parte trial is, usually, required to adduce only such evidence as is necessary to establish his case on a prima facie basis*** *by establishing the constituent elements of his Cause of Action. This is subject to the Court seeing* ***no reason to doubt the authenticity and bona fides of the evidence****."* [emphasis added]

It is therefore seen that for judgment to be entered in favour of the Plaintiff at an *ex parte* trial, it is critical that the learned Trial Judge must be satisfied on a prima facie basis that the Plaintiff is entitled to the relief claimed by him. In order to satisfy himself, the learned Trial judge must hear and consider the evidence and thereafter engage in a judicial assessment of the evidence in relation to the constituent elements of the plaintiff's cause of action. It is only after having done so, and where the learned Trial Judge is satisfied that the plaintiff has discharged that burden can the learned Trial Judge enter judgment in favour of the Plaintiff.

Temporary Overdraft facilities

I shall now consider the nature and form of an overdraft in order to determine the constituent elements thereof.

A customer who does not have sufficient funds in his account but who has an urgent or sudden requirement for money although for a limited purpose and a temporary period, may seek the assistance of his/her bank by requesting such sum of money either orally or through a written request, depending on the relationship that exists between the customer and the bank. The easiest form of making this sum of money available to the customer is by permitting the customer to overdraw his current account. The withdrawal would generally be through a cheque of the customer, with the standard terms of the bank relating to the settlement of overdrafts being applicable thereto. In most instances,

this would be a one-off overdrawing of the account and is a pure and simple temporary overdraft facility.

The essential feature of an overdraft facility is that the customer is permitted to withdraw from his current account a sum of money over and above the credit balance available in such account, or in other words to overdraw the account in spite of the account not having sufficient funds.

An overdraft facility can take many forms, and accordingly, the terms and conditions subject to which:

(a) the customer would be permitted to overdraw his current account including the rate of interest payable on the overdrawn amount; and

(b) the manner in which the overdrawn sum of money must be re-paid, including the period within which it must be paid,

would vary from one form to the other.

In **Gunawardana v Indian Overseas Bank** [(2001) 2 Sri L.R 113 at pages 119-120] Wigneswaran, J described an overdraft facility in the following manner: -

> "*overdraft facility is afforded by a bank by permitting a customer to overdraw his current account up to certain limits. The current account being operative and in force the facility too will continue to be operative until cancelled and or unless the money due to the bank is demanded by it. If the customer does not take steps to pay-off the overdrawn amount, interest will accrue on such overdrawn amount and shall continue to be a debt due to the bank until there is a repayment of the debt or cancellation of the debt. The overdraft facility itself will come to an end, as stated above, on the cancellation of the facility or when the bank demands repayment. This would be generally so unless there are special arrangements to the contrary*."

In **Bank of Ceylon v Aswedduma Tea Manufacturers (Pvt) Limited** [SC Appeal 175/2015; SC Minutes of 6th October 2017], which was cited with approval by Murdu Fernando, J in **Sampath Bank PLC v Kaluarachchi Sasitha Palitha** [SC Appeal 196/2011; SC Minutes of 9th September 2019], Anil Gooneratne, J referred with approval, two English judgments that capture the essence of a one-off overdraft facility.

The first was **Peter Royston Voller v Lloyds Bank PLC** [No. B3/99/1177; 19th October 2000] where Justice Wells of the Court of Appeal (Civil Division) held that:

> "*In my judgment, the position is very simple and well established as a matter of banking law and practice. It is this. If a current account is opened by a customer with a bank with no express agreement as to what the overdraft facility should be, then, in circumstances where the customer draws a cheque on the account which causes the account to go into overdraft, the customer, by necessary implication, requests the bank to grant the customer an overdraft of the necessary amount, on its usual terms as to interest and other charges. In deciding to honour the cheque the bank, by implication accepts the offer*."

The next was **Barclays Bank Ltd v W.J. Simms Son and Cooke (Southern) Ltd and Another** [(1980) 1 QB 699] where Goff, J held as follows:

> "*It is a basic obligation owed by a bank to its customer that it will honour on presentation cheques drawn by the customer on the bank* ***, provided that there are sufficient funds in the customer's account to meet the cheque****, or* ***the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque****. Where the bank honours such a cheque, it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque, and further that the bank's payment is effective to discharge the obligation of the customer to the payee on the cheque, because the bank has paid the cheque with the authority of the customer.*
>
> *In other circumstances, the bank is under no obligation to honour its customer's cheques. If however a customer draws a cheque on the bank without funds in his*

account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. ***If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities****; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque*." [emphasis added]

Thus, it is clear that while each withdrawal over and above the available credit balance will be by cheque, each such withdrawal need not be accompanied by a separate written request.

<u>Permanent Overdraft facilities</u>

There may be instances where a customer faces short term cash flow mismatches which arises more frequently or are spread over a longer period of time or on a more permanent basis, but is able to repay the borrowed sum in short periods of time. Such a revolving need for cash could be addressed more effectively through an overdraft facility than a long term loan. It would generally be reflected in a formal request to the bank by the customer followed by the execution of a written agreement containing the specific terms and conditions subject to which the customer would be permitted to overdraw his current account. While such an agreement could also be temporary as well as permanent, it would, in addition to the standard terms and conditions, contain the credit limit upto which the account could be overdrawn, the period of the facility and the interest rate that is payable on the overdrawn amount. Such a facility involves more than one instance of overdrawing, and is an ongoing or revolving facility, enabling the account to be operated by the customer by withdrawals within the credit ceiling and payments being made to reduce the overdrawn balance as well as the interest that is charged at the end of the month on the balance outstanding.

The constituent elements of the cause of action

Based on the foregoing discussion and taking into consideration the facts and circumstances of this case, I would identify the following as being the constituent elements of the cause of action in this case:

1) Did the Defendant have and maintain a current account with the Plaintiff?

2) Has the Defendant made a request that he be permitted to overdraw his account?

3) Has the Plaintiff acted on the said request of the Defendant and permitted him to overdraw his account?

4) Has the Defendant settled the overdrawn amount or part thereof?

5) What is the amount outstanding to the Plaintiff from the overdrawn amount?

6) Has the Plaintiff demanded the repayment of the outstanding sum of money?

I shall now consider if the evidence led before the District Court was sufficient to establish the above constituent elements.

The first element that must be established is that the Defendant had and maintained a current account with the bank. The Plaintiff has pleaded that the Defendant opened the aforementioned current account on 15th March 2007. Annexed to the plaint and the affidavit of Chandrani Bogoda was the mandate signed by the Defendant at the time the account was opened. Hence, there is no doubt that the Defendant had and maintained current account No. 306-1002-4053-7427 at the Maharagama Branch of the Plaintiff. The first element has therefore been established.

Prior to considering the second to fifth elements, it would be convenient to consider the final element, namely, whether the bank demanded the repayment of the said sum of money. As I have already observed, by letter dated 30th July 2009, the bank had

demanded the repayment of a sum of Rs. 565,742.56. As proof of such demand having been made, the Plaintiff has annexed the registered receipt article dated 6th August 2009. There are two matters that I wish to advert to. The first is that the said letter does not state that the amount demanded has arisen out of the said overdraft facility granted to the Defendant. The second is that the plaint does not contain an averment that the Defendant failed to respond to the said letter. Be that as it may, I am satisfied that there is sufficient material to establish that the amount claimed in the plaint has been demanded and that the final element has been established.

This brings me to the second to fifth elements. In considering these elements, the first issue that arises is whether it is mandatory for the Plaintiff to have produced a written request submitted by the Defendant, or whether evidence of an oral request was sufficient.

Section 50 of the Civil Procedure Code stipulates that, "*If a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.*"

It is clear from the plaint that the Plaintiff has not based its cause of action on a written agreement, a cheque or any other document. The complaint of the Plaintiff was simply that it had permitted the Defendant to overdraw his current account on a request made by him, with the plaint being silent on whether such request was made in writing or was an oral request. Thus, Section 50 does not apply in the present instance and it was not mandatory for the Plaintiff to have produced any document.

This matter was considered in **Bank of Ceylon v Aswedduma Tea Manufacturers (Pvt) Limited** [supra] where this Court observed as follows:

> "*I do agree with the learned counsel for the Bank that the bank does not rely on Section 50 of the Civil Procedure Code, which require a litigant who relies on a document to produce the document or even annex it to the plaint. This was an arrangement between the Plaintiff Bank and the Respondent. This being an overdraft facility* ***the bank need not annex a document or the several cheques since***

there is evidence of the several bank statements placed and produced before court. *These documents i.e., the statements of account were produced in court and had been compared by witness No. 2 for the bank with the relevant ledger. This is not an action based on a cheque but on overdraft facilities.*" [emphasis added]

As a request to temporarily overdraw a current account need not be in writing, the submission of a written request with the plaint cannot be made mandatory in order to establish that the Defendant made a request to overdraw his account. Therefore, while oral evidence is sufficient to establish that the request for an overdraft was in fact made, evidence of such request in the form of the relevant ledger on which the entry relating to the withdrawal was recorded, and where available the cheque presented must be produced in order to establish that the Plaintiff acted on the said request and that the Plaintiff proceeded to honour the cheque.

While in terms of Section 59 of the Evidence Ordinance, "*All facts, except the contents of documents, may be proved by oral evidence*", Section 60 provides as follows:

"*Oral evidence must, in all cases whatever, be direct;*

that is to say-

(i) If it refers to a fact which could be seen it must be the evidence of a witness who says he saw that fact;

(ii) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;

(iii) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

(iv) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

… Provided also that, if oral evidence refers to the existence or conditions of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection."

In **The Law of Evidence** by E.R.S.R. Coomaraswamy [1989, Volume II – page 4], the author having described Sections 59 and 60 as two cardinal rules relating to the direct testimony of witnesses, states that, "*The first important aspect of this matter is that while the general rule is that all facts may be proved by oral evidence, there is a restriction that no person giving oral evidence can describe the contents of a document, unless he produces the document itself, or he is allowed to give secondary evidence of its contents under Section 65.*"

According to paragraph 2 of the affidavit of Chandrani Bogoda signed on 26th August 2013, she is affirming to the facts contained therein on two grounds. The first is on her personal knowledge. Chandrani Bogoda does not however state if she was the Manager of the Maharagama Branch or serving in some other capacity in the said branch at about the time the Defendant was permitted to overdraw his account in September 2008, nor does she state the manner in which she acquired personal knowledge of the facts contained in the said affidavit. Therefore, the statement of Chandrani Bogoda that she had personal knowledge of the fact that the Plaintiff permitted the Defendant to overdraw his account and that the Defendant in fact did so, has not been substantiated. Chandrani Bogoda cannot give oral evidence relating to the transactions carried out by the Defendant or on any of the matters relating to the second to the fifth elements, as her evidence falls outside Section 60 of the Evidence Ordinance.

The second ground on which Chandrani Bogoda has affirmed to the matters set out in her affidavit is on the basis of having examined the Statement of Account and the documents available at the Bank [පැමිණිලිකාර බැංකුවේ ඇති ගිණුම් ප්‍රකාශන හා ලියවිලි පරීක්ෂා කිරීමෙන් ලබා ගන්නා ලද බවත්]. Chandrani Bogoda is therefore relying on documents that she had examined. Hence, while the production of the cheque by which the said sum of Rs. 1,268,000 was withdrawn would have been proof of the fact that the Defendant presented such a cheque on the date claimed by the Plaintiff and that the said cheque was honoured, it was imperative for the Plaintiff to have produced the original ledgers or

the bankers books on which the transactions relating to the Defendant's account had been maintained, in order to establish that:

(a) the bank acceded to the request made by the Defendant to overdraw his account;

(b) as a result of the cheque being honoured, the Defendant had overdrawn his account; and

(c) a sum of Rs. 565,742.56 is due and owing to the Plaintiff, as claimed by the Plaintiff, as a result of the said overdrawing.

Sections 90A and 90C of the Evidence Ordinance

While the general rule set out in Section 61 of the Evidence Ordinance is that the content of documents may be proved either by primary or secondary evidence with the document itself being primary evidence thereof – vide Section 62 – Section 64 provides that documents must be proved by primary evidence, except in the cases mentioned in the Ordinance itself. Section 65 sets out that secondary evidence, defined in Section 64, may be given of the existence, condition or contents of a document in the seven situations set out therein. This includes the situation in Section 65(6) which provides that, "*when the original is a document of which a certified copy is permitted by this Ordinance or by any other law in force in Ceylon to be given in evidence*."

It is common knowledge that until about three decades ago when electronic forms of storage of information was introduced, all banking transactions were recorded manually on ledgers, with each ledger containing details of accounts maintained by multiple customers. Having to produce the ledger or the bankers' books in Court caused inconvenience to the bank as such books were in constant use in their business. Furthermore, absence of the ledgers prevented banking transaction pertaining to other customers whose details were on the same ledger from being carried out thus inconveniencing several customers of the bank. As a response to this situation, special provisions relating to bankers books based mainly on the English Bankers Books Evidence Act, 1879 have been introduced in the form of Sections 90A – 90F.

Section 90C reads 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*."

Section 90A contains the definitions of a 'bankers' book' and a 'certified copy' . These are re-produced below:

> "*"Bankers' book" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of a bank and includes data stored by electronic, magnetic, optical or other means in an information system in the ordinary course of business of a bank.*"

> "*"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 and where the bankers books consist of data stored by electronic, magnetic, optical or other means in an information system, includes a printout of such data together with an affidavit made in accordance with Section 6 of the Evidence (Special Provisions) Act, No. 14 of 1995, or such other document of certification as may be prescribed in terms of any law for the time being in force relating to the tendering of computer evidence before any court or tribunal*."

The composite effect of the above two provisions is that the ledger or bankers book itself on which the relevant entries have been recorded need not be produced, and that a copy thereof shall be *prima facie* evidence of the existence of such entries provided the copy is certified in the manner stipulated in Section 90C.

As the learned Trial Judge and the learned Judges of the High Court have stated, the Statement of Account that has been presented, both with the plaint and the affidavit, consists of only one page. I have examined the case record of the District Court and find that the above position is correct. The first entry on the Statement of Account is dated 15th April 2009 and reflects the fact that a debit balance of Rs. 579,242.56 is being carried forward from the previous page. There are five further entries with two entries relating to two deposits and the other three entries relating to a dishonoured cheque. What the Statement of Account tendered by the Plaintiff establishes is that the balance outstanding in the Defendant's current account as at 4th August 2009 is a sum of Rs. 567,242,56.

However, the entries that would reflect the fact that the Defendant was permitted to overdrew his account on 2nd September 2008 upon the presentation of a cheque or that the Defendant thereafter made payments to settle in part the said amount, as pleaded by the Plaintiff, have not been tendered by the Plaintiff, either with the plaint or with the affidavit of Chandrani Bogoda. Furthermore, there is no material to indicate that the sum of money that is prayed for arises from an overdraft facility granted to the Defendant. Therefore, Chandrani Bogoda's statement that the matters pleaded in her affidavit are based on the statements of account examined by her is not reflected in the Statement of Account that she had certified in terms of Section 90C.

In these circumstances, it is clear that the Plaintiff has failed to establish the third, fourth and fifth elements and I am therefore in agreement with the learned Judges of the High Court that the Plaintiff has failed to discharge the burden cast on it to satisfy the trial Court that it had granted the Defendant overdraft facilities and that such facilities have not been settled.

There are two important matters that I wish to advert to, prior to concluding.

Should the Trial Judge have called for a complete copy of the Statement of Account?

The first is that in **The Finance Company PLC v Jayakody Arachchige Don Thushara and Others** [supra], this Court, having considered what a trial Court should do where it is not satisfied with the evidence placed before it in an *ex-parte* trial, held as follows:

> *"Before concluding, I should mention that, if the learned Trial Judge was of the view that there was a doubt with regard to the sale of the vehicle or any other matter, he should have given the Plaintiff an opportunity to clarify such doubt by adducing additional evidence, before proceeding to deliver the judgment. The learned Trial Judge should have kept in mind the well established and salutary practice and, in fact, recognized principle of law that,* ***where the Plaintiff in an ex parte trial has adduced evidence in support of a substantial part of his case but the Trial Judge has a doubt with regard to a particular aspect of the case,*** *the Plaintiff should be given an opportunity to adduce such evidence or make the requisite clarifications, by way of an affidavit or viva voce and within a specified period of time. The ex parte judgment should be delivered only after such additional material is considered, if adduced within the allotted time.*
>
> *This rule was referred to in BRAMPY vs. PERIS [3 NLR 34 at p.36] where Lawrie A.C.J. stated "….. whatever be the evidence it must be sufficient to satisfy the Judge, who is not bound to give a decree until he is satisfied. If he is dissatisfied, he should in an order point out in what, respect the evidence already recorded is defective and then adjourn to a day named or sine, die." Browne A.J. stated [at p.37] "But in my opinion plaintiff on the occurrence of any doubt in the mind of the Judge as to his right to judgment should have opportunity given to him to dispel that doubt ere his action were finally dismissed to the absolute extinction of his claim for ever, and I cannot see that he had that opportunity here given him". In SIRIMAVO BANDARANAIKE vs. TIMES OF CEYLON LTD [at p.39], Fernando J, citing Browne A.J. stated "…. whatever the evidence, it must be sufficient to* ***satisfy*** *the judge who is not bound to give a decree until he is* ***satisfied****, if he had a doubt, he was not bound to enter judgment, but should have given the plaintiff an opportunity to dispel it".*

I am of the view that the above reasoning would apply in limited circumstances when the Plaintiff has adduced evidence in support of a substantial part of his case. To cast such an obligation in a manner that would place the onus of proving the plaintiffs' case on the trial Court would be both unfair by the learned Trial Judge and unwarranted. I have already held that the Plaintiff has failed to establish a substantial part of its case, namely that it granted the Defendant a temporary overdraft in a sum of Rs. 1,268,000 and that what is outstanding in the Defendant's account arises out of the said overdraft. The Plaintiff has failed to adduce evidence to establish three of the constituent elements of its cause of action and in such a scenario, the learned Trial Judge was under no obligation to take on the evidentiary burden of the Plaintiff, and to have called for clarifications.

In fact, in **Beebi Johara v Warusawithana** [(1998) 3 Sri LR 227 at page 231] Chief Justice G.P.S. De Silva, referring to a finding by the Court of Appeal that a Court should not sit back and say that it would give its determination only on what is placed before it, stated as follows:

> "*Finally, I wish to refer to section 134 of the Civil Procedure Code and section 165 of the Evidence Ordinance. Mr. F. C. Perera for the defendant-respondent relied on section 134 of the Civil Procedure Code in support of the view taken by the Court of Appeal. Section 134 of the Civil Procedure Code no doubt confers on the District Court the power of its own motion to summon any person as a witness to give evidence or to produce any document in his possession. Section 165 of the Evidence Ordinance confers inter alia the power on the Judge to order the production of any document or thing. These are enabling provisions intended to be cautiously and sparingly used in the interests of justice. Neither section 134 of the Civil Procedure Code nor section 165 of the Evidence Ordinance was meant to fill in the gaps in the presentation of its case by a party to the action.* ***While these provisions confer a power upon the court, they do not place a burden upon the court****; they do not detract from the adversarial nature of the proceedings before the court*."

Is the narration of the Plaintiff truthful?

The second matter that I wish to advert to is of a very serious nature and is something which has not caught the attention of either the Trial Court or the High Court. At the bottom of the Statement of Account annexed both to the plaint and the affidavit of Chandrani Bogoda is the following endorsement:

"Early balance:	*1,807,335.26*	*DR*	
Credit Trans:	*4,931,871.60*		*38*
Debit Trans:	*3,691,778.90*		*56*
Final Balance:	*567,242.56*	*DR*	
(As at 09/09/09)"			

Thus, according to the above endorsement, there appears to have been:

(a) an opening debit balance of Rs. 1,807,335,26;

(b) 38 credit transactions – i.e., deposits - totalling Rs. 4,931,871.60;

(c) 56 debit transactions – i.e., withdrawals – totalling Rs. 3,691,778.90.

None of the above credit and debit transactions save five entries to which I have already referred to, are reflected in the Statement of Account tendered to the Trial Court. Furthermore, the sum of Rs. 567,242,56 which was the amount outstanding as at 4th August 2009 is the difference between the deposits, and the aggregate of the opening balance & the withdrawals.

The above endorsement created a serious doubt in my mind with regard to the narration of the Plaintiff, as confirmed by the affidavit of Chandrani Bogoda given under oath that the Defendant was permitted to overdraw his account only once, and the bona fides of the Plaintiff in producing only one page of the Statement of Account. For that reason, the Registrar of this Court was directed to call for the original Statement of Account from the Attorney-at-Law for the Plaintiff, which was duly complied with.

Having examined the said Statement of Account consisting of four pages and certified by none other than Chandrani Bogoda in 2010, I observed the following:

(a) The Defendant's current account had a debit balance of Rs. 1,807,435.26 on 1st September 2008 – i.e., the day before the purported overdraft facility is said to have been granted. This means that the Defendant had been permitted to overdraw his account much earlier than claimed by the Plaintiff;

(b) There are two debit entries for 2nd September 2008, one for Rs. 666,234 and the other for Rs. 100,000. There is no entry to indicate that the Defendant overdrew his account in a sum of Rs. 1,268,000 on 2nd September 2008;

(c) There is no entry to indicate that the Defendant had overdrawn a sum of Rs. 1,268,000 in a single transaction or through multiple transactions at any time between 1st September 2008 and 4th August 2009;

(d) There are in fact 38 credit entries and 56 debit entries on the said Statement that have taken place between the period 1st September 2008 and 4th August 2009, as reflected in the aforementioned endorsement that appears on the Statement of Account to which I have already referred to;

(e) Although the Plaintiff claims that the account was transferred to the non-performing category on 1st November 2008 and on that date the debit balance was Rs. 565,742.56, the truth is the Defendant had continued to operate his current account until 4th August 2009 and the debit balance on 1st November 2008 was Rs. 2,626,142.56.

Thus, not only the plaint but even the affidavit of Chandrani Bogoda is replete with lies.

Conclusion

In the above circumstances, I see no merit in this appeal and would answer all three questions of law in the negative. The judgments of the District Court and the High Court are affirmed and this appeal is accordingly dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. Dehideniya, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT