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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 235/2014

SC/ HCCA/LA/ 416/2014

UVA/HCCA/Badulla/82/12(F)

DC Badulla No/6419/MB

Seylan Bank PLC
Ceylinco Seylan Towers,
No. 90, Galle Road,
Colombo 03.

Plaintiff

Vs.

1. Mullavidanalage Don Padman Hemachandra,
   No. 7D, South Lane,
   Badulla.
2. Mullavidanalage Don Amarasiri Hemachandra,
   No 35 / 2,
   Bandaranayake Mawatha,
   Badulla.

Defendants

AND BETWEEN

Mullavidanalage Don Amarasiri Hemachandra,
No 35 / 2,
Bandaranayake Mawatha,
Badulla.

2nd Defendant Appellant

Vs.

Seylan Bank PLC
Ceylinco Seylan Towers,
No. 90, Galle Road,
Colombo 03.

Plaintiff Respondent

AND NOW BETWEEN

Seylan Bank PLC
Ceylinco Seylan Towers,
No. 90, Galle Road,
Colombo 03.

Plaintiff Respondent-Appellant

Vs.

Mullavidanalage Don Amarasiri
Hemachandra,
No 35 / 2,
Bandaranayake Mawatha,
Badulla.

2nd Defendant Appellant-Respondent

BEFORE : EVA WANASUNDERA, PC, J.

UPALY ABEYRATHNE, J.

ANIL GOONARATNE, J.

COUNSEL : Anura Ranawaka with Oshada Mahaarachchi for the Plaintiff Respondent Appellant

D.P.L.A. Kashyapa Perera for the 2nd Defendant Appellant Respondent

WRITTEN SUBMISSION ON: 20.01.2015 (Plaintiff Respondent Appellant)

18.03.2015 (2nd Defendant Appellant - Respondent)

ARGUED ON : 03.12.2015

DECIDED ON : 14.10.2016

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted the said action bearing No 6419/MB against the 1st and 2nd Defendants in the District Court of Badulla seeking inter alia to recover a sum of Rs. 3,141,832.34 and interest accrued thereon from 01.11.2008. The Appellant averred that the 1st Defendant obtained loan facilities and overdraft facilities from the Appellant Bank at several instances and the immovable property described in the schedule to the plaint which was owned by the 2nd Defendant was mortgaged to the Appellant Bank by executing the mortgage bond bearing No 544 dated 19.10.1992 as security for the facilities already obtained and also in respect of the future financial facilities to be obtained by the 1st Defendant. Accordingly the Appellant prayed for a judgment against the 1st and 2nd Defendant to recover the said sum of money and to sell the said mortgaged property at a public auction to recover the said sum of Rs. 3,141,832.34.

The 2nd Defendant filed an answer praying for a dismissal of the Appellant's action. In his answer he took up the position that no cause of action has been disclosed by the plaint and in any event the cause of action disclosed in paragraphs 10 and 11 of the plaint is prescribed in law. He further averred that

since there was no formal demand of money made by the Appellant, he cannot have and maintain the action against the 2nd Defendant.

The case proceeded to trial on 13 issues and the learned District Judge delivered a judgment in favour of the Appellant as prayed for in the plaint. Being aggrieved by the said judgment dated 27.08.2012 the 2nd Defendant Appellant Respondent (hereinafter referred to as the 2nd Respondent) preferred an appeal to the High Court of Civil Appeal of the Uva Province holden at Badulla.

The 2nd Respondent, in his written submission to the High Court of Civil Appeal sought an interpretation of the document produced marked P 12 (the mortgage bond bearing No 544 dated 19.10.1992) since the learned District Judge had delivered the judgment for a sum of amount which exceed the amount agreed for by the parties to the mortgage bond marked P 12 dated 19.10.1992.

The Appellant, countering the said submission of the 2nd Respondent, had submitted before the High Court of Civil Appeal that the said issue was never raised before the District Court.

When the parties were given an opportunity to file further written submissions by the High Court of Civil Appeal, in addition to the said complaint the 2nd Respondent had taken up another new position that the non appearance of the 1st Defendant in the District Court deprived the 2nd Respondent of the opportunity to obtain cogent evidence necessary for his defence.

The learned Judges of the High Court of Civil Appeal, by their judgment dated 17.07.2014 have set-aside the judgment of the learned District Judge dated 27.08.2012 and ordered a trial *Denovo* on the basis that the trial judge had failed to correctly interpret the document P 12 which states that the liability under the document should not exceed Rs. 300,000/-.

The Appellant sought leave to appeal from the said judgment of the High Court of Civil Appeal dated 17.07.2014 and this court granted leave on the following question of law set out in paragraph 20(i), (ii), (iii), (iv), (v), (vi), (vii) and (viii) of the petition dated 26.08.2014.

20(i). Did the Civil Appellate High Court err in law by concluding that the learned District Judge had failed to correctly interpret the document marked P 12?

(ii). Did the Civil Appellate High Court err in law in coming to the conclusion that the sum of money to be recovered in the District Court action was dependant on the interpretation of the document marked P 12 and that it amounts to a pure question of law?

(iii). Did the Civil Appellate High Court err in law by failing to take in to account that the Respondent in the letter marked P 17 and in his evidence had admitted that he was liable to pay the monies claimed by the Petitioner?

(iv) Did the Civil Appellate High Court err in law by taking in to consideration the statement made in the Respondent's further written submissions that the non-appearance of the 1st Defendant in the District Court deprived the Respondent to obtain crucial evidence when there is no material to show that the Respondent had taken any attempt to obtain such evidence?

(v) Did the learned Judges of the High court of Civil Appeal misdirect themselves in law by taking the view that ordering a trial *Denovo* against the Respondent would not make any extra

burden on the Petitioner and such an order would be justified in view of the circumstances of the case and thus falling to appreciate that the evidence against the Respondent would be different to that of evidence against the 1st Defendant?

(vi) Did the Civil Appellate High Court err in law by failing to appreciate the principles of law applicable to allowing new arguments in appeal?

(vii) Did the learned Judges of the Civil Appellate High Court misdirect themselves in law by taking irrelevant matters in to consideration for their decision?

(viii) Are the conclusions of the Civil Appellate High Court based on incorrect and/or irrelevant matters?

The Appellant has contended that by the document marked P 17 the 2nd Respondent had admitted that that he was liable to pay the monies claimed by the Appellant. P 17 was a letter sent by the 2nd Respondent to the Manager, Seylan Bank, Badulla, dated 01.03.2005 requesting for a waiver of the interest and to settle only the loan amount by way of instalments. The total amount contained therein is a sum of Rs. 757,127.79. According to the prayer ‘a’ of the plaint the Appellant has sought a judgment against the Respondents to recover a sum of Rs 3,141,832.34. It is clear from the said prayer ‘a’ that by P 17 the 2nd Respondent has not admitted the liability to pay the sums claimed by the Appellant.

On the other hand the Appellant has not instituted the present action against the 2nd Respondent upon the document marked P 17. The Appellant’s action is solely based on the Mortgage Bond Marked P 12. Hence the 2nd

Respondent's liability to pay the Appellant has arisen only from the mortgage bond marked P 12.

At the hearing of this appeal the Appellant contended that the mortgage bond marked P 12, although titled as a "mortgage bond", was not intended to be a mortgage, but to bind both the Respondents to a written contract to repay on demand the monies due to the Appellant Bank, as well as a mortgage of the property to secure the said payment. Further the said mortgage bond was also to constitute a continuing obligation and liability to pay on demand for payment.

The Appellant heavily relied on clause 11 of the Mortgage Bond bearing No 544 dated 19.10.1992 which was produced at the trial marked P 12. Clause 11 of the said mortgage bond reads thus;

> " that these presents shall be a continuing security to the bank for all and every the sums and sum of money which now are or is or which shall or may at any time and from time to time and all times hereafter be or become due owing and payable by the obligors to the bank under by virtue or in respect of secured by these presents notwithstanding that the amount of such sums or sum of money from time to time vary or be reduced or fluctuate or be repaid in full and that fresh liabilities shall be incurred after the Obligors ceased to be indebted to the Bank it being intended that the total amount of the monies hereby secured shall not exceed the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300.000/-)** of lawful money of Sri Lanka the security hereby created being intended to cover the final balance of account between the Obligors of the **ONE PART** and the Bank of the **OTHER PART** in respect of all transactions and dealings

such final balance not to exceed in the whole the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300,000/-)** of lawful money of Sri Lanka plus interest thereon."

On the said clause the Appellant's contention was that by P 12 both Respondents had agreed and undertaken to pay on demand to the Appellant the monies due on the loans given to the 1st Respondent and the mortgage of property by P 12 had been made to secure the monies due on the said loans given to the 1st Respondent.

It is clear and no doubt that according to the said Clause the repayment would only arise when demanded by the Appellant. Even the 2nd Respondent had not challenged the said provisions contained in the said Clause. Even in paragraph 10 of his answer the 2nd Respondent has averred that prior to the institution of the action against him the Appellant had failed to send a formal demand and therefore the Appellant cannot have and maintain the present action against him.

It is clearly apparent from the above questions of law that the words "on demand" contained in clause 11 of P 12 do not arise for consideration in this appeal since the plea of prescription has not been raised before this court.

The 2nd Respondent's contention before the High Court of Civil Appeal was that under any circumstances the liability under the said mortgage bond should not exceed a sum of Rs. 300,000/-. In this regard the 2nd Respondent too heavily relied upon the Clause 11 of the Mortgage Bond. As submitted by the learned Counsel for the 2nd Respondent the relevant provisions contained in Clause 11 of the said Mortgage Bond read thus;

"that the total amount of the monies hereby secured shall not exceed the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300.000/-)** of lawful money of Sri Lanka **the security hereby created being intended to cover the final balance of account** between the Obligors of the ONE PART and the Bank of the OTHER PART in respect of all transactions and dealings **such final balance not to exceed** in the whole the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300,000/-)** of lawful money of Sri Lanka plus interest thereon." (Emphasis added)

Needless to say that said Clause 11 in clear and unambiguous terms express that the liability under the mortgage bond should not exceed Rs 300,00/-. It specifically stipulates that "in respect of all transactions and dealings the final balance should not exceed in the whole the sum of Rs. 300,000/=."

At the hearing our attention was drawn to Clause (a) at page 2 of the Mortgage Bond marked P 12 by the Appellant, which reads thus;

"All and every the sums and sum of money which now are or is or which shall or may at any time from time to time and at all times hereafter be or become due owing and payable to the Bank by the principle debtor upon or in respect of loans advances or payments which may at any time and from time to time and at all times hereafter be made by the Bank to or for the use or in respect of any account or accounts transaction or transactions whatsoever between the principle debtor and the Bank."

On the said provisions the Appellant contended that, irrespective of the provisions contained in Clause 11 of P 12 the 2nd Respondent is liable to pay on

demand all monies obtained on loan facilities and on overdraft facilities by the principal debtor which became due to the Appellant Bank. I am not inclined to agree with the contention of the Appellant. Provisions contained in said Clause (a) has no bearing on the limitations set out in Clause 11 of the Mortgage Bond which has been embodied therein to protect the rights of the 2nd Respondent. As I have aforementioned, wordings in Clause 11 of the Mortgage Bond is clear and unambiguous and hence a narrow interpretation cannot be attached to such Clause creating room for said Clause (a) to supersede the limitations set out in Clause 11 of the Mortgage Bond. It is a cardinal principle of interpretation that the words must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless there is something in the object to suggest to the contrary. The words themselves best declare the intention of the makers. Hence the Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by them and not to ignore them.

Therefore I hold that in the Mortgage Bond marked P 12, the 2nd Respondent's liability is limited to a sum of Rs. 300,000/= plus interest and the Appellant's claim against the 2nd Respondent should not exceed in the whole a sum of Rs. 300,000/= plus interest thereon.

The Appellant further contended that the Respondent had taken up new arguments for the first time in appeal before the High Court of Civil Appeal. Learned Counsel for the Appellant submitted that initially in the written submission filed before the hearing of appeal, the 2nd Respondent took up the position that in the Mortgage Bond, the 2nd Respondent's liability was limited to a sum of Rs. 300,000/= plus interest and therefore the 2nd Respondent could not be held liable for a sum of Rs. 400,000/= as set out in P 6 and subsequently at the stage of filing further written submission after the hearing of oral submission the

2nd Respondent took up another position that the non appearance of the 1st Respondent in the District Court deprived him of the opportunity to obtain cogent evidence necessary for his defence.

The raising of new issues for the first time in appeal has been considered in a long line of cases. In this regard the requirement to be adhered by a party who wish to bring such new issues for the consideration of the appellate court is that the matter in question should be one which deals with a pure question of law. I must place on record that the practice of our courts to insist in the exercise of raising new issues of law for the first time in appeal for the exercise of appellate powers has taken deep root in our law and has got hardened in to a rule which should not be disturbed unless the matter in question is tainted with facts of the case.

Dias, J. in *Talagala Vs. Gangodawila Co-operative Stores Society 48 NLR 472* held that "Where a question which is raised for the first time in appeal is a pure question of law and is not a mixed question of law and fact, it can be dealt with. The construction of an Ordinance is a pure question of law".

In the case of *Setha vs. Weerakoon 49 NLR 225 Howard C.J.* stated that "A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it, all the requisite material for deciding the point, or the question is one of law and nothing more."

In the case of *Candappa vs. Ponambalampillai (1993) 1 SLR 184* Supreme Court held that "A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved

which were not in issue at the trial such case not being one which raises a pure question of law."

In the case of *Alwis vs. Piyasena Fernando (1993) 1 SLR 119 G. P. S. de Silva, C.J.* held that "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

In the circumstances I am of the view that the 2nd Respondent's new issue with regard to the interpretation of Clause 11 of the Mortgage Bond marked P 12 is a pure question of law and the learned High Court Judges have correctly gone in to the matter and have reached to a correct conclusion. But on the other hand having reached a correct conclusion and thereafter proceeding to make an order for a trial *Denovo* against the 2nd Respondent cannot be justified in law. Unfortunately before arriving at such conclusion the learned High Court Judges have failed to adhere to the requirements to be considered by a court of law whether the facts and circumstances that were revealed at the trial on evidence warrant the case to be remitted back to the trial court for a trial *Denovo*.

The relevant provisions in section 773 of the Civil Procedure Code empower the Court of Appeal, **where think fit, or, if need be,** to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit. (Emphasis added)

In Lada vs. Marshall [1954] 3 All ER 745 at 748, Denning, L.J. said, "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is

presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

These conditions were taken into account and applied in *Ratwatte vs. Bandara 70 NLR 231 (SC)* where the question of the admission of fresh evidence at the hearing of the appeal was referred to; It was held that “Reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz., (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, (3) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.”

It clearly seems that the 2nd Respondent has not shown any material so required to consider whether the case against him should be remitted back to the trial court for a trial *Denovo*. In the circumstances the 2nd Respondent’s second new issue that the non appearance of the 1st Respondent in the District Court deprived him of the opportunity to obtain cogent evidence necessary for his defence should be unsuccessful. Hence I am of the view that the order of the learned High Judges of the High Court of Civil Appeal to send the case against the 2nd Respondent back to trial court for a trial *Denovo* is untenable. Hence I set aside the said portion of the judgment of the High Court of Civil Appeal dated 17.07.2014.

Accordingly I vary the judgment of the learned District Judge dated 27.08.2012 and hold that the 2nd Respondent’s liability is limited to a sum of Rs. 300,000/= plus interest and the Appellant is entitled to a judgment against the 2nd

Respondent in the whole a sum of Rs. 300,000/= plus interest thereon. Learned District Judge is directed to enter decree against the 2nd Respondent accordingly with cost. Subject to the aforementioned variations the appeal of the Appellant is dismissed without costs.

Appeal dismissed subject to variations.

Judge of the Supreme Court

EVA WANASUNDERA, PC, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court