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

Seylan Bank Limited

No. 33, Sir Baron Jayathilake Mawatha,

Colombo 01.

Presently at:

Ceylinco-Seylan Towers

No. 90, Galle Road,

Colombo 03

PLAINTIFF

Vs.

1. Christian Melanie Rozairo
13 43/5, De Soysapura,
Ratmalana

Presently at:
15/C1, Haramaniz Lane
Attidiya
Dehiwala

2. Adrian De Rozairo
B/4, 3/5, Soysa Flats,
Moratuwa

DEFENDANTS

SC Case No. SC (CHC) Appeal No 11/06

Case No. CHC 101/2000(1)

AND NOW

In the matter of an Appeal against the Judgement of the learned Judge of the Commercial High Court of the Western Province

holden in Colombo dated 25.11.2005.

Seylan Bank Limited

No. 33, Sir Baron Jayathilake Mawatha,

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PLAINTIFF-APPELLANT

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Moratuwa

DEFENDANTS-RESPONDENTS

Before: **Justice A.L. Shiran Gooneratne**

Justice Achala Wengappuli

Justice K. Priyantha Fernando

Counsel: Shanaka de Livera for the **Plaintiff-Appellant**

Ms. Anuradha Abeysekera with Sandun Batagoda instructed by Udeni Gallage for the **1st Defendant-Respondent**

Argued on: 15/10/2025

Decided on: 05/02/2026

A.L. Shiran Gooneratne J.

Introduction

By Plaint dated 28/06/2000, the Plaintiff-Appellant (hereinafter referred to as "the Plaintiff Bank") instituted Action No. CHC 101/2000 (1) in the Commercial High Court of Colombo against the 1st and 2nd Defendants-Respondents (hereinafter referred to as "the 1st and 2nd Defendants"), seeking to recover a sum of Rs. 3,125,091.75 together with interest on an overdraft facility allegedly granted at the request of the Defendants.

In paragraphs 3 of the Plaint, the Plaintiff averred that, at all times material to this action, the 1st Defendant operated and maintained a current account with the Plaintiff Bank at its Dehiwala Branch.

In paragraphs 4 and 6, the Plaintiff further averred that, upon the request of the 1st Defendant, the Plaintiff Bank granted the aforesaid overdraft facility, and that after giving due credit for payments made, a sum of Rs. 3,125,091.75 remained due and owing as at 30/09/1999, together with interest at 30% per annum from 01/10/1999 until payment in full.

In paragraphs 10, 11, and 12 of the Plaint, the Plaintiff stated that, in consideration of the said financial facility granted to the 1st Defendant, the 2nd Defendant executed a Guarantee dated 22/11/1995, whereby he agreed, inter alia, to be jointly and severally liable with the 1st Defendant to pay the said sum to the Plaintiff on demand. The Statement of Account and the Guarantee were marked A and B respectively and annexed to the Plaint.

In paragraphs 13 and 14, the Plaintiff pleaded that the 1st and/or 2nd Defendants were in breach of the said agreement, had failed and neglected to make payment to the Plaintiff, and that a cause of action had thereby accrued to the Plaintiff to institute proceedings for the recovery of the said sum.

The 1st Defendant filed her Answer dated 01/12/2000 and, inter alia, denied that any cause of action had accrued to the Plaintiff Bank. In paragraphs 3 and 4 of the Answer, she admitted maintaining a current account at the Dehiwala Branch of the Plaintiff Bank, but denied having requested an overdraft facility and further denied signing any cheques that would permit the account to be overdrawn. She accordingly prayed for a dismissal of the action.

The 2nd Defendant failed to file an Answer, and the trial proceeded *ex parte* against him.

Upon consideration of the pleadings, the evidence led at the trial, and the written submissions filed by the respective parties, the learned Judge of the Commercial High Court, by Judgment dated 25/11/2005, held inter alia, that the Plaintiff Bank had failed to duly prove the Loan Facility Agreement marked P3. The Court observed that the sole witness who testified regarding P3 had no personal knowledge of whether the 1st Defendant had signed the document, and that P3 had neither the signature of any authorized officer of the Plaintiff Bank nor the seal of the Bank. The learned Judge accordingly dismissed the Plaintiff's action.

Being aggrieved with the said Judgment, the Plaintiff Bank preferred this appeal by Petition of Appeal dated 20/01/2006.

The questions of law raised by the Plaintiff-Appellants may be summarized as follows:

1. Whether the Plaintiff Bank has proved that the 1st Defendant requested and/or obtained any loan facility from the Plaintiff Bank.
2. Whether the purported Loan Facility Agreement marked P3 has been proved by the Plaintiff Bank.
3. Whether the Plaintiff Bank has proved that any of the cheques purportedly signed by the 1st Defendant were in fact signed by her.
4. Whether Section 154 of the Civil Procedure Code, as amended by Act No. 17 of 2022, applies to document P3.

Proceedings in the Commercial High Court

The Plaintiff Bank led the evidence of a single witness, Shameel Nadeem, the recovery officer of the Dehiwala Branch, who produced documents marked P1 to P8. Documents P5 to P8 were admitted without further proof. It is material to note that this witness was not attached to the Dehiwala Branch during the period relevant to the transactions in dispute. He joined the branch only a few months before the institution of the action and expressly stated that he had no personal knowledge of the dealings in question, including whether the 1st Defendant signed the Overdraft Agreement Form marked P3. The 1st Defendant, in her testimony, denied having applied for an overdraft facility.

Cause of Action Against the 1st Defendant

According to the Plaint, the Plaintiff Bank granted an overdraft facility to the 1st Defendant pursuant to a request made by the Defendants through the Dehiwala Branch. The Facilities Agreement Form marked P3 states, inter alia, that the Bank

would continue to grant credit facilities up to a limit of Rs. 300,000 by way of overdraft. The name of the 1st Defendant, C. M. Rozairo, appears therein as the borrower.

The 1st Defendant admitted maintaining Current Account No. 1604620 at the Dehiwala Branch. The mandate form [P1(a)] and the acknowledgment [P1(b)] contain the specimen signature of the 1st Defendant, set out in block letters. However, the original specimen signature appearing on P1(a) and P1(b) has been struck off in red ink and replaced by a flowing signature purporting to be that of the 1st Defendant. Notably, the substituted signature appears on the Facilities Agreement Form (P3) as that of the borrower. In addition, P3 bears significant omissions: the date, the commercial registration number, the borrower's address, and the signature of the guarantor, which are left blank.

For the purposes of the Guarantee marked P4, the 1st Defendant is described as "the debtor". Clause 2 of P4, dated 22/11/1995, contains inapplicable words that have not been struck out. Only the 2nd Defendant has signed as guarantor, and the liability is limited to Rs. 300,000. Although the 2nd Defendant's name appears as "ADRIAN DE ROZAIRO" in Clause 2, he signs the final page as "ADRIAN DE ROSARIO".

Despite these material defects, the Plaintiff's witness was unable to speak to any of the contested facts. He confirmed that he had no personal knowledge of the 1st Defendant or her signature. The person who could have addressed these matters, the then-Manager of the Dehiwala Branch, was not called to testify.

It is observed that, having moved for an adjournment on the basis that it intended to summon S. A. Dias, who was the Manager at the material time and possessed direct knowledge of the transactions in issue, the Plaintiff Bank failed to call the said witness. When the trial resumed, the Plaintiff Bank proceeded to close its case without leading his evidence. The absence of this testimony has resulted in the case being presented without a vital piece of evidence that was within the Plaintiff Bank's power to adduce.

The Plaintiff Bank relies on the Loan Facility Agreement dated 04/11/1995, marked P3. The document was marked subject to proof. The Plaintiff Bank contends that, since no objection was raised at the closure of its case, P3 stands proved and requires no further evidence. In the circumstances, the Plaintiff Bank submits that Section 154 of the Civil Procedure Code does not apply to P3.

The Manager who certified the account balance statement (P2) was also not called to testify. The Plaintiff nonetheless asserts that P2 constitutes evidence of the 1st Defendant's liability.

The 1st Defendant, while admitting that she maintained a current account with the Plaintiff Bank, firmly denied requesting an overdraft facility, signing any Loan Facility Agreement, or signing any of the cheques marked P9 to P90.

The 1st Defendant contends that the proceedings of 02/11/2004 indicate that all documents, except P5 to P8, were implicitly objected to, and that P3 and the remaining documents were marked subject to proof. The Plaintiff, on the other hand, maintains that P3 was admitted without objection.

Attention has also been drawn to Section 154A of the Civil Procedure Code (Amendment Act No. 17 of 2022).

Section 154A changed how attested deeds and documents are proved in civil cases. It provides that, except for wills, if a deed or other attested document looks duly executed on its face, the party relying on it does not have to call attesting witnesses or give "formal proof" of execution or genuineness, unless (a) the other side has specifically challenged that execution or genuineness in the pleadings and made it an issue, or (b) the court itself requires formal proof. However, this does not apply to deeds or documents that are not included in its pleadings, and the same is extended to summary procedure actions as well.

However, the transitional provisions contained in section 3 of the Act, which apply to all appeals that were pending at the time the Amendment Act came into force in 2022, create an exception to the general rule in section 154A. Under this section, if the opposing party did not object to the document when it was tendered, or objected at that stage but did not maintain the objection when the document was read in evidence at the close of the case, the court must accept the document without demanding further proof. If the opposing party did or does object, the judge has a discretion to decide whether formal proof of execution or genuineness is or was necessary and must exercise that discretion by considering the strength of the objection to the document.

This case, being an appeal that was pending at the time, the act came into force in 2022, is subject to the above-mentioned transitional provision.

The proceedings indicate that the Petitioner, in these circumstances, has explicitly admitted the documents contained in P5, P6, P7, and P8 *(vide page 242 of the appeal brief)*.

"මෙම නඩුවෙ පැමිනිල්ල විසින් පැ 5,6,7 සහ 8 වශයෙන් සලකුණු කර ඇති ලෙඛන ඔප්පු කිරීමකින් තොරව ඒ ආකරයෙන්ම බාර ගෙන සාක්ශි වශයෙන් ඇතුලත් කර ගැනීමට විත්තියේ නීතීඥ මහතා එකඟ වේ"

The learned Counsel for the 1st Defendant has not given a blanket consent to all of the Plaintiff's documents. He has expressly mentioned documents he wishes to be received and read in evidence without proof. By identifying only those four documents, Counsel has made it clear that his admission was confined to them.

That selective admission has a necessary consequence. It means that the remaining documents, including the alleged facility document P3, were **not** admitted and therefore remained in dispute and subject to proof. If Counsel had intended to accept all the documents without proof, there would have been no reason to single out P5–P8 by their individual numbers.

In this context, section 3 of Act No. 17 of 2022 cannot be used to convert a limited admission into a general waiver of objection. Therefore, the document marked P3 cannot be considered as duly admitted.

The Plaintiff's witness testified, inter alia, to the following matters that:

I. under the Loan Facility Agreement marked P3, a customer is required to repay any outstanding amount where the loan exceeds Rs. 300,000,
II. the Bank refrains from issuing cheque books when overdraft facilities remain unsettled,
III. the Bank is entitled to dishonor cheques where the current account is overdrawn beyond its approved limit,
IV. an unsecured loan facility is limited to Rs. 200,000, and
V. that even where a bank guarantee is executed, an overdraft facility would not exceed Rs. 200,000.

The Plaintiff Bank admits that it possesses no written document evidencing a request by the 1st Defendant for an overdraft facility. In the absence of such a written request, no letter of offer exists. The letter of offer is a fundamental contractual document, specifying the credit limit, the terms and conditions of the facility, and the period for which it is granted. Once signed by the proposed borrower, it becomes the letter of acceptance. Such a document must be properly addressed to the borrower, must exclude inapplicable conditions, and must accord strictly with the approved terms, including the securities to be obtained. The Plaintiff Bank has placed no evidence before Court to show that a letter of acceptance was ever issued to the 1st Defendant pursuant to any alleged approval of an overdraft facility.

Against that background, even assuming for the sake of reasoning that the Loan Facility Agreement marked P3 could be admitted without further proof, the question arises whether the Court can rely on the undertakings contained therein, purportedly by the 1st Defendant, to establish her liability to the Bank.

Before addressing that question, it is necessary to consider the admissibility and reliability of the mandate form marked P1(a). A customer is under a general duty to provide clear and unambiguous instructions to the bank, in a manner that does not facilitate falsification. Correspondingly, the bank must obtain proper specimen signatures of the authorized account operator and act strictly in accordance with its mandate. As noted earlier, the 1st Defendant categorically asserted that the original specimen signature appearing on the mandate form and on the Acknowledgment Receipt had been struck off and substituted with another signature. The substituted signature, on the face of the documents, differs materially from the admitted specimen signature and corresponds instead with the signature appearing on all the disputed cheques. In these circumstances, the Plaintiff Bank had ample reason to suspect the genuineness of the signature, and the face of the record clearly suggests the possibility of fraudulent substitution.

The Plaintiff's sole witness lacked personal knowledge and was incapable of testifying to the authenticity of the substituted signature. Significantly, no question was put by the Plaintiff Bank to the 1st Defendant to establish whether the signature appearing on P1(a), the cheques, or the Loan Facility Agreement P3 was her signature. Therefore, no satisfactory proof was placed before the Court to establish that the substituted signature was the signature of the 1st Defendant.

Section 101 of the Evidence Ordinance provides:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

In this action, it is the Plaintiff Bank that asserts the existence of a Loan Facility Agreement said to have been signed by the 1st Defendant, as well as cheques allegedly signed by her. The burden of proving those facts, therefore, lies on the Plaintiff.

Since the Plaintiff relies on the signature of the 1st Defendant, section 67 of the Evidence Ordinance also applies to this case. It provides:

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person' handwriting must be proved to be in his handwriting."

The 1st Defendant, throughout her pleadings and evidence, has consistently denied requesting and/or signing any Loan Facility Agreement and denied signing any cheques. In such a situation, the law requires the party relying on the document to prove the signature in one or more of the recognized ways.

In this regard, the 1st Defendant has relied on the decision of the Supreme Court in ***Multiform Chemicals Limited v Adrian Machado*, S.C. Appeal No. 183/2011 (decided on 18/07/2024**), where Janak De Silva J, referring to E. R. S. R. Coomaraswamy's *The Law of Evidence, Vol. I (Stamford Lake Publication, 2022)* and to ***Robins v Grogan*** (**43 NLR 269)**, held that a document cannot be used in evidence until its genuineness has either been admitted or established by proof, and that where there is no admission of execution, the handwriting or signature must be proved by acceptable evidence. The same judgment summarizes, with reference to *The Law of Evidence, Vol. I (Stamford Lake Publication, 2022)*, the recognized methods by which the authenticity of a document may be proved, including: the evidence of the alleged signatory; the evidence of a witness who saw the document being signed; evidence of a person acquainted with the handwriting (section 47 of the Evidence Ordinance), expert comparison, admissions, comparison by court under section 73 of the Evidence Ordinance, and circumstantial or intrinsic evidence.

On that analysis, the 1st Defendant's submission that the mere production of the original document, without any other form of proof, is not sufficient, contains merit.

As per Section 102 of the Evidence Ordinance:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

In these circumstances, if no evidence at all were led, it is the Plaintiff Bank's claim that would fail.

It is also pertinent to note that, when the 1st Defendant's Counsel moved, on 27/07/2005 (vide page 285 of the appeal brief), for a commission to the Examiner of Question Documents (EQD) to compare the signatures appearing on cheques with the specimen signature on the mandate marked P1, the Plaintiff Bank objected, stating that the application is belated and prejudicial. That conduct is, at the very least, inconsistent with a party confident in the genuineness of the signatures it relies on.

Accordingly, the Court finds that the Plaintiff Bank has failed to adduce evidence, in any of the recognized modes, capable of establishing that the signatures are in fact those of the 1st Defendant, and the burden resting upon it has not been discharged.

Turning to the Guarantee marked P4, the document required attestation by at least two witnesses under the Prevention of Frauds Ordinance, which is designed to guard against forgery and disputes relating to execution. P4 contains the signature of only one witness, whose identity is not disclosed. Where a non-staff member witnesses a document, the bank must ensure the person is known to it and must record identifying details such as the National Identity Card number or residential address. The Plaintiff Bank has not complied with these procedural requirements, thereby compromising the authenticity of the security document. Since the overdraft facility is tied to the borrower's current account, the signature of the account holder required verification and proper witnessing, that requirement was also breached.

It is evident that the terms in P3 and P4 were neither properly tailored to the facility allegedly approved nor appropriately initialed or signed by the branch manager. These

deficiencies further undermine the establishment of liability on the part of the 1st Defendant.

It is of significance to observe that, during the period material to the transactions in question, the 1st Defendant was the estranged wife of the 2nd Defendant and, according to her testimony, remained in possession of the cheque books. The bank statements marked P2 indicate two cheque-book charges on 22/11/1995, which is the date on which the Guarantee P4 was signed by the 2nd Defendant at the Bank. It is therefore reasonable to infer that the cheque books were issued to him. The 1st Defendant admits receiving only the initial cheque book issued upon the opening of the account.

When granting the alleged overdraft facility, the Bank purported to rely on a guarantee (P3), executed by the 2nd Defendant for Rs. 300,000. P3 contains a proviso making the facility repayable on demand and enabling the Bank to seek immediate repayment upon any unfavorable development. The Bank seeks to justify the substantial excess over the approved limit by relying on clause 5 of P3, arguing that it was contractually obliged to honour cheques that exceeded the limit since it had undertaken to do so by accepting the customer's payment orders.

As at 22/11/1995, the account was already overdrawn by approximately Rs. 430,000. The Bank permitted the account to remain overdrawn from 1995 until 1999, ultimately reaching approximately Rs. 3,100,000, which was more than ten times the limit of the guarantee. These overdrawings were not the result of cheques issued by authorized persons but were, according to the Plaintiff, the result of transactions by the 1st Defendant herself. The Bank did not caution the 1st Defendant about these substantial overdrafts yet continued issuing cheque books to the 2nd Defendant. In these circumstances, the learned Judge of the Commercial High Court raised pertinent questions to the Plaintiff's witness.

ප්‍ර : ඒ සම්බන්ධයෙන් ඈ අද දින දක්වා විරුද්ධත්වයක් දක්වා නැහැ?

උ : ඔව්

ප්‍ර : එක දිනක්වත් අවුරුදු 5ක් ඇතුලත, පැමිණිලිකාර බැංකුවට පැමිණ තමාගේ ජංගම ගිණුමේ මෙවැනි අයිරාවක් බවට පත්වී ඇත්තේ, කෙසේද යන්න සම්බන්ධයෙන් පැමිණිලිකර බැංකුවට පැමිණ විමසා නැහැ?

උ : ඔව්. විමසා නැහැ.

ප්‍ර : මෙම නඩුවේ චිත්තිකරුවන් දෙදෙනා විසින්, පැමිණිලිකාර බැංකුවට, එකී රුපියල් තිස්එක්ලක්ෂය විසිපන්දහස් අනූඑකයි ශතහැත්තෑපහක් (රු 3,125,091.75) ගෙවීමට තිබෙන බව තුමා කීවා?

උ : ඔව්

ප්‍ර : එම මුදල සහ පොළිය අද දින තෙක් පැමිණිලිකාර බැංකුවට ලැබී නැහැ?

උ : නැහැ. ලැබී නැහැ.

අධිකරණයෙන් :-

ප්‍ර : අයිරා මුදල් කී වතාවක් දීලා තියෙනවද කියලා සාමාන්‍යයෙන් කියන්න පුළුවන්ද?

උ : කීවතාවක් කියලා හරියට සඟන් කර කියන්න බැහැ. හේතුව, සෑම චෙක්පතක්ම වගේ ගරු කර තිබෙනවා. මෙම එම චෙක්පත් වලින් මෙම ගිණුම අයිරා වී තිබෙනවා.

ප්‍ර : චෙක්පත් 50ක් 60ක් පමණ?

උ : ඊටත් වඩා

ප්‍ර : ලක්ෂ ගණන් නිකුත් කරනවාද ඇයි එහෙම නිකුත් කරන්නේ?

උ : වෙළඳ කටයුතු සළකා බලා නිකුත් කරන්නේ.

ප්‍ර : ලක්ෂ 31ක් අය කර ගන්න කොච්චර පිරිවැටුමක් තිබෙනවද?

ලක්ෂ 31ක් අයිරා වෙන්න කොයි වාගේ ගණුදෙනුකරුවෙකුට දෙන්නේ?

උ : භාණ්ඩ බෙදා හරින ඒජන්ත වරයෙකු වාගේ කෙනෙකුට දෙනවා.

සුළු සුළු චෙක්පත් එකතු කර දෙනවා.

ප්‍ර : ලක්ෂ 31ක් වගේ මුදලක් දෙන්නේ කොයි වාගේ ගණුදෙනුකරුවෙකුටද?

උ : ඔහුගේ ගිණුම සළකා බලනවා. ඔහුගේ ව්‍යාපාරික කටයුතු පරීකෂා කර බලනවා.

ප්‍ර : ණය වෙනවා නම් සුරකුමක් නැතිව, ස්වාමිපුරුෂයා ඇපකාරයාව වෙන්න තරම්,

මෙවැනි මුදලක් දෙන්නේ මොන වාගේ පුද්ගලයෙකුටද?

උ : විශ්වාසවන්ත පුද්ගලයෙකුට තමයි දෙන්නේ.

ප්‍ර : කොපමණ මුදලක් පරිහරනය වෙන්න ඕනද? කොපමන මුදලක් පරිහරනය වී තිබෙනවාද සුරකුමක් නැතිව දෙන්න?

උ : ලක්ෂ 2ක් පමණ කිසිම සුරකුමක් නැතිව දෙන්නේ.

As Paget's Law of Banking (15th edn, LexisNexis Butterworths 2018), referring to several decided cases, states:

"An overdraft limit will often be expressly agreed: this is called a 'planned' or 'authorised' overdraft.

If, however, a customer gives a payment instruction (including by a cheque that is presented for payment) that would take the customer beyond the agreed overdraft limit (if any), then that is treated as an implied request for a further overdraft. The bank is not obliged to honour the request and permit further borrowing, although it may have an obligation not to act irrationally…"

The 1st Defendant testified that she opened the account at the request of the 2nd Defendant, solely to facilitate deposits relating to his business activities. There is no evidence that she participated in that business, exercised financial decision-making, or possessed the means to form an independent commercial judgment. In those circumstances, it is apparent that the Plaintiff Bank was aware of the true nature of the relationship between the debtor and the guarantor.

The 1st Defendant has consistently denied requesting any overdraft facility. The Plaintiff Bank failed to take reasonable steps to call the branch manager who granted the alleged facility, and therefore failed to establish that the 1st Defendant entered into the transaction with adequate understanding of its nature or that her consent, if any, was freely and knowingly given.

The Plaintiff Bank continued to honour cheques under the purported overdraft facility despite its knowledge that the 2nd Defendant was estranged from the 1st Defendant, and that a conflict of interest was likely. This deterioration in the relationship between the borrower and the guarantor constituted, at the very least, a circumstance giving the Bank actual or constructive notice of potential wrongdoing by either the debtor or the guarantor. The Bank, however, chose to ignore these warning signs.

In ***Barclays Bank plc v O'Brien*** **[1993] QB 109 (CA)**, the Court of Appeal proceeded on a "special equity" analysis in relation to relationship-based suretyship, holding in substance that where a wife provides security for her husband's business debts and her consent has been procured by undue influence or misrepresentation (or without an adequate understanding), the charge may be unenforceable against her unless the bank has taken reasonable steps to ensure that her consent was properly and informedly obtained.

On appeal, the ***House of Lords in Barclays Bank plc v O'Brien*** **[1994] 1 AC 180 (HL)** dismissed the bank's appeal but reformulated the legal basis. It held that the wife's right to set aside the security arises from her equitable right against the husband whose wrongdoing (such as misrepresentation or undue influence) procured her consent. That right can be enforced against the bank if the bank had actual or constructive notice, and in the relevant class of surety cases the bank is "put on inquiry" unless it takes reasonable steps to ensure the wife's agreement was properly obtained.

The bank "put on inquiry" in this context means that if a bank is taking security/guarantee from someone for another person's debt in a relationship-based, non-commercial setting, the bank must treat the situation as a warning sign that the suretyship may be based on misrepresentation, pressure, or undue influence.

Once the bank is "put on inquiry", it will be fixed with constructive notice of the surety's potential equitable right to set the transaction aside unless the bank takes a reasonable step to ensure the surety's consent is properly obtained.

Those reasonable steps could be practical safeguards, such as ensuring the surety understands the nature and extent of the liability and the risks, and having independent advice.

The estrangement between the 1st and 2nd Defendants is an even more serious indicator than that of an ordinary spousal guarantee. Such a deterioration in relationship squarely places the bank "on inquiry."

Royal Bank of Scotland v Etridge **(No. 2) [2001] UKHL 44; [2002] 2 AC 773,** the House of Lords reaffirmed and clarified *Barclays Bank plc v O'Brien* on when a lender will be "put on inquiry" in domestic suretyship cases. Accordingly, bank is put on inquiry whenever a wife offers to stand surety for her husband's debts, and the bank is then required not to investigate the private relationship, but to take reasonable steps to ensure the surety understands the nature of the documents and the practical risks being undertaken. The House explained that the "furthest" a bank can ordinarily be expected to go is to satisfy itself that the implications have been brought home to the surety in a meaningful way, typically by insisting on independent legal advice and obtaining written confirmation from a solicitor acting for the surety (and the bank is generally entitled to proceed on the assumption that the solicitor has done this properly, absent knowledge to the contrary).

In the present case, the evidence indicates that the branch manager met the 1st Defendant at her residence. However, this meeting must be assessed considering the undeniable fact that the Bank was aware that the 1st Defendant's account was operated exclusively for the benefit, and under the effective control of her estranged husband's business activities. This circumstance alone should have prompted the Bank to adopt a heightened level of scrutiny.

The Bank was plainly put on inquiry that the 2nd Defendant might be acting solely for his own benefit when executing the payment orders. In the absence of any compelling indication to the contrary, the Bank ought reasonably to have approached the situation with an initial suspicion that a fraudulent act may have been committed by the 2nd Defendant.

The applicable standard of inquiry for a banker was articulated by Millett J. in ***Macmillan Inc v Bishopgate Investment Trust plc*** **[1995] 1 WLR 978, 1014**, where he stated:

"Account officers are not detectives. Unless and until they are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the presumption that they are dealing with honest men. In order to establish constructive notice, it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation, it was obvious that the transaction was probably improper."

As demonstrated earlier in this judgment, the documentation before Court is riddled with serious infirmities, and the 1st Defendant has categorically denied the transactions said to have been undertaken by her. These circumstances made it imperative that the Plaintiff Bank lead the evidence of the branch manager who handled the transaction and who was acknowledged by the Plaintiff Bank to be available at short notice. His testimony was essential to address the doubts surrounding the transaction and the Bank's own conduct.

Nevertheless, after moving for time to summon the branch manager, the Plaintiff Bank chose not to call him as a witness and proceeded to close its case for reasons known only to the Bank. The Bank's failure to meet the 1st Defendant's consistent and clear position, or to meaningfully confront the evidence indicating irregularity, amounts to a deliberate failure to assist the Court in uncovering the truth.

The learned Judge of the Commercial High Court, having considered the evidence in its totality, dismissed the Plaintiff's action on a balance of probabilities and awarded costs. I find no basis to interfere with that determination. Accordingly, I answer questions of law Nos. 1 to 4 in the negative.

Despite the clarity of the evidence before the Commercial High Court, the Plaintiff Bank has nevertheless preferred this appeal. Its sole witness was manifestly incapable of testifying to the crucial facts in issue. Not only did the Bank fail to prosecute its case with diligence at first instance, but it has also now burdened this Court with a frivolous appeal, thereby unnecessarily consuming valuable judicial time.

Having considered the submissions of learned Counsel, the documentary material placed before Court, and the totality of the evidence recorded in the Commercial High Court, it is clear that the Plaintiff Bank failed to discharge the burden of proof that lay upon it. The conduct of the Plaintiff Bank, in proceeding with the overdraft facility despite being put on inquiry, its omission to take reasonable steps to verify the 1st Defendant's position, its failure to address the material infirmities in the documentation, and its decision not to call the branch manager who was directly involved in the disputed transactions, collectively demonstrate a lack of due diligence that is inconsistent with the obligations expected of a prudent banker.

The learned Judge of the Commercial High Court, having correctly evaluated these deficiencies, dismissed the Plaintiff's action on a balance of probabilities. Upon an independent examination of the findings and the evidence, this Court sees no basis to interfere with that conclusion. The decision of the Plaintiff Bank to pursue this appeal

despite the clear weaknesses in its own ca se has resulted in unnecessary expenditure, judicial time and resources.

For all the reasons set out above, this Appeal is dismissed. The Plaintiff–Appellant is directed to pay costs in the sum of Rs. 750,000/- (Rupees Seven Hundred and Fifty Thousand) to the 1st Defendant–Respondent, such amount to be paid in full within three months from the date of this Judgment.

Appeal dismissed.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree

Judge of the Supreme Court