

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

In the matter of an Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Al Haj Abdul Azeez Mohamed Razik,
Alias Ramzi Hajjar
No. 118/1, Outer Circular Road, Ratnapura.

Plaintiff

SC. CHC. Appeal No: 66/2014

HC (Civil) Case No. 597/2010 MR

Vs.

Ceylinco Profit Sharing Investments Corporation Limited,
No. 153, Dharmapala Mawatha, Colombo -07.
And also of
No. 3/1, Melbourne Avenue Colombo - 04.

Defendant

AND NOW BETWEEN

Ceylinco Profit Sharing Investments Corporation Limited,
No. 153, Dharmapala Mawatha, Colombo -07.
And also of
No. 3/1, Melbourne Avenue Colombo - 04.

Defendant-Appellant

Vs.

Al Haj Abdul Azeez Mohamed
Razik,
Alias Ramzi Hajiar
No. 118/1, Outer Circular Road,
Ratnapura.

Plaintiff-Respondent

BEFORE:

HON: P. PADMAN SURASENA, CJ.
HON: K. KUMUDINI WICKREMASINGHE, J.
HON: JANAK DE SILVA, J.

COUNSEL:

Faiszer Musthapha, PC. With Tharaka
Nanayakkara and O.K.T.M. Muneer
instructed by Abdeen Associates for the
Defendant-Appellant.

Manoj Bandara with Thidas Herath and Ms.
Thamali Wijekoon instructed by Sudath
Perera Associates for the
Plaintiff-Respondent.

WRITTEN SUBMISSIONS:

Pre Argument Written Submissions by the
Defendant-Appellant on 17.12.2021.

Post Argument Written Submission by the
Defendant-Appellant on 22.07.2024.

Pre Argument Written Submissions by the
Plaintiff-Respondent on 18.02.2022.

ARGUED ON: 26.02.2024

DECIDED ON: 23.03.2026

K. KUMUDINI WICKREMASINGHE, J.

This is an appeal from a judgment of the High Court of the Western Province
holden in Colombo (Exercising its Civil Jurisdiction) of case bearing No: HC
(Civil) 597/2010 MR dated 25.04.2014.

The Plaintiff-Respondent (hereinafter referred to as the “Respondent”) instituted the initial action in the High Court of Western Province holden in Colombo (Exercising its Civil Jurisdiction) against the Defendant-Appellant (hereinafter referred to as the “Appellant”).

The Respondent instituted this action on 30th September, 2010 against the Appellant seeking, *inter alia*, a judgment and decree in the sum of Rs. 38,240,696.29, to be due and owing on account of the Respondent’s investments and savings maintained with the Appellant, together with interest thereon until the payment in full, and costs.

Dr. Z.M. Rafeek, Director/Chief Executive Officer (CEO) and two other representatives of the Appellant, Ceylinco Profit Sharing Investments Corporation Limited, an investment company, requested the Respondent to make an investment at the Appellant’s Ratnapura branch. Pursuant to the request, the Respondent deposited a sum of Rs. 40,000,000 as a Mudarabah investment (this document was marked as “X4” (Page 123 of the brief)) and a sum of Rs. 9,000,000 as savings (this document was marked as “X5” (Page 124/133 of the brief)). The parties have entered into a Mudarabah agreement on the 11th of December 2008 where the Respondent invested the said amount of Rs. 40,000,000 under a Mudarabah investment. This document was marked as “1ᨀ1” (Page 172/173 of the Brief). The investment of Rs. 40,000,000 was for a period of six (06) months and was withdrawable upon seven days’ notice during that period, whilst the savings deposit of Rs. 9,000,000 was withdrawable at any time. This document was marked as “P6” (Page 59 of the brief) and “X8” (page 145 of the brief).

The Respondent averred that, within a few months of deposit, public reports emerged alleging financial instability within the Ceylinco group and irregularities in the management of public funds. Consequently, the Respondent sent a notice to the Appellant on 02.02.2009 seeking to withdraw the savings amount of Rs. 9,000,000 and the Mudarabah investment amount of Rs. 40,000,000 aggregating to a total amount of Rs.

49,000,000. This document was marked as “X9” (Page 146 of the Brief) and “P7” (Page 60 of the brief). Since there was no response, the Respondent went to the Head Office where the Respondent got in contact with the CEO and Mr. K.A.S. Jayatissa, the Deputy Chairman of the Appellant. The Respondent states that both the CEO and the Deputy Chairman promised that the amount would be fully paid within two weeks and issued two post-dated cheques from the Seylan Bank of Ratnapura Branch (a member of the Ceylinco Group), with their signatures on them, bearing No. 201867 for a sum of Rs. 25,000,000, document marked as “X11” (pages 149/150 of the brief) and “P9” (page 62 of the brief) and bearing No. 201868 for a sum of Rs. 24,000,000 document marked as “X12” (pages 151/152 of the brief) and “P9” (page 62 of the brief) totalling a sum of Rs. 49,000,000. However, the said cheques were dishonoured and returned stating “refer to drawer” and “drawer’s mandate determined” because there were no funds in the account. This can be seen for cheque no. 201867 on document marked as “X13(a)” (Page 154 of the brief) and for cheque no. 201868 on document marked as “X14” (Page 155 of the brief). Furthermore, the Respondent came to learn that the Deputy Chairman did not possess the authority to sign the cheques.

Due to the failure in the recovery of money, the Respondent filed a complaint in the Criminal Investigation Department (CID). The Respondent states that becoming aware of this, the Appellant by letter dated 06.04.2009, took undertakings that the full payment of Rs. 49,000,000 would be paid. Pursuant to the undertakings, the Appellant made partial payments to the Respondent, leaving a balance of Rs. 38,240,696.29 yet to be paid. The Respondent, to recover the outstanding balance, sent a Letter of Demand through an Attorney-at-Law to the Appellant, asserting that, in terms of the irrevocable undertakings, the Appellant had failed to settle the remaining sum of Rs. 38,240,696.29, and by such failure, had committed a repudiatory breach of the undertaking. The said Letter of Demand was marked as “X18” (pages 163/165 of the brief) and “P12” (pages 71/73 of the brief). In response thereto, the Appellant, through an Attorney-at-Law,

denied any irrevocable undertaking and contended that no repudiatory breach had occurred while stating that steps were being taken in relation to the matter. This document was marked as “X19” (page 166 of the brief) and “P13” (page 74 of the brief). As the outstanding balance remained unpaid, the Respondent instituted the proceedings.

The Appellant in the answer stated that the Appellant denies liability and pleaded inter alia that-

- a. The Respondent had made the investment with the Appellant as a Mudarabah under the concepts and rules of Islamic finance;
- b. Under the Mudarabah concept the investor agrees to bear the loss of the investment/ capital;
- c. The cheques issued by the Chief Executive Officer and the Deputy Chairman of the Appellant were obtained under duress.

When the matter was taken up for trial, eight admissions were recorded. The translation of the said admissions were as follows:

- 01. The Defendant admits that the plaintiff is a Sri Lankan citizen.*
- 02. The Defendant admits the location of the Defendant's registered office as pleaded in paragraph 3 (a) of the Plaintiff.*
- 03. The Defendant admits that the Plaintiff paid the Defendant Rs. 49,000,000.*
- 04. The Defendant admits the statements contained in paragraphs 2, 4(a), 4(c), 4(d), 4(e), 5(a), 5(b), 11(a), 11(b), 11(c), 19(c) and 19(e) of the Plaintiff.*
- 05. The Defendant admits that the Plaintiff met Dr. Z.M. Rafeek (the Defendant's CEO) as pleaded in paragraph 8 of the Plaintiff.*
- 06. The Defendant admits the documents marked P.10(a), P.10(b), and P.10(c) to the Plaintiff.*
- 07. The Defendant admits that he received the Letter of Demand, document marked P.12 to the Plaintiff.*
- 08. The Plaintiff only acknowledges the reply to the Letter of Demand, document marked P.13 to the Plaintiff sent by the Defendant.*

The Respondent issues were from 01-14 and the Appellant's were from 16-25. The Appellant raised the issue that the High Court does not have jurisdiction to hear the case. However, it was later conceded by the Appellant that the High Court has jurisdiction. The Learned High Court Judge allowed the Respondent to give the testimony by an affidavit. The affidavit was filed on 30.01.2012 with documents marked from X1 to X20 (Page 94/168 of the Brief). After the conclusion of the trial, written submissions were filed by both the parties.

The Learned High Court Judge found that this case is built on two aspects one is that the invested money is not returned and the other that the undertakings by the Appellant to pay the amount were not fulfilled. In this regard, the Learned High Court Judge held that there was a Mudarabah agreement which the Respondent suppressed. However, the undertakings by the Appellant modified or novated the Mudarabah agreement and was enforceable. The Appellant cannot revert to the original agreement after the novation of the agreement. Consequently, the Learned High Court Judge held in favour of the Respondent. Being aggrieved by the said decision of the Learned High Court Judge, the Appellant appealed to the Supreme Court. The questions of law stated in Paragraph 12 of the Petition dated 10.06.2014, are set out below.

- a) The Learned Provincial High Court judge has erred in law and in fact in holding that the subsequent purported undertakings and dealings with the Chief Executive Officer and the Deputy Chairman constituted an agreement binding on the Appellant
- b) The Learned Provincial High Court judge has erred in law in holding that the investments made by the Respondent were not subject to the principles of Islamic finance/a Mudarabah investment
- c) The Learned Provincial High Court judge has erred in law and in fact in failing to consider that the subsequent purported undertakings were contrary to public policy and illegal

- d) The Learned Provincial High Court judge has failed to consider whether the said purported undertakings and/or agreements were obtained and/or entered into under duress
- e) The Learned Provincial High Court judge has misdirected himself on essential questions of law and fact and thereby erred in law

My analysis hereafter will be confined to examining the aforesaid questions of law. However, the questions of law have not been answered in accordance with the said order.

The **second question of law (b)**, which will be the first matter for consideration by this Court, is whether the learned Provincial High Court Judge erred in law in holding that the investments made by the Respondent were not subject to the principles of Islamic finance/ a Mudarabah investment.

A Mudarabah agreement is a contract in which one party (the rabb-ul-maal) contributes the capital and the other party (the mudarib) provides skill, expertise, and labour to undertake a business venture or investment where parties share the profit. Profits shared between the parties are according to a pre-agreed ratio, while the financial losses are borne only by the rabb-ul-maal unless they result from the mudarib's negligence or mismanagement.

The parties have entered into a Mudarabah agreement on the 11th of December 2008, document marked "1٥1". In addressing this question of law, the preliminary issue for determination is whether a Mudarabah Agreement existed between the parties. The Respondent contended that the Respondent was unaware of the existence of such an agreement. This position is reflected both in the cross-examination and in the Respondent's submissions, wherein the Respondent admitted having signed the agreement and opening the relevant account, while asserting the

unawareness to the contents thereof. However, the Respondent agreed that the information to fill the form/ agreement was given by the Respondent.

It must be noted that the Respondent's own documents contain references to a Mudarabah Agreement, despite the Respondent's contention to the contrary. Such references are found in documents marked "X9/P7" and "X18". Further, express references of Mudarabah can be found in document "X8/P6" and "X4" (page 123 of the brief) which records the receipt of the Mudarabah investment for a sum of Rs. 40 million. In light of these, it could be stated that the Learned High Court Judge was correct in finding that the Respondent demonstrates an intention to suppress/ conceal the existence of the Mudarabah Agreement.

In analysing this question of law, reference is made to Clauses 14(b) and 14(c) of the said Agreement, which read as follows:

*b) **This Mudharabah agreement is governed by and shall be construed in accordance with the Sri Lankan Law.** The District Court of Colombo shall have non exclusive jurisdiction to hear and determine any action, name or proceedings arising out of or in connection with this Mudharabah agreement.*

c) All matters provided and not provided for in this Mudharabah agreement shall be subjected to the Islamic Law.

As set out in Clauses 14(b) and 14(c) of the Mudarabah agreement, the parties have provided that the Mudarabah agreement shall be governed by Sri Lankan law, while simultaneously stipulating that all matters provided or not provided in the Mudarabah agreement shall be subjected to Islamic law. These dual provisions give rise to a conflict of laws.

The present dispute gives rise to a conflict of laws issue, as the contractual arrangement contains references to more than one legal system. Conflict of laws, derived from the English common law tradition, governs situations where a legal dispute contains a foreign element, meaning a connection with a legal system other than the forum law. In the present context, the foreign

element arises from the reference within the agreement to Islamic law, while the proceedings are before a Sri Lankan court.

Although many jurisdictions have codified conflict of laws principles through instruments such as the Rome Convention or the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), Sri Lanka has not enacted comprehensive statutory provisions governing conflict of laws. Consequently, Sri Lankan courts must look to principles developed under English common law in some areas of conflict laws, which historically form part of our legal heritage, in determining such issues.

A fundamental concept within private international law is the choice of law clause, by which contracting parties expressly agree upon the legal system that will govern their contractual relationship. The chosen legal system is commonly referred to as the governing law or the proper law of the contract, and it determines the nature, validity, interpretation, and legal consequences of the contractual obligations.

In order to determine the proper law of the contract, I refer to the case of *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 where the parties entered into a contract which consisted of the following clause: “*This contract shall be governed by English Law*”. In that case the Privy Council held that where parties have expressly indicated their intention as to the law governing their contract, that intention must be given effect, provided that the chosen law is bona fide, legal, and not contrary to public policy. The Court emphasized that an express choice of law clause is decisive in determining the proper law of the contract.

If the same is applied, the Mudarabah agreement has an express choice of law as, “*This Mudharabah agreement is governed by and shall be construed in accordance with the Sri Lankan Law*”. Such language constitutes an unequivocal expression of the parties’ intention. Consistent with the principle in *Vita Food Products*, this clause establishes Sri Lankan law as

the proper law of the contract. It is nevertheless necessary to consider the effect of a further provision in the agreement which states: “*All matters provided and not provided for in this Mudharabah agreement shall be subjected to the Islamic Law*”.

The question therefore arises whether this reference has the effect of displacing the governing law clause and rendering Islamic law the proper law of the contract.

In addressing this issue, the reasoning in ***Vita Food Products*** is again instructive. The Privy Council recognised that although the proper law governs the contract, that legal system may incorporate provisions of another legal system as part of the contractual framework. However, such incorporation does not displace the proper law itself. Their Lordships stated that although English law might import foreign legal provisions in certain respects, the contract remains governed by its proper law, which continues to define its nature, obligations, and interpretation.

Thus, even where foreign legal rules are incorporated within a contract, they operate only as contractual terms or supplementary provisions, and cannot supersede the governing law expressly chosen by the parties.

This principle was further affirmed in the case of ***Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] APP.L.R. 01/28***, where it was observed that:

“Accordingly, insofar as each of the clauses provides in clear terms that “this agreement shall be governed by and construed in accordance with the laws of England”, the proviso that such provision shall be “subject to the principles of the Glorious Sharia’a” should be approached on a basis which is reconcilable with the purpose evident from the words which follow, rather than operating to defeat such purpose.”

The Court of Appeal held that the governing law clause remained determinative and that the reference to Sharia principles must be interpreted **in a manner consistent with the express choice of English law**, rather than in a way that would defeat the contractual intention.

Sri Lankan law, in recognising party autonomy, permits the incorporation of aspects of a foreign system of law into contractual arrangements. As stated in ***Vita Food Products Inc case***, it could be noted that the express choice of law becomes the governing law of the contract and the incorporation of a foreign law becomes the contractual terms of the law governing the contract. The incorporation of foreign law acts as contractual terms and cannot supersede the governing law of the contract. If this was applied, it could be outright stated that the proper law/ governing law of the contract is Sri Lankan law and that the Sri Lankan law will define the nature, obligation, interpretation, validity and legal consequences of the contract and the references to Islamic law operates in a supplementary capacity and does not supersede the application of Sri Lankan law which remains the proper governing law of the contract. These references to Islamic law can only guide the court on matters of religious or ethical significance inherent in a Mudarabah arrangement, including the prohibition of interest, the contribution of capital by the rabb-ul-maal, the provision of skill and labour by the mudarib, the sharing of profits and losses borne only by rabb-ul-maal etc.

Furthermore, as observed in ***Beximco Pharmaceuticals Ltd case***, a provision stating that the matters in Mudarabah agreement is “*All matters provided and not provided in this Mudharabah agreement shall be subjected to the Islamic law*” must be construed in a manner consistent with the commercial purpose evident from the agreement and not in a manner that would undermine or defeat that purpose. As mentioned above these references only act as guiding principles to give the effective meaning to understand the Mudarabah arrangement acting in a supplementary capacity and it cannot be interpreted to override, supersede or displace the

express choice of Sri Lankan law. Rather, Islamic law principles must be reconciled with Sri Lankan law to the extent necessary to give effect to the parties' intention and to preserve the intended commercial efficacy of the Mudarabah agreement.

Additionally, it must be noted that Islamic law is not a law and are principles derived from various religious, academic and historical sources. In ***Beximco Pharmaceuticals Ltd case***, states where the principles of Islamic/ Sharia law are derived from, "the law laid down by the Qur'an, which is the holy book of Islam, and the Sunnah (the sayings, teachings and actions of Prophet Mohammad (pbuh)). These are the principal sources of the Sharia. The Sunnah is the most important source of the Islamic faith after the Qur'an and refers essentially to the Prophet's example as indicated by the practice of the faith. The only way to know the Sunnah is through the collection of Ahadith, which consists of reports about the sayings, deeds and reactions of the Prophet ...".

I refer to ***Beximco Pharmaceuticals Ltd case***, where it was observed **that**

"Finally, so far as the "principles of ... Sharia" are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute."

Furthermore, Islamic law is not a law but rather principles, where the principles are translated to the modern law texts which were centuries ago set out as religious and moral codes which have different interpretations based on the variety of schools of thoughts. In order to interpret this, it requires expert opinions which could lead to uncertainty based on the

school of thoughts. Therefore, if the Islamic law was to be used as the governing law of the contract, it would give rise to floodgates based on the interpretation of various schools of thoughts.

For these reasons, the reference to Islamic law in the present agreement must properly be understood not as a choice of governing law, but rather as the incorporation of certain ethical or structural principles characteristic of Mudharabah transactions. These principles may guide the interpretation of the agreement in a supplementary or interpretative capacity, but they cannot displace or override the express choice of Sri Lankan law.

Accordingly, it must be concluded that Sri Lankan law remains the proper law governing the Mudharabah agreement, determining the nature, validity, interpretation, and legal consequences of the contract, while the references to Islamic law operate only as supplementary guiding principles intended to inform the commercial structure of the arrangement.

Additionally, even if this Court was to accept the Appellant's contention that the Islamic law constitutes the proper law of the contract, it is evident that certain fundamental requirements under Islamic finance law must be satisfied for a valid formation of a Mudarabah agreement. One such fundamental requirement, as articulated in Islamic Commercial Law textbook by Muhammad Yusuf Saleem (published by John, Wiley & Sons), is that the parties must agree at the outset or when entering into a contract upon a specific profit-sharing percentage. While such profit percentage may be equal or unequal between the rabb-ul-maal and the mudarib, the proportionality must be clearly determined; failure to do so renders the Mudarabah agreement invalid. In this case, Clause 06 titled "*Distribution of Profits*" of the Mudarabah agreement (page 173 of the brief) is left blank, with no specific profit percentages stipulated for either the mudarib or the rabb-ul-Maal. This omission demonstrates that the parties had not agreed upon a definitive profit-sharing percentage at the time of entering into the agreement. Further, during cross-examination, the Respondent stated that he was informed via telephone that the profit percentage would at least be

9%, that such percentage would increase as the business developed, and that the initial profit percentage applied was 18%. This evidence further underscores the absence of a clear and mutually agreed profit-sharing arrangement at the inception of the contract making the Mudarabah agreement invalid.

The other fundamental criteria is that the mudharib cannot guarantee a fixed return and a guaranteed capital to the rabb-ul-maal. If a fixed return and capital is guaranteed, then this changes the Mudarabah agreement into an interest-based loan, making the Mudarabah agreement void. After two (02) months the Respondent requested for the withdrawal of both the savings amount Rs. 9 million and the investment amount Rs. 40 million. The detailed discussion on this matter would be later in this judgment. However, it is significant to note that the Appellant, instead of asserting that the investment had suffered a loss, proceeded to return the entire amount of Rs. 49 million including the Mudarabah investment. This is evident in two occasions. Firstly, when the Appellant issued two cheques and secondly when the cheques were dishonoured the Appellant took undertakings to pay the entire sum of Rs. 49 million. This Letter of Undertaking was marked as "X15" (Pages 156/158) and "P10(a)" (Pages 63/65). The issuance of the cheques evidences a fixed return of the invested capital, while the undertakings unequivocally guarantee repayment of the capital. In these circumstances, the transaction ceased to retain the fundamental characteristics of a Mudarabah and was thereby transformed into an interest-based loan. Consequently, the Mudarabah agreement is rendered void under Islamic finance law. Even if this Court were to consider the Appellant's contention that Islamic law is the proper law of the contract, it is evident that the fundamental requirements of a valid Mudarabah were not satisfied, and the Mudarabah Agreement would, in any event, be void.

Referring to the ***Beximco Pharmaceuticals Ltd case*** which stated the following:

“In this connection it was stated in the witness statement of Mr Choudhury for the defendants that he made it clear that the monies sought from the Bank by the first and second defendants were required as working capital for the Beximco group and that it was the Bank which required that the transaction be structured in the forms adopted in order to comply with Sharia law. The fourth defendant, as a director of the first, second and fifth defendants' and a personal guarantor of the ESUAs, stated that:

‘... it is not uncommon for banks, in their enthusiasm to make profitable loans, to use a Morabaha Agreement to disguise what is, as a matter of commercial reality, an interest-bearing loan. That is precisely what happened in the present case and both the Claimant and the Defendants were quite content that this should happen. Neither was under any illusion as to the commercial realities of the transactions, and the claimant was happy to dress the loan transactions up as Morabaha sales (or Ijarah leases), whilst taking no interest in whether the proper formalities of such a sale or lease were actually complied with.’”

It may be noted, as contended by the Respondent, that even though both parties entered into a Mudarabah Agreement, they did not adhere to its terms. The fundamental principle that the parties must agree, at the outset, upon a specific profit-sharing ratio was not observed. Further, while Clause 2 of the Mudarabah Agreement provides that withdrawal prior to the expiration of the agreement is not permissible, the Appellant nonetheless issued a confirmation letter facilitating such withdrawal (“X8/P6”). In addition, the Appellant issued cheques and undertook to pay the entire amount, despite the fact that such a payment was not permissible under the terms of a valid Mudarabah Agreement. As observed in ***Beximco Pharmaceuticals Ltd’s case***, it is apparent from commercial reality that the Mudarabah Agreement was, in substance, a device to generate profit,

and it does not appear that the parties had a genuine intention to be bound by its terms.

The Learned High Court Judge appears to have proceeded on the basis that, although Islamic law governing a Mudarabah agreement did not form part of the law of Sri Lanka under the common law of Sri Lanka, if the parties enter into an agreement accepting the terms and conditions of such law then those terms and conditions are considered as agreed terms under our contract law.

While the Learned High Court Judge is correct in incorporating the Mudarabah agreement terms and condition into the Sri Lankan law in settling the dispute at hand, however the reasoning is different. In my view, as discussed above, a proper law of the contract needs to be determined as per the conflict of laws. As established in ***Vita Food Products Inc case***, where parties have expressly chosen the law governing the contract, that choice is conclusive and determines the proper law of the contract, provided that it is bona fide, legal, and not contrary to public policy. The reference to a foreign law is incorporated as contractual terms of the law governing the contract.

Once the proper law has been identified, it is that system of law which governs nature, obligation, interpretation, validity and legal consequences of the agreement. The reference within the agreement that “*matters provided and not provided for*” shall be subjected to Islamic law operates in a supplementary or interpretative capacity, informing the commercial and ethical framework characteristic of a Mudarabah arrangement. However, these principles cannot override or supersede the express choice of Sri Lankan law, which remains the proper law/ governing law of the contract.

The **first question of law (a)**, which is the second matter for consideration by this court is whether the Learned Provincial High Court Judge has erred in law and in fact in holding that the subsequent purported undertakings

and dealings with the Chief Executive Officer and the Deputy Chairman constituted an agreement binding on the Appellant.

The Respondent withdraws the savings with immediate effect and the Mudarabah investment with a notice period of two (02) weeks “X9/P7”. This satisfies the criteria of giving a seven (07) days’ notice period as per the confirmation letter “X8/P6”. The Appellant forwarded to the Respondent a cheque confirmation letter two (02) weeks subsequent to the withdrawal, confirming the issuance of two cheques, which was duly signed by the CEO and the Deputy Chairman. The said document was marked as “X10” (Page 148 of the Brief) and “P8” (Page 61 of the Brief).

The post-dated cheques or the due date for the cheques were on 16.03.2009 for the cheque no. 201867 (X11) and on 06.04.2009 for the cheque no. 201868 (X12). The cheques given by the Appellant were dishonoured and returned. However, the Respondent proceeded to lodge a complaint with the CID on 23.03.2009 even before the due date of cheque No. 201868. This was evident from the Respondent’s subsequent withdrawal from the proceedings and the temporary suspension of the inquiry/investigation which was marked as “X17” (Page 162 of the Brief) and “P11” (Page 70 of the Brief). It must be noted that on the due date, 06.04.2009 of cheque no. 201868, the Appellant sent a Letter of Undertaking to the Respondent stating that the cheque No. 201867 was dishonoured and that the Respondent will not be able to release funds for cheque no. 201868 as well at that time “X15/P10(a)”.

In analysing the **first question of law (a)**, it is noted that the Respondent requested the Appellant to furnish a list of its directors. At the time, when the parties entered into the Mudarabah Agreement, the Appellant had nine (09) directors. The list of directors was produced and marked as “X2” (page 121 of the brief) and “P3” (page 56 of the brief). A further document containing the names of the directors together with their National Identity Card numbers and signatures was also produced and marked as “X3” (page

123 of the brief) and “P4” (page 57 of the brief). It is evident from these documents “X2/P3” and “X3/P4” that, as of 11th December 2008, the CEO/Director and the Deputy Chairman/Director were directors of the Appellant at that time. The same two individuals were also reflected as directors in Form 20, which sets out the composition of the Board as of 15th October 2009, marked as “P14” (pages 75/77 of the brief).

The Board of Directors derives its powers from the Memorandum of Association of Ceylinco Islamic Investment Corporation Limited, marked “P2” (pages 49/55 of the brief), and the Articles of Association, marked “X1” (pages 94/120 of the brief). Article 116 of the Articles of Association states as follows:

“..... All cautionary obligations administrations and fidelity bonds to which the seal may be affixed shall be subscribed to by any two Directors or any one Director and the Secretary, Assistant Secretary or such other persons as the Board may appoint for the purpose and every other instrument to which the seal may be affixed shall be subscribed to by one Director and the Secretary. Every such subscription shall be equally binding whether attested by witnesses or not. In favour of any purchaser or person dealing bona fide with the Company such subscription shall be conclusive of the fact that the seal has been properly affixed. Every certificate for shares, stock or debenture-stock or representing any other form of security (other than letters of allotment or scrip certificates shall be issued under the Seal of the Company.”

I refer to the case of ***Paul Coir (Pvt) Ltd v Waas 2002 1 SLR 13***, where Justice Wigneswaran held that:

“The only difference between natural persons and a Company might be the fact that a Company is a legal entity not blessed with bones, marrow and flesh. But, a Company has to work through human beings. The intention of such human beings could no doubt be ascertained. In

fact, the subsequent proxy filed ratifying the earlier acts of the attorney-at-law on record in this case was evidence of the "intention" of the Company."

As stated above, Article 116 stipulates that cautionary obligation administrations and securities are required to be executed under the seal of the company and to be authenticated by the signatures of two Directors, thereby prescribing the formal mode of execution for such obligations. In the present instance, the undertaking in question bears the signatures of the CEO and the Deputy Chairman, who were both directors of the Appellant at the material time. It is noted, however, that the company seal was not affixed to the said undertaking. As held in ***Paul Coir's case***, a company acts through human agency, and the intention of those acting on its behalf may be gathered from its conduct rather than from strict adherence to formalities.

This principle is applied to the present case. The intention could be inferred from the conduct of the CEO and the Deputy Chairman of the Appellant. As discussed above, initially the cheques have been issued and then from the Letter of Undertaking, "X15/P10(a)". In the Letter of Undertaking, the Appellant undertook to pay the entire amount of Mudarabah investment, Rs. 40 million and the savings, Rs. 9 million; a total sum of Rs. 49 million by using the following statements in the document that "*we hereby undertake to settle in entirety the monies together with any profits thereon lawfully due to you and in all good faith*" The Appellant has further stated, "*We further undertake to strictly adhere to the above and implement the same until such time the entire sum of Rupees Forty Nine Million (Rs. 49,000,000/-) together with the profit thereon is paid to you in full.*" and concludes by stating that "*This undertaking is irrevocable and shall be deemed to be binding and valid on Ceylinco and its successor in office.*" There was a letter of authorisation annexed to this document, marked as "X16" (page 159 of the brief) and "P10(b)" (page 66 of the brief), by which authority was conferred upon Mohamed Yoosuf Ali Akram, Senior Assistant Manager

of the Appellant, to execute and perform all internal tasks to effect the return of the entire capital investment and savings on behalf of the Appellant, and to deposit the same into the Respondent's joint account (No. 0070-30378800-001). In implementation thereof, the Appellant undertook that 70% of the facility collections monies recovered by Ceylinco daily will be deposited into the said joint account. Further, in respect of any non-performing facilities, the entirety of the amounts recovered was to be deposited into the said account. Likewise, in respect of any other monies received by Ceylinco, 70% thereof was to be credited to the said account. Both the documents/ undertaking "X15/P10(a)" and "X16/P10(b)" was signed by the CEO and the Deputy Chairman and the aforesaid Senior Manager acted as the first witness. As evidenced by the words and phrases quoted above from the Letter of Undertaking, with special emphasis on the irrevocable undertaking and to settle the money in entirety, the intention of the CEO and the Deputy Chairman is clearly manifested therein. That intention was not confined to mere assurances but was operationalised through the adoption of a definite course of action, including the formulation of a payment mechanism and the delegation of responsibility to a Senior Assistant Manager to carry out and ensure compliance with the necessary internal processes. These circumstances collectively demonstrate a clear and deliberate intention on the part of the CEO and the Deputy Chairman to ensure, by way of the undertaking, that the entire amount was paid. The Appellant contends that the undertaking does not have a specific due date or deadline to repay the complete amount making it only a modality for payment. However, I refer to the following statement in the Letter of Undertaking marked "X15/P10(a)", which has been set out above:

"..... implement the same until such time the entire sum of Rupees Forty Nine Million (Rs. 49,000,000/-) is paid to you"

While no specific calendar date or time is prescribed, the undertaking itself, through the formulation of the payment mechanism, provides a clear temporal scope that the obligation subsists until such time as the entire sum is fully paid. It may also be observed that the aforesaid manager has

signed the Confirmation letter “X8/P6” as an authority to represent the Appellant to withdraw the Mudarabah investment with 07 days’ notice period.

Furthermore, it must be noted that the Appellant did not merely provide the Undertaking but also proceeded to initiate part payments in furtherance of that commitment, leaving an outstanding balance of Rs. 38,240,696.29. Although the Respondent admits that the part payments were made, no documentary evidence has been produced both by the Respondent and the Appellant in proof of such payments. Additionally, it must be emphasised that even in the reply to the Letter of Demand marked “X19/P13”, the Appellant stated that a repayment plan had been submitted to the Customer Association of Ceylinco Profit Sharing Investment Corporation Ltd and that steps would be taken to settle the matter in accordance with the said repayment plan, subject to its acceptance by the Customer Association. This clearly demonstrates the Appellant’s continuing intention to pay the remaining amount. This makes the Respondent believe that the entire sum of the capital investment and savings would be paid as undertaken by the Appellant. These conducts can be used to infer the intention of the two directors acting on behalf of the Appellant leading to the conclusion that the undertaking by the CEO and the Deputy Chairman constituted an agreement binding on the Appellant.

Furthermore, I refer to **Section 21(1)(c)(ii) and 21(1)(d)** of the **Companies Act No. 7 of 2007** which reads as follows:

21.(1) A company or a guarantor of an obligation of the company or any person claiming under the company, may not assert against a person dealing with that company or with any person who has acquired rights from the company, that

(c) a person held out by a company as a director, officer or agent of the company-

(ii) does not have authority to exercise the powers and perform the duties that are customary in the business of the company or are normal for a director, officer or agent of a company carrying on business of the kind carried on by that company; or

(d) a document issued by any director, the secretary of the company or by any officer or agent, with actual or normal authority to issue the document, is not valid or genuine, unless that person has, or by virtue of that person's position with or relationship to the company, ought to have knowledge to the contrary.

By virtue of section **21(1)(c)(ii) and (d) of the Companies Act**, a company/Appellant cannot resile from acts or documents issued by a person held out as its director or officer acting within the ordinary scope of such authority, unless the counterparty had knowledge to the contrary. This principle accords with the long-established rule in ***Royal British Bank v. Turquand (1856) 6 E & E 327***, commonly referred to as the Turquand case, which embodies the indoor management rule, to the effect that a person dealing in good faith with a company is entitled to assume that acts done within the scope of the company's constitution and authority have been duly and regularly performed, and is not bound to inquire into the regularity of the company's internal management. Based on these principles, it is evident that the Respondent has initially relied on the cheques issued and then on the undertakings because of which the Respondent has withdrawn or temporarily suspended the CID investigation. The Respondent cannot have much knowledge of the internal procedure as to the delegation and execution of tasks and the responsible person to authorise/ authenticate the documents within the company/Appellant. Moreover, it is reasonable to believe that an undertaking given by the CEO and Deputy Chairman will be valid, based on seniority/ power of the position in the company/Appellant. It must also be noted that the Respondent did not request the undertaking from the Appellant. This conduct of undertaking was voluntarily done by the Appellant. The document "X15/P10(a)" states that "*We are further informed*

that you are contemplating the institution of Legal proceedings against Ceylinco by whom the cheques have been issued to you” shows that the Appellant became aware that the Respondent initiated legal proceedings because of which the Appellant took undertakings. As the Learned High Court Judge stated the said Letter of Undertaking/ document from the Appellant could have easily emphasised on the terms of the agreement and refused the return of the entire Mudarabah investment. However, as explained above, the Appellant acted otherwise, took undertakings, initiated payments and had submitted a repayment plan to the Customer Association of Ceylinco Profit Sharing Investment Corporation Ltd to ensure the return of the entire amount.

Having considered the foregoing discussions and analysis, I agree with the Learned High Court Judge in holding that the undertakings and dealings with the CEO and the Deputy Chairman constituted an agreement binding on the Appellant.

The **fifth question of law (e)**, which is the third matter for consideration by this court is whether the Learned Provincial High Court Judge has misdirected himself on essential questions of law and fact and thereby erred in law.

The essential questions of law for determination are whether a Mudarabah Agreement existed between the parties, and if so, whether the Appellant, having suppressed the agreement, retains a cause of action. It is also necessary to consider whether the Respondent validly withdrew the said agreement, and whether, following such withdrawal, the Appellant issued cheques to pay the entire sum of Rs. 49 million. In the event of failure to deposit funds in the cheques, the question arises whether the Appellant, in light of the legal proceedings, gave an undertaking to pay the entire sum, and whether such undertaking, given by the CEO and Deputy Chairman, constituted a binding agreement on the Appellant. Since the arrangement was a Mudarabah Agreement, a further question arises as to whether the

Appellant was obligated to pay the remaining sum in circumstances where losses are borne entirely by the rabb-ul-maal (the Appellant). In addition, having regard to the undertaking, it becomes necessary to consider whether the Respondent was entitled to recover the remaining balance, given that only part payments were made, and whether such undertaking operated to novate the Mudarabah agreement, thereby binding the Appellant. It must be noted that some of these essential questions have been answered previously.

As discussed under the **second question of law (b)**, the Respondent suppressed and/or concealed the existence of the Mudarabah Agreement. Nevertheless, the cause of action pleaded by the Respondent is not founded upon the Mudarabah Agreement itself, but rather upon the written undertakings furnished by the Appellant and the part-payments admittedly made thereunder, on the basis of which the Respondent seeks recovery of the remaining balance alleged to be payable in full. On that footing, the Respondent asserts the existence of a cause of action. The Respondent seeks to characterise the entering into a contract from a mistake relating to the terms of the contract, based on the nature of the transaction. In this regard, it has been contended in cross-examination and in written submissions that the investment was made in the expectation of earning a profit. However, the Respondent has also conceded that an investment necessarily carries the possibility of loss too. As discussed under the **second question of law (b)**, the documentary evidence contains several express references to the Mudarabah Agreement, which clearly demonstrate that the Respondent was aware of its existence and nature. Although it is true that the parties did not adhere to the terms of the Mudarabah Agreement, such conduct cannot be construed as a mistake. Consequently, the Respondent cannot maintain a claim founded on mistake. As correctly observed by the Learned High Court Judge, having regard to the nature of the Mudarabah Agreement under which the Respondent, as rabb-ul-maal, bears the losses, it may reasonably be inferred that the Respondent sought to suppress the existence of the Mudarabah Agreement in order to avoid the legal consequences flowing

therefrom. Notwithstanding the foregoing, since the Respondent's claim is grounded on the written undertakings and admitted part-payments, the Respondent does disclose a cause of action.

The Appellant contends, relying on Sections 50 and 52 of the Civil Procedure Code, that where the Respondent bases its action upon the Mudarabah Agreement, such agreement must be produced before Court. In the event that the Respondent is not in possession of the said agreement, the Respondent is required to disclose to the Court the person in whose possession or custody the document lies. However, the Respondent's claim had not been on the Mudarabah agreement for it to be produced by the Respondent. Moreover, the said document had been produced in the open Court of the High Court.

As discussed under the **first question of law (a)**, the undertakings and dealings with the CEO and Deputy Chairman constituted an agreement binding on the Appellant. The Appellant contended that the parties had entered into a Mudarabah Agreement, under which the rabb-ul-maal, the Respondent as investor, was solely liable to bear any losses. On that basis, it was submitted that the Appellant was not liable to pay the remaining amount. However, this contention necessarily gives rise to the issue of whether the subsequent undertaking operated to novate the Mudarabah Agreement.

Novation of a contract as per C.G. Weeramantry in the Law of Contracts, page 719 (fifth print) states that:

"Where there is a novation of contract, there comes into existence in the eye of the law a new independent contract. A new obligation must be created, which contains some element not found in the earlier obligation... A mere variation of the terms of a document does not produce this effect, for there must be a new agreement superseding the terms and conditions of the old."

In the case of **Karthikesu v Ponnachy [1911] 14 NLR 486**, Chief Justice Lascelles held that:

“Novation may take place, not only by express agreement, but also tacitly or by implication, the consent of the parties to the novation being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation.”

Reference is made to Clause 02: Participation in Investment of the said Agreement read as follows:

The parties hereto agree that the Rabbul Maal from time to time shall entrust to and invest through the Mudharib on his behalf sum or sums of money as stipulated in the official investment certificate/passbook/individual investment slip/statements which shall constitute an integral part of this agreement.

It is agreed by and between the parties that Rabbul Maal is not entitled for a withdrawal before the expiration of the original agreed period of investment. However such funds shall be refunded by Mudharib at its sole discretion.

As per C.G. Weeramantry, the contract is novated when there is a new obligation which overrides and supersedes the terms and condition of the old obligation. As stated in **Karthikesu’s case**, novation may occur either expressly or by implication where the consent of the parties is inferred from the circumstances and conduct of the parties, provided such conduct clearly and necessarily shows an intention to replace the original obligation with a new inconsistent and incompatible one from the original.

It should be noted that paragraphs 32-40 of the post-argument written submissions by the Appellant was a copy of the paragraphs 34-41 of the pre-argument written submissions of the Respondent with slight amendments with words except paragraph 35. As per the mentioned paragraphs, the Respondent contends that the written undertakings given by the Appellant created a new obligation, thereby novating the original contract (Mudarabah agreement). It is further contended that, irrespective of the manner in which the parties transacted, Clause 2 of the agreement provides a mechanism for the refund of the deposit. In this context, the Respondent states that the undertakings marked “X15” and “X16” were issued pursuant to Clause 2 of the agreement. Accordingly, the Respondent submitted that the undertakings are not inconsistent with the Mudarabah Agreement. As per the Respondent’s contention, there had been no novation of the contract, effectively supporting the Appellant’s position that the original Mudarabah Agreement continues to operate. This explains why the Appellant, in its written submissions, reproduced the same paragraphs, asserting that no novation took place and that the Respondent, as the rabb-ul-maal, remains responsible for bearing the losses, with no obligation of repayment by the Appellant.

At first glance, it may appear that the undertakings given by the Appellant fall within Clause 2 of the agreement, which provides that the refund of funds is at the sole discretion of the Mudarib. Indeed, both parties have relied on this clause to frame the obligation to repay the Respondent by the undertaking of the Appellant. However, a closer examination of the fundamental principles of the Mudarabah Agreement reveals otherwise. As mentioned above in the **second question of law (b)**, a Mudarabah Agreement does not permit a fixed return of the entire capital investment. This means that when the Appellant agrees to refund the amount, any losses must first be deducted, and only the remaining investment can be returned and not the entire capital. By undertaking to pay the full amount, the Appellant created a new obligation, which cannot be regarded as falling

within the scope of Clause 2 of the original Mudarabah agreement. As explained in the consideration of the **first question of law (a)**, the intention underlying the undertaking is clearly demonstrated, thereby evidencing the parties' intention to recede from the original Mudarabah Agreement and replace it with a new obligation of undertaking, as recognised in ***Karthikesu's case***.

The Appellant relies on Clause 14(a) of the Agreement, which provides that any amendment or modification shall be binding only if signed by both parties, and on that basis contends that the Mudarabah Agreement was not novated. However, as explained in the consideration of the **first question of law (a)**, an undertaking may validly be given by two directors in accordance with the Articles of Association, and the intention to create a binding obligation is clearly demonstrated. Accordingly, the Appellant's contention that the absence of signatures of both parties precludes novation is untenable.

Therefore, as held by the Learned High Court Judge, the undertaking operated to novate the Mudarabah Agreement, such that the Appellant cannot rely on the original terms of the Mudarabah Agreement to contend that the Respondent is merely an investor and must bear the losses.

Additionally, it must be noted that the Appellant has not produced evidence indicating what became of the investment, where it was applied, or whether it resulted in a profit or a loss. The Appellant has not given any document to support that the investment was a loss neither to the Respondent nor to the court to rely on Mudarabah agreement. The Respondent by the Investment account shows that there was an initial profit that can be seen on Investment passbook "X5" and "X6" on 13th January 2009. Under Islamic finance law, a Mudarabah investment must be applied solely for investment purposes and cannot be diverted for personal gain. While the rabb-ul-maal is generally responsible for any losses, the mudarib bears liability where such losses result from negligence or misconduct. In this regard, Clause 05

of the said Agreement provides that, in the event of negligence on the part of the mudarib (the Appellant), the mudarib shall bear the loss, consistent with the principles of Islamic finance law. The Appellant submitted that the Respondent did not receive any profit because the Appellant is a sister company of the Ceylinco Group of Companies, which collapsed around the year 2010. In the present case, the Appellant has failed to produce any evidence of a legitimate loss and admits that no profit arose due to the collapse of the sister company. During this period, the company's management was significantly reduced, with the board of Directors decreasing from nine (09) to three (03) and the Company Secretary resigning, as reflected in Form 20 ("X20"). The absence of any evidence regarding the loss of investment, coupled with the reduction in the Appellant's management and its own contention that the sister company was collapsing, indicates that the investment was not applied to any legitimate purpose but was instead used to offset the losses of the sister company, contrary to the principles of a Mudarabah agreement. This constitutes negligence on the part of the Appellant, who is therefore responsible for the losses arising from the investment.

The Appellant referred to the Respondent's contention that no proof had been produced of the sale of assets in relation to the part payments made. However, it must be noted that the burden lies on the Appellant to produce documentary proof of the payments made. As stated above, neither the Appellant nor the Respondent has produced documentary evidence in support of such payments.

In conclusion, I do not find that the Learned High Court Judge has misdirected the essential questions of law and facts.

The **third question of law (c)**, which is the fourth matter for consideration by this court is whether the Learned Provincial High Court Judge has erred in law and in fact in failing to consider that the subsequent purported undertakings were contrary to public policy and illegal.

Contracts contrary to public policy falls under three categories as stated by C.G. Weeramantry on page 354 that:

“Although social concepts are ever changing, there would at any given time be definite types and classes of contracts which the law would condemn on grounds of public policy. These contracts, such as they are known to our law, may conveniently be grouped as follows:

(A) Agreements conflicting with the interests of the State

(i) in relation to national security

(ii) in relation to the public service

(iii) in relation to the administration of justice.

(B) Agreements conflicting with considerations of morality.

(C) Agreements restraining individual freedom.”

Under the three (03) categories, this case comes under the (A)(iii) where it states that agreements conflicting with interests of the state in relation to the administration of justice. Stifling of criminal prosecution falls under this category.

Stifling of criminal prosecution is defined in the case of **Fernando v Piyadasa [1958] 61 NLR 566** held that:

“All bargains tending to stifle criminal prosecution whether by suppressing investigations of crime or by deterring citizens from their public duty in assigning in the detection or punishment of crime are void as against public policy.”

As seen from the aforesaid authorities, where parties enter into a contract with the object of suppressing or preventing the initiation or continuation of criminal proceedings, such contract is void as being contrary to public policy. However, as noted by C.G. Weeramantry at page 357 with reference to **Keir v. Leeman (1846) 6 QB 371**, it was held that the rule prohibiting agreements for the compromise of criminal proceedings is confined to offences of a public nature. Where the offence is essentially private, and the

injured party has the option of pursuing either a civil or a criminal remedy, the law permits a lawful compromise of such offence.

In the present case, although the Respondent's CID proceedings were discontinued following the undertaking marked "X15/P10(a)" furnished by the Appellant, the matter does not relate to an offence of public concern. Rather, it arose from a private commercial dispute in respect of which the Respondent was entitled to elect between civil and criminal remedies. It is evident that the Respondent elected to pursue the civil remedy and, accordingly, withdrew the CID proceedings in order to settle the dispute with the Appellant. Furthermore, it must be noted that the said undertaking arose from a prior promise to repay the amount by way of issued cheques, which the Appellant failed to honour by depositing sufficient funds. In these circumstances, the undertaking was intended as a settlement mechanism to secure payment of a previous obligation, rather than as an agreement to stifle or suppress criminal proceedings. Therefore, the undertaking in question cannot be characterised as an agreement to stifle a prosecution so as to render it void or contrary to public policy.

The **fourth question of law (d)**, which is the final matter for consideration by this court is whether the Learned Provincial High Court Judge has failed to consider whether the said purported undertakings and/or agreements were obtained and/or entered into under duress.

C.G. Weeramantry, at page 320, states that duress is when a person acts or forbears from acting under a fear of actual or threatened danger so compelling as to deprive him of his freedom of will. As discussed under the **first question of law (a)**, it is evident that the Appellant acted voluntarily in issuing the cheques and in subsequently giving the undertakings. Upon becoming aware that the Respondent had initiated legal proceedings following the dishonour of the cheques, the Appellant proceeded to furnish the undertakings of its own accord. As observed by the learned High Court Judge, the Appellant could have, at that stage, relied on the terms of the Mudarabah agreement and refused the return of the entire capital sum. Instead, the Appellant chose to proceed with the undertakings. No cogent

evidence had been produced to substantiate the contention of duress. Accordingly, I agree with the findings of the Learned High Court Judge that the undertakings and/or agreements were not obtained by duress.

When considering all the above discussed circumstances, the proper law of the contract is the Sri Lankan law. It is evident that there had been a Mudarabah agreement. Both the Mudarabah investment amount and the savings amount had been duly withdrawn. The subsequent undertakings and dealings constituted a binding agreement. This agreement novated the original Mudarabah agreement. Therefore, Appellant cannot rely on the previous terms of the Mudarabah agreement to state that the Respondent is an investor and must bear the loss. Consequently, the Appellant must pay the remaining amount of Rs. 38,240,696.29 to the Respondent. Furthermore, the Appellant had acted negligently handling the invested funds in the circumstances and, because of such negligence, is required to bear the losses.

Having examined the facts of the case, and the material placed before this court, I dismiss the appeal of the Appellant and uphold the judgment of the High Court of the Western Province holden in Colombo (Exercising its Civil Jurisdiction).

JUDGE OF THE SUPREME COURT

P. Padman Surasena, CJ.

I agree.

CHIEF JUSTICE

Janak De Silva, J.

I agree.

JUDGE OF THE SUPREME COURT