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

1. K.A.S. Auto International (Pvt.) Ltd.,
   No.402/A, Hibutana Road,
   Angoda.
2. Kalum Harsha Kamal Weerasinghe,
   No.402/A, Hibutana Road,
   Angoda.

   Petitioners

CASE NO: CA/WRIT/205/2020

Vs.

1. Sampath Bank PLC,
   No.110, Sir James Peiris Mawatha,
   Colombo 02.
2. Malik Ranasinghe,
   Chairman,
3. Nanda Fernando,
   Managing Director,
4. Dhara Wijayathilake,
   Deputy Chairperson,

5. Annika Senanayake,
   Non-executive Director,
6. Ranil Pathirana,
   Non-executive Director,
7. Rushanka Silva,
   Non-executive Director,
8. Dilip De S Wijeratne,
   Non-executive Director,
9. Aroshi Nanayakkara,
   Non-executive Director,
10. Sanjiva Weerawarna,
    Non-executive Director,
11. Deshal de Mel,
    Non-executive Director,
12. Vajira Kulathilake,
    Non-executive Director,
13. Manoj Thayagaraja Kumara
    Rodrigo,
    Non-executive Director,
14. Thanuja Muthukumarana,
    Manager,
    Thalahena Branch,

All of
Sampath Bank PLC,
No.110, Sir James Peiris
Mawatha,
Colombo 02.

15. P.K.E. Senapathi,
    Licensed Auctioneer of Colombo,
    No.134, Beddagana Road,
    Kotte.
16. Central Bank of Sri Lanka,
    No.30, Janadhipathi Mawatha,
    Colombo 01.
17. Director,
    Bank Supervision Department,
    Central Bank of Sri Lanka,
    No.30, Janadhipathi Mawatha,
    Colombo 01.

    Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Upul Jayasuriya, P.C., with Sandamal Rajapakshe for the Petitioners.

Romesh de Silva, P.C., with Niran Anketell for the 1st-12th and 14th-15th Respondents.

Shaheeda Barrie, S.S.C., with Indumini Randeny, S.C., for the 16th-17th Respondents.

Argued on: 15.10.2020

Decided on: 18.11.2020

Mahinda Samayawardhena, J.

The Petitioners filed this application mainly seeking to quash by a writ of certiorari the Board resolution of the 1st Respondent Sampath Bank PLC dated 26.03.2020 (P13A), whereby the Bank resolved to recover the dues from the 1st Petitioner to the Bank by selling the mortgaged property, in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990, as amended. The two Mortgage Bonds executed as collaterals are No.1365 (P3) and No.1746 (P6) in respect of the same property, the former being a primary mortgage and the latter being a secondary mortgage. In paragraph 12 of the petition, the Petitioners accept the execution of P3, but in paragraph 26, deny P6 as having been fraudulently executed without their consent. The public auction, which was to be held on 14.08.2020 pursuant to the said resolution, was halted by an interim order of this Court.

In paragraph 32 of the petition, the Petitioners accept having obtained two loan facilities from the Bank in a sum of Rs.50 million but state they never defaulted on the payment.

The position of the Bank is that the Petitioners did default on the payment and, therefore, at the request of the Petitioners (1R1), the Bank rescheduled the monies due from the Petitioners, as seen from the offer letter 1R2 dated 13.09.2018, the conditions of which were accepted by the Petitioners. In addition, the Petitioners entered into two loan agreements 1R3A and 1R3B. The bank statement 1R4 for the month of September 2018 relevant to the account of the 1st Petitioner shows monies

being credited to the said account upon the rescheduling of the facilities. The secondary mortgage P6 dated 13.09.2018 was signed by the Petitioners as collateral in terms of the offer letter 1R2 – *vide* page 2 of 1R2 under "COLLATERAL FOR FACILITY 01 & 03". Three loan facilities were agreed to be rescheduled by 1R2, and relevant to the instant matter are facilities 1 and 3.

The Petitioners say, in view of the Bank's own documents 1R2 and the letters compendiously marked 1R7, the Petitioners were not in arrears at the time the Board resolution was passed, in that 1R2 allows a grace period of 6 months to make payments on the rescheduling of facilities and 1R7 says there were no arrears of installments. But according to 1R2, the grace period is for the principal amount and not the interest component. This is made clear by *inter alia* conditions 4, 5, 7 of the loan agreements 1R3A and 1R3B. Condition 7 further says that in the event of a default, repayment of the full loan shall be deemed to be in default. It is not the case of the Petitioners that the interest component was paid during the grace period as agreed. According to the resolution statement 1R9, not a single installment of the loan repayment has been made.

It is interesting to note that both directors of the 1st Petitioner company (the 2nd Petitioner and his wife) have signed the above documents, almost on each and every page, and they do not say their signatures were forged. The 2nd Petitioner's position is that the 14th Respondent, who is the present Manager of the Thalahena branch of the Sampath Bank, and the Attorney-at-Law who executed the secondary Mortgage Bond P6, got his and his wife's signatures on several unfilled pre-printed formats and

blank papers and later manufactured the documents referred to above to falsely manifest the rescheduling of the loan facilities. This is a very serious allegation that is flatly denied by the Bank. Regarding the Mortgage Bond P6, however, the 2nd Petitioner in P7G says the Bank "*enticed me to sign a security of a mortgage*" and not that the Bank manufactured the secondary Mortgage Bond unknown to him.

The Petitioners would appreciate that if the said documents tendered by the Bank with its statement of objections were in fact consciously signed by them and they thereafter defaulted on the payments, they cannot complain about the Board resolution passed.

This leads me to the irresistible conclusion that major facts are in dispute and therefore the writ Court lacks the jurisdiction and ability to pass judgment on this matter. The writ Court is not a trial Court to decide the veracity of conflicting assertions of rival parties. Although I can conveniently stop here and dismiss the application, let me add the following, as the Petitioners thought it fit to bring this matter before this Court.

According to the documents tendered by the 2nd Petitioner himself, he is not an illiterate person. He is well-educated, having the qualification of Doctor of Philosophy (PhD) from a foreign university (P1D). He is also a businessman. He is not a novice and has obtained loan facilities from the 1st Respondent Bank previously.

As a general rule, if a signatory to a document is an adult who is neither illiterate nor blind, he shall take full responsibility for

the contents thereof. He cannot disavow or disown the document he admittedly signed when he later realises it is unfavourable to him. If he signs blank documents, he does so at his own peril. This may be subject to limited exceptions.

Professor Weeramantry, in his celebrated work *The Law of Contracts*, states at page 300 of Vol I:

> *A person signing a document is held strictly to its terms on the basis that he does so at his peril. This is known as the caveat subscriptor rule, and in the operation of this rule the principles relating to Justus error come into play. This rule must not however be viewed as a special head of exemption from the ordinary rules relating to mistake. Where a person deliberately affixes his signature to a written contract, the court would naturally be more hesitant in permitting him to plead that he did so in consequence of a mistake as to the nature or substance of the transaction, and to this extent would be less prone to view the error as Justus.*
>
> *In accordance with the rules of Justus error the court would not readily come to the aid of a person who states that he did not sufficiently attend to the terms of a contract or did not read it sufficiently carefully, or altogether neglected to read the document containing the contract. Thus where a person who is neither illiterate nor blind signs a deed without examining its contents, he would not, as a general rule, be permitted in Roman-Dutch Law to set up the plea that the document is not his. If, however, without negligence, a person executes a document in ignorance of*

> *its true nature, he may repudiate it, and this repudiation holds good even as against third persons who have in good faith acted upon it as a genuine expression of intention.*

This statement of law was quoted with agreement in *Mercantile Credit Ltd v. Thilakaratne [2002] 3 Sri LR 206* at 211-212.

In *Jayawardena v. Piyaratne [2004] 1 Sri LR 37*, the Defendant admitted signing the indentures of Lease, but stated he was unaware of the contents therein. This Court rejected this argument and stated at page 47:

> *The evidence of the Defendant-Respondent that the contents of P1 and P4 were not explained to him and as such he did not know the contents cannot be believed. It has been held in Saunders v. Anglia Building Society [1970] 3 All ER 961 that a plea of non-est factum, will rarely succeed if the document was signed by an adult or a literate person.*

The Petitioners have also tendered some email correspondence P7A-H. In this email correspondence, the Talahena Bank Manager refers to the rescheduling of the loans and gives a detailed description of the then prevailing status of the Petitioners' account. But the Petitioners did not reply any of these emails denying the rescheduling of the facilities with their concurrence. This is not the usual behaviour of a prudent person. Any prudent person in such circumstances would have immediately reacted and denied such an occurrence. The email P7G was sent by the 2nd Petitioner to his Counsel and not to the Bank.

After the rescheduling, the Bank had sent several letters (1R7) reminding the Petitioners of the default on payment (of the interest component) but the Petitioners remained silent.

In December 2018, the Petitioners wrote to the Bank through an Attorney-at-Law (1R8) asking for details of their accounts, but even in this letter there is no denial of the rescheduling of the facilities.

I must emphasise that the pivotal issue in the instant application is the rescheduling of the banking facilities by the present Bank Manager. The impugned Board resolution P13A is based on this rescheduled facility.

In business matters, if the party receiving a letter, email or the like disputes the assertions contained in it, he must reply, for failure to do so can be regarded as an admission of the claims made therein.

In the oft quoted decision of *Saravanamuttu v. de Mel (1948) 49 NLR 529*, it was held:

> *In business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute the assertions. Otherwise, the silence of the latter amounts to an admission of the truth of the allegations contained in that letter.*

The following dicta of *Lord Esher M.R. in Wiedeman v. Walpole (1891) 2 Q.B. 534* was quoted with approval in *Colombo Electric*

Tramways and Lighting Co. Ltd v. Pereira (1923) 25 NLR 193 at 195:

> *Now there are cases—business and mercantile cases—in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it, if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, "but you promised me that you would do this or that", if the other does not answer that letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement.*

The above has been quoted with approval in several cases, including *Seneviratne v. LOLC [2006] 1 Sri LR 230.*

However, I must hasten to add that failure to reply alone cannot decide the whole case. In the words of Justice Weeramantry in *Wickremasinghe v. Devasagayam (1970) 74 NLR 80* at 93: "*although the failure to reply to this letter is a circumstance which may be urged against the defendant, it cannot by itself prove the plaintiff's case.*"

The Petitioners in paragraphs 18-21 of the petition state they noticed some unusual activity in their bank accounts in or around July 2018 but when they made inquiries about it from the 13th Respondent, who was the former Manager of the

Thalahena branch of the Bank, he attributed it to a system error.

The Petitioners' main complaint is that the former Manager of the Bank fraudulently misused the funds in their accounts for his personal gain without their knowledge and, upon the Petitioners' making a complaint on 08.10.2018, the former Manager was arrested and produced before the Magistrate's Court and remanded for 14 days.

The Petitioners say the Magistrate's Court ordered a forensic audit and in the resultant Report (P11) it was found that the former Manager being an agent of the Bank had acted in a fraudulent manner with intent to defraud the Petitioners. The Petitioners say large sums of monies were withdrawn/overdrawn from their accounts by the former Manager without their consent. In the said context, it is the contention of the Petitioners that the resolution passed without consideration of the Forensic Audit Report P11 is *mala fide*, *ultra vires* and bad in law.

The allegation against the former Manager of the Bank is not directly relevant to the impugned resolution. The resolution is based on the rescheduling of the then existing facilities, subsequent to the alleged misuse of funds by the former Manager. The rescheduling of the facilities in September 2018 is a separate transaction/agreement (in practical terms entered into between the Petitioners and the present Manager on behalf of the Bank). This created a new contract in substitution of the former contract. In other words, by rescheduling the

outstanding facilities, a new debt was created in place of the existing debt with new terms. In the law of contracts, this is known as "novation proper". Professor Weeramantry in the same treatise (*The Law of Contracts*, Vol II) says at page 753: "*Where there is a novation of a contract, there comes into existence in the eye of the law a new and independent contract*." This proposition of law was acknowledged in the Supreme Court case of *Hatton National Bank Limited v. Rumeco Industries Limited [2011] 2 BLR 329*.

Although the Petitioners say the former Manager allegedly misappropriated large sums of money from the Petitioners, this does not seem to be entirely correct. According to the summary of the findings of the Forensic Audit Report (page 12 of P11B), there had been 23 questionable transactions and of them only four transactions were not cleared.

> *19 (approx.) out of 23 transactions claimed by Dr. Weerasinghe [the 2nd Petitioner] are cleared to an extent where the money has been returned subject to few exceptions. The balance four transactions, totaling Rs. 12,166,000/=, out of the 23 were not cleared as to whether same amount has been returned.*

Regarding the rescheduling of the facilities, the Forensic Audit Report states at page 23:

> *4 credit facilities under Dr. Weerasinghe were rescheduled on 14th Sep 2018. Total value of these credit facilities were Rs.109 Mn (Approx). Even though Dr. Weerasinghe has claimed that his signatures were fraudulently obtained by*

current branch manageress of Sampath Bank Talahena Branch, several documentary evidence was available in the credit files provided by Sampath Bank to substantiate that Dr. Weerasinghe was aware and agreed to obtain credit facilities from the Bank. The said evidence includes Board Resolution extracts of board of directors of K.A.S. Auto International (Pvt) Ltd, request letters, applications, agreements, receipts etc.

In view of a news article, the 16th Respondent Central Bank of Sri Lanka, acting in terms of its statutory powers derived from the Monetary Law Act and the Banking Act, conducted a spot examination through the Bank Supervision Department of the Central Bank regarding the instant issue and compiled the Report 17R3. The conclusion of the said Report is, in my view, not in favour of the Petitioners:

12.1 There is inadequate evidence to ascertain that the fund transfers and cheque encashments were initiated without the customer's knowledge due to the following reasons:

i. The customer had received monthly statements for the personal/ business current accounts and SMS alerts for the withdrawals from his personal current account;

ii. Since the alleged transactions are of high value, those transactions would have come to the notice of the customer;

iii. The customer has complained about the suspicious transactions occurred during the period from

06.02.2017 to 30.01.2018, only after a lapse of 9 months;

iv. *The customer does not deny that the signatures placed on the fund transfer requests and cheques were placed by him (as informed by the CID officer in charge of the investigation). To the naked eye, the customer's signature placed on the vouchers of the alleged transactions were similar to the specimen on the relevant mandates; and*

v. *The customer has placed signatures on the reversal of the cheques of the alleged cheque encashments and the customer has signed the alteration in the fund transfer request (Rs.2,500,000 dated 30.06.2017).*

12.2 The conduct of the manager is questionable since, as per the draft Internal Audit Report of the bank, Mr. Manoj Rodrigo has provided financial assistance though his personal funds to certain customers using his wife's account, which seems unusual and questionable.

12.3 Currently, the investigations are in progress and the matter is before the Court of law.

As I stated at the outset, the major facts are in dispute in the instant matter. After the institution of this application in this Court, the Petitioners have, in my view, rightly filed two actions in the Commercial High Court, CHC/167/2020/MR and CHC/168/2020/MR, seeking in effect the identical reliefs and further reliefs. The Petitioners may pursue their substantive grievances through those cases.

For the aforesaid reasons, I dismiss the application of the Petitioners but without costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal