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

In the matter of an Appeal in terms of section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 reads with Article 154P (3) of the Constitution of the Republic of Sri Lanka

Commercial Bank of Ceylon Limited alias Seemasahitha Lanka Vanija Bankuwa of No. 21, Bristol Street, Colombo 01 and having branch office and/or place of business at No. 343, Galle Road, Colombo 06.

Plaintiff

SC/CHC /19/2007

HC (Western Province) Civil Case No. 100/98 (1)

Vs

1. Samarathilaka Wijesingha Ekanayaka
2. Indra Iranganie Wijesingha Ekanayaka
3. Sujeewa Wijesingha Ekanayaka

Carrying on business under the name style and firm of "Sahana Printers" at Dummaladeniya, Wennappuwa.

Defendants

And

Commercial Bank of Ceylon Limited alias Seemasahitha Lanka Vanija Bankuwa of No. 21, Bristol Street, Colombo 01 and having branch office and/or place of business at No. 343, Galle Road, Colombo 06.

Plaintiff-Appellant

Vs

1. Samarathilaka Wijesingha Ekanayaka
(Now deceased)

1A. Indra Iranganie Wijesingha Ekanayaka

1st Substituted Defendant-Respondent

2. Indra Iranganie Wijesingha Ekanayaka

2nd Defendant-Respondent

3. Sujeewa Wijesingha Ekanayaka

Carrying on business under the name style and firm of "Sahana Printers" at Dummaladeniya, Wennappuwa.

3rd Defendant-Respondent

Before: **Justice Vijith K. Malalgoda PC**
Justice L.T.B. Dehideniya
Justice S. Thurairaja PC

Counsel: **S. A. Parathalingam, PC with Varuna Senadhira for the Plaintiff-Appellant**

Lasitha Kanuwanaarachchi with Bhagya De Silva for the Substituted Defendant-Respondent

Argued on: 22.03.2019

Decided on: 28.11.2019

Vijith K. Malalgoda PC J

The Plaintiff-Appellant (here in after referred to as "the Appellant Bank") has instituted an action before the Commercial High Court of the Western Province against the 1st to 3rd Respondents-Respondents (here in after referred to as the 1st to 3rd Respondents) for the recovery of

a) a sum of Rs. 1,545,986/35 a further sum of Rs. 475,231/96 by way of unpaid interest and a sum of Rs. 9,504/63 by way of Turn Over Tax on such interest and a sum of Rs. 21,385/43 by way of Defence Levy on such interest from 01. 08. 1995 to 12.02.1997 aggregating to sum of Rs 2,052,108/37 and further interest on the said sum of Rs. 1,545,986/35 at 20% per annum from 13.02.1997 until full and final settlement and Turn Over Tax on such interest at 2% and Defence Levy on such interest at 4.5% and
b) a sum of Rs. 1,800,000/- with legal interest from the date of the Plaint and thereafter with further legal interest on the decreed amount till payment in full

granted to the Respondents by the Appellant Bank as a loan facility.

During the trial before the Commercial High Court three admissions and 35 issues were raised by the parties.

The Plaintiff summoned one Keerthi Ediriweera an executive from the Plaintiff bank and closed the case marking P-1 to P-9. On behalf of the Defendants, the 1st Defendant S.W. Ekanayake testified before the High Court and summoned one Senarathne, Inspector of Police as the witness for the defence and closed the case marking V-1 to V-19.

At the conclusion of the said trial, the Commercial High Court of the Western Province by its judgment dated 07th February 2007 dismissed the said action. Being aggrieved by the said judgment, the Appellant Bank has filed the instant appeal before this court.

As revealed before this court, the 1st-3rd Respondents, who were carrying on a business under the name and style of "Sahana Printers", was a regular customer of the Appellant Bank in its branch at No. 343, Galle Road, Colombo. 06 and had maintained a current account bearing No. 6049 which was later changed to No. 6017320 with the said branch of the Appellant Bank.

As admitted by both parties, the Appellant Bank had granted an overdraft facility to the said account and according to the Appellant Bank, by 17th March 1994 the aforementioned current account was overdrawn in a sum of Rs. 3,472,592/50.

The Appellant Bank had taken up the position before the Commercial High Court that the Bank has granted a loan in a sum of Rs. 3,500,000/- that was duly credited to the aforesaid current account of the Respondents in order to settle the said overdrawn facility. It was further submitted that the Appellant Bank had rescheduled the said loan into two parts; such as an interest free loan of Rs. 1,800,000/- and an interest bearing loan of Rs. 1,700,000/-. Both the said loans were utilized to recover the overdrawn balance in the current account of the Respondents. But, as stated by the Appellant Bank, the Respondents have failed and neglected to repay the due amounts.

At this point, it is pertinent to observe that according to the evidence of witness Ediriweera, the overdraft facility that has been granted to the Respondents was based on an oral request made by them. The witness of the Appellant Bank whilst giving evidence before the Commercial High Court stated that the Respondents had been granted overdraft facilities in the absence of any funds in the said account to honour the cheques drawn by them.

The 1st Respondent, in his evidence, has admitted that the Appellant Bank has granted an overdraft facility to the Respondents. This has been accepted by both parties but it was the position taken by the 1st Respondent whilst giving evidence before the trial court that, they have settled such amount. However, the settlement of the overdraft balance is not the question before us. The foremost question is whether the bank has granted another loan to recover the overdrawn balance.

During the trial, it was submitted on behalf of the Appellant Bank that there were some discussions regarding a settlement of the overdrawn balance of Rs. 3,472,592.92/- and then the bank has granted the said loan valued Rs. 3,500,000/- to the Respondents. Even though the Bank has taken up the position that it is the established usual banking procedure when an overdrawn balance in a current account remains outstanding such overdrawn balance could be recovered by granting a loan to such customer, the Appellant Bank had failed to establish the granting of a loan, with documentary proof. It means that there is no request letter of the Respondents, no valid certificate regarding the granting of this loan and no signed documents. Without providing any such signed documents, it is doubtful as to how the Appellant Bank, being a responsible

institution, had granted a loan to their customers. Although, it was stated that the loan facility was granted based on the oral request of the Respondents, the Bank had failed to bring acceptable evidence to prove their case.

In the case of the **Hatton National Bank Limited v Helenluc Garments Ltd and Others (1999) 2 SLR 365**, Wijetunga J has stated that 'Overdrafts are loans by the banker to the customer…….' In such a situation, a question arises as to whether a fresh loan could be granted to settle the given loan.

On the perusal of the Judgment of the High Court, I observe that the learned Judge has correctly identified that there was no evidence to substantiate the said loan. Further, the learned Judge had observed that the procedure followed by the Appellant Bank to recover the overdraft balance was an unusual as well as surprising process.

Moreover, it is important to focus that the bank has granted a high amount of a loan for the Respondent to settle their overdrawn balance. But, there is no guarantee bond, mortgaged bond, valid loan agreement, and the bank has failed to take sureties privileges such as *beneficium ordinis sue excussionis* and *beneficum divisionis*.

The importance of such requisites were discussed in several cases before Appellate Courts. In the case of ***Brunswick Exports Ltd vs. HNB Ltd (1999) 1 SLR 219*** it is stated that " the Mortgage had been executed to secure the repayment of a commercial loan given by a commercial bank to a company for the purpose of its business." Further, in the ***Hemas Marketing (pvt) Ltd Vs. Chandrasiri and Others (1994) 2 SLR 181***, the Court of Appeal observed that "a guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promise must exist or be contemplated……" Therefore, as a reputed Commercial Bank, the Appellant Bank should have a greater responsibility more than this when they are granting loan facilities to their customers.

On the other hand, the Counsel for Respondents has submitted that the Respondents have never asked for such a loan valued 3.5 Million or otherwise. Further, the counsel submitted that the Respondents have settled the said overdraft of Rs. 3,472.92/=. Furthermore, the Respondents' position is, during this time, one Lalith Peiris, who was the Manager of the Appellant Bank, had fraudulently prepared documents and misappropriated monies belonging both, to customers of

the Bank as well as the Appellant Bank. The learned High Court Judge has correctly analyzed the above position based on V-19 a document produced by the defence as follows;

> "විත්තියෙන් පැමිණිලිකාර බැංකුවට සහ එහි කළමණාකරුවෙකු වශයෙන් සිටි ලලිත් පීරිස්ට විරුද්ධව එල්ල කරන ලද මෙම චෝදනාව ඇත්ත වශයෙන්ම ඉතා බරපතලය. මෙම චෝදනාව ඔප්පු කිරීම සඳහා විත්තිය පැමිණිලිකාර බැංකුවේ නිලධාරියකු වන "ලලිත් පීරිස්" යන කළමණාකරුගේ අනුප්‍රාප්තික නිලධාරියා විසින් වරක් පොලීසියට කරන ලද පැමිණිල්ලක් උපයෝගී කර ගත්තේය. එම පැමිණිල්ලේ සහතික පිටපතක් විත්තියෙන් සාක්ෂි සඳහා කැඳවන ලද අපරාධ පරීක්ෂණ දෙපාර්තුමේන්තුවේ සාක්ෂිකරු වන පොලිස් පරීක්ෂක යාපා මුදියන්සේලාගේ සේනාරත්න මාර්ගයෙන් ඉදිරිපත්කරන ලදී. මෙම තීන්දුවේ සම්පූර්ණත්වය උදෙසා "වි-19" ලේඛණයෙන් සමහර කොටස් නැවත උපුටා දැක්වීම යෝග්‍ය බව මගේ අදහස බැවින් එකී ලේඛණයේ සමහර කොටස් පහත උපුටා දක්වමි.
>
> > "මා කොමර්ෂල් බැංකුවේ ප්‍රධාන කාර්යාලයේ ශාඛානය අංශයේ ප්‍රධාන කළමණාකරු ලෙස සේවය කරනවා. මාගේ රාජකාරී ස්වභාවය වනුයේ කොළඹ ශාඛා මගින් නිකුත්කරන ණය සහ අයිරා අධීක්ෂණය කිරීමයි. එක් එක් අංශය මගින් නිකුත් කරන එවැනි ණය පහසුකම් සම්බන්ධව මාසික වාර්තාවක් ප්‍රධාන කාර්යාලයට එවීම කෙරෙනවා. වැල්ලවත්ත ශාඛාවේ කළමණාකරු ලෙස එච්. ආර්. ආරියතිලක මහතා 1994.03.21 වෙනි දින වැඩ බාරගත් පසුව ගනුදෙනු සම්බන්ධව සොයා බැලීමේදී සැක සහිත ණය පහසුකම් ලබාදී තිබූ බව අප වෙත වාර්තා කළා. එම විස්තර අනුව සහකාර සාමාන්‍ය අධිකාරී පිටදෙණිය මහතාගේ ප්‍රධානත්වයෙන් එම විස්තර පරීක්ෂා කළා. එම පරීක්ෂණයෙන් අනාවරණය කරගෙන තිබුණා එම බැංකු ශාඛාවේ හිටපු කළමණාකරු එල්.එස්. පීරිස් මහතා බැංකු ප්‍රතිපත්ති වලට පටහැනිව විශාල ප්‍රමණයේ සැක සහිත ණය පහසුකම් තුනක් සපයා දී ඒවා ගෙවීම් පැහැරහැර බැංකුවට අලාභවී තිබීමක් ගැන. මේ ගැන සොයා බලා ගෙන යද්දී කරුණාරච්චි ජේ. පී. නැමැති අයට නිකුත්කර තිබූ රු. දසලක්ෂ හතයි දශම 06 ක ණය අයිරා පහසුකම් බැංකුවට ගෙවීමෙන් එම ගනුදෙනුව අවසන් කළ හෙයින් දැනට අලාභයක් නැත. පහත සඳහන් විස්තර අයිරා දෙකක පීරිස් මහතා විසින් වංචනික ලෙස නිකුත් කර

ඇත. (1) කලුතර ගාලු පාර නිව් පරණගම බිල්ඩර්ස් යන ලිපිනයේ ලක්‍ෂාන් සමාගමට රු. 7700000/- යි. (2) දුම්මලදෙණිය වෙන්නප්පුව සහන ප්‍රින්ටර්ස් ආයතයට රු. 3500000/- යි. එකතුව 11200000/- යි. ඉහත කී ලක්‍ෂාන් සමාගම හවුල්කරුවන් 05 දෙනෙකුගෙන් යුක්තය. එච්.ඊ. තිසේරා, එන්. වයි. පරණගම, වයි. එම්. එම්. චූලවතී, පීරිස් එම අයයි. එම සමාගමට 26.09.91 සිට 26.08.94 දක්වා කොටස් වශයෙන් එකී ණය අයිරාව ගෙවා තිබුනා. ආරම්භයේ ගිණුම් අංක 6170 යටතේත් පසුව කම්පියුටර් කලාට පසුව අංක 6018386 යටතේත් ගෙවීම් කර තිබුනා. අංක 251250 චෙක් පොතේ චෙක්පත් 15 ක් මගින්ද අංක 8003800 චෙක් පොතෙහි චෙක් පත් 08 ක් මගින්ද, අංක බී 818-383200 චෙක් පොතේ චෙක් පත් දෙකක් මගින්ද ගෙවීම් කර තිබේ. තවද එම ණය අයිරා ගෙවූ බව සඳහන් කර තිබුනේ ණය ලබාගන්නා සමාගම ලක්‍ෂ 72 ක තැනපතුවක් බැංකුවේ තැන්පත් කළ බවට ව්‍යාජ විස්තරයක් ඉදිරිපත් කිරීමෙනි. එවැනි තැන්පතුවක් නොතිබූ බව අප පරීක්ෂණයේ හෙළි වී තිබුණා. ඉහත කී චෙක් පොත් 03 ට නිකුත් කළ චෙක්පත් 25 ට අමතරව වෙනත් චෙක්පත් රාශියක් නිකුත් කර ඇති බවට පෙනී ගියා...... එම චෙක්පත් වල විස්තර බැංකු ප්‍රකාශයේ ඇතුළත් වේ. තවද මෙම 1994 මාර්තු 17 දින ලක්ෂ 3500000/- ක ණයක් මගින් මෙම අයිරාව බැර කර අයිරාව ගෙවීමක් ලෙස පෙන්වා ඇත. එසේ කර ඇත්තේ බැංකුව නොමඟ යැවීමටයි. එහෙත් එම මුදල දැනට ණය ලෙස සුරැකුම් නොමැතිව මේ දක්වා අලාභයක්ව පවතී."

ඉහත වී.19 ලේඛණයේ අඩංගු සියළු කරුණු මෙම නඩුවේ පාර්ශවකරුවන් අතර පැණ නැගී ඇති ආරවුලේ විනිශ්චය සඳහා අරටුවටම කිඳා බසින සුළු කරුණු අඩංගු ලේඛණයකි. එකී ලේඛණය අපක්ෂපාතී ලෙස විශ්ලේෂණය කර බලන විට නෛතික වශයෙන් මතු වන්නා වූ ප්‍රධාන ප්‍රතිඵලයක් නම්, පැමිණිලි පක්ෂය සිය වගකිව යුතු නිලධාරියෙකු මාර්ගයෙන් මෙම නඩුවට අදාළ ප්‍රශ්නය ඇති වූ වකවානුවේම දරා ඇති ස්ථාවරය පැහැදිලි වන්නේය. වී.19 මගින් පැමිණිල්ල දරා ඇති ස්ථාවරය අනුව මෙම නඩුවට අදාළ විත්තිකරුවන්ට දානය කරන ලද බව කියන මිලියන 3.5 ක මුදලක් ඇත්ත වශයෙන්ම විත්තිකරුවන් හට ගෙවා නොමැත. එම මුදල වී.19 කිසි ව්‍යාකූලතාවයකින් තොරව පැහැදිළි කරන අයුරු පැමිණිලිකාර බැංකු ශාඛාවේ කලක්

කළමනාකාර සේවයේ නියුක්තව සිටි ලලිත් පීරිස් යන අය විසින් සිය පරිහරණයට ලබා ගෙන ඇති බව පැහැදිලිය. එකී සිද්ධිමය කරුණ තව දුරටත් ඔප්පු කිරීමේ අවශ්‍යතාවය විත්තිය මත පැටවීම අවශ්‍ය වන්නේ නැත."

In the case of the ***Sri Lanka Ports Authority and Another vs. Jugolinija –Boal East (1981) 1 SLR 18***, *Samrakoon CJ* held that "If no objection is taken, when at the close of a case, documents are read in evidence, they are evidence for all purposes of the law. This is the *cursus curiae* of the original civil courts". Therefore, the 'V-19' can be accepted as evidence to this fraud done by the Appellant Bank official.

I am further mindful of the decision in ***Alwis vs. Piyasena Fernando (1993) 1 SLR 119*** where *G.S.P. de. Silva CJ* had observed that, "the findings of primary facts by a Trial Judge who hears and sees the witnesses are not to be lightly disturbed on appeal."

This court is also of the view that the Appellant Bank by having preferred this appeal cannot seek benefits as there was a fraud done by the bank official Lalith Peiris and in the said circumstances the Appellant Bank has failed to establish the issues before the High Court.

Hence, I affirm the judgment of the High Court of Western Province Civil (holden in Colombo) and dismiss the instant appeal.

Appeal Dismissed with cost.

Judge of the Supreme Court

Justice L.T.B. Dehideniya

I agree,

Judge of the Supreme Court

Justice S. Thurairaja PC

I agree,

Judge of the Supreme Court