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

In the matter of an application for leave to Appeal under Section 5C of the High Court of the provinces (Special Provisions) Act, No. 19 of 1990 as amended by Act No. 54 of 2006.

Supreme Court Appeal No:
SC/Appeal/85/2023
Supreme Court L.A No.
SC HCCA/LA /33/2021
Civil Appellate High Court
of Kegalle Case No:
SP/HCCA/KEG /63/2019(F)
D.C. Kegalle Case No.
371/MS

Wickramaarachchige Senani,
No. E 10,
Medagodella Mawatha,
Kooriyanpola.
Rambukkana.

PLAINTIFF

v.

Mallawa Waduge Jayaratne
No. 167/22,
Thataka Road,
Kegalle.

DEFENDANT

AND

Wickramaarachchige Senani,
No. E 10,
Medagodella Mawatha,
Kooriyanpola.

Rambukkana.

PLAINTIFF-APPELLANT

v.

Mallawa Waduge Jayaratne
No. 167/22,
Thataka Road,
Kegalle.

DEFENDANT - RESPONDENT

AND NOW BETWEEN

Mallawa Waduge Jayaratne
No. 167/22,
Thataka Road,
Kegalle.

DEFENDANT – RESPONDENT - APPELLANT

v.

Wickramaarachchige Senani,

No. E 10,

Medagodella Mawatha,

Kooriyanpola.

Rambukkana.

PLAINTIFF – APPELLANT - RESPONDENT

BEFORE : Janak De Silva, J.
Achala Wengappuli, J &
M. Sampath K. B. Wijeratne J.

COUNSEL	:	Shane Foster for the Defendant- Respondent-Appellant. Shabbeer Huzair for the Plaintiff - Appellant – Respondent.
ARGUED ON	:	21.03.2025
DECIDED ON	:	04.09.2025

M. Sampath K. B. Wijeratne J.

Introduction

This is an appeal arising out of the judgment delivered on November 26, 2020 by the High Court of the Civil Appeals of Sabaragamuwa Province holden in Kegalle, setting aside the judgment of the learned District Judge of Kegalle, dismissing the action of the Plaintiff – Appellant – Respondent (hereinafter referred to as the Plaintiff) and granting reliefs prayed for in the plaint.

The Defendant-Respondent-Appellant (hereinafter referred to as the Defendant) sought leave to appeal from this Court against the judgment of the High Court of Civil Appeals. This Court having heard the submissions of both learned Counsel appearing for the parties, granted leave to appeal on the question of law set out in Paragraph 18b of the petition and also on question of law framed by this Court. I will quote the two questions of law **as they read**;

> "***18b.*** *Have the learned Lordship of the Honorable Civil Appellate High Court of Kegalle erred in law in failing to take into account the fact that the Plaintiff's Petition to the Civil Appellate of Kegalle was tendered to the Court out of time and therefore should not have been entertained?"*

Questions of law formulated by this Court on May 23, 2023.

Have the learned Lordships of the Civil Appellate High Court erred in law by failing to consider Sections 45 and 48 of the Bills of Exchange Ordinance in relation to presentment for payment and dishonor well considering whether the sums payable on අ-1 were in fact payable?"

At the stage of argument both the learned Counsel for the Defendant and of the Plaintiff were heard and the judgment was reserved.

Factual background

The Plaintiff instituted action against the Defendant in the District Court of Kegalle claiming a sum of Rs. 375,000/- along with interest on the basis that she advanced the said sum for which the Defendant furnished the promissory note marked 'P1' as security. It was her case that she demanded the said sum which the Defendant defaulted payment. Consequently, this action was filed under summary procedure set out in Chapter LIII of the Civil Procedure Code.

The Defendant having successfully made an application to unconditionally defend the case, took up the position that he borrowed only a sum of Rs. 250,000/- out of which a sum of Rs. 135,000/- was repaid.[1]

The Defendant while challenging the promissory note and alleging that he never signed the said document, stated in the answer that he placed his signature on a stamp pasted on a blank promissory note.

[1] At page 119 of the appeal brief.

At the trial, in evidence in chief itself, the Defendant denied having signed the promissory note marked 'P1'[2]. However, in cross examination he admitted his signature in the said note[3].

The learned District Judge dismissed the action of the Plaintiff on the ground that, in proof of the promissory note 'P1', the provisions containing in Section 68 of the Evidence Ordinance were not complied with. However, in the appeal preferred to the Provincial Civil Appellate High Court, the learned Judges of the High Court have set aside this reasoning. The Civil Appellate High Court has rightly observed that Section 68 of the Evidence Ordinance is applicable to documents which are required by law to be attested in a special form.

Whether Promissory Notes Require a Particular Form?

Neither Bills of Exchange Ordinance nor any other law requires a promissory note to be written in a particular form. The Court of Appeal in the case of ***Karunawathie Epa v. G. Francis Direckze***[4] has observed that,

"*Law does not require a particular form to be used, in a promissory note. No particular form of words is essential to the validity of a note, but the form must be such as to show the intention to make a note. 16 NLR at 480. Every undertaking in writing to pay a sum of money is not necessarily a promissory note but where the intention of the maker of the document is manifestly that it should be and take effect as a promissory note the document is a promissory note. 29 NLR at 293 - English Law governs this subject. It is to be noted that, where money has been lent on a note a claim for money lent can be maintained apart from the note 24 NLR 487; 22 NLR at 344."*

[2]At page 118 of the appeal brief.
[3]At pages 140 and 141 of the appeal brief.
[4] C.A 267/1997 (F) decided on 17.06.2011.

Section 85 provides thus;

"85. *(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.*

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section, unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within Ceylon is an inland note. Any other note is a foreign note."

Thus, I am of the view that the learned Judges of the High Court were correct in their conclusion.

Consequences of Placing a Signature on a Document

The learned Judges of the High Court had further held that the Defendant's admission in evidence that he signed the promissory note marked 'P1' sufficiently establishes its execution.

Section 184 sub section (1) of the Civil Procedure Code provides thus;

"184. (1) *The court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective counsels or registered attorneys (or recognized*

agents), shall after consultation with the assessors (if any), pronounce judgment in open court, either at once or on some future day, of which notice shall be given to the parties or their registered attorneys at the termination of the trial.

(2)(...)"

Hence, an admission in evidence of a party falls within the terminology '*...evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, ...'*

It is settled law that a person who places his signature on blank document has *prima facie* granted authority to the person to whom it's given to fill the same. (***Murugappa Chetty v. Perumal Kangany*** [1891] 2 C.L.R 56; **C*arrupiah v. Dorasamy*** 17 NLR 103; ***Muttusami Pillai v. Mohamadu*** 31 NLR 373)

In ***Mercantile Credit Ltd v Thilakaratne*** [5] Nimal Dissanayake, J cited with approval the following passage from Justice Weeramantry's treatise, 'The Law of Contracts' [1999 reprint, vol. 1 at page 300] as follows:

> "*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.*

[5] [2002] 3 Sri LR 206; at pages 211 and 212.

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."

Accordingly, the learned Judges of the High Court have rightly held that the execution of promissory note 'P1' was sufficiently established and proceeded to set aside the judgment of the learned District Judge holding the case in favour of the Plaintiff.

Issues to be Considered by this Court

The Defendant sought leave to appeal from this Court against the said judgment of the Civil Appellate High Court.

Consequently, three points arise for consideration by this Court.

(a) Whether the appeal preferred against the judgment of the District Court was out of time by seven days and hence the High Court had no jurisdiction to grant the impugned judgment?

(b) Was there evidence of presentment of the promissory note, justifying the judgment of the Civil Appellate High Court?

(c) Was there evidence of valid notice of dishonour warranting grant of reliefs prayed for by the Plaintiff?

The last two points were never raised in the original Court nor were they raised before the Civil Appellate High Court.
However, this Court granted leave on the said points as questions of law to be considered by this court.

The appeal from the District Court to the High Court being out of time.

The judgment of the District Court was pronounced on 22nd of February 2019 and the petition of appeal was tendered to the District Court on 30th April 2019, seven days after the lapse of the prescribed period statutorily granted for an appeal.

Section 755 (3) of the Civil Procedure Code provides;

755. *(1) - (2) (...)*
*'**(3)**. Every appellant shall within sixty days from the date of the judgment or decree appealed against, present to the original Court, a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty:*

provided that, if such petition is not presented to the original court within sixty days from the date of the judgment or decree appealed against, the Court shall refuse to receive the appeal.'

(4)-(5) (...)

Therefore, it is abundantly clear that an appeal had been preferred after the lapse of period contained in the above provision. The District Court in receiving the Petition of appeal observed the delay and accordingly made a minute to that effect[6].

The Plaintiff while tendering the petition of appeal has moved that the same be accepted despite delay due to the disturbing situation prevailed in the country at that time.

'…. පසුගිය දිනවල රටේ පැවති කලබලකාරී තත්ත්වය හේතුවෙන්…...'[7]

The judgment had been delivered on the 22nd of February 2019 and the last date for tendering the petition of appeal was 23rd of April 2019 whereas the petition had been actually tendered only on the 30th of April. It is common knowledge that the Easter Sunday attack causing a disturbance occurred on April 21, 2019. It must be noted that no evidence was produced to show that curfew was declared or was in force during this period.

With the minute in journal entry No. 39, the District Court has forwarded the brief to the Civil Appellate High Court. The Civil Appellate High Court having received the appeal has proceeded to hear and determine the same without drawing its attention to the above fact. If an objection was raised at that time, Civil Appellate High Court could have considered whether there was granting of an extension of time or curfew been declared due to any disturbance.

However, interestingly the Defendant raised no objection to the appeal. Having waved the right to object and having submitted to jurisdiction, he has for the first time raised the objection before this Court. He has cited the judgments in ***Ranaweera***

[6] *Vide* J.E. No. 39 at p. 39 of the Appeal brief.
[7] At p. 9 of the Civil Appellate High Court Appeal brief marked 'P'.

and other v. Sub-Inspector Wilson Siriwardena and others[8]**, *Rodrigo v. Raymond***[9] and ***Nawinna Kottage Dona Lalitha Padmini and Another v. N.K.D. Pradeepa Nishanthi Kumari and Another***[10] in support of his contention.

In ***W.G.T. Panikkiya v. W.G. Sedarama and others***[11] it has been observed that the District Judge is not bound to mechanically transmit an appeal filed out of time to the Court of Appeal. I am also of the view that he is entitled to consider whether it could be accepted and forwarded.

The learned Counsel for the Plaintiff cited the judgment in the ***Ceylon Brewery Limited v. Jax Fernando, Proprietor, Maradana Wine Stores***[12] where an application to set aside an *ex-parte* decree filed out of time came into consideration. This Court has held that the provisions which go into the jurisdiction must be strictly complied with.

In ***Wickremasinghe v. De Silva***[13] the issue with regard to tendering a petition of appeal out of time came into consideration. Justice Soza in his judgment, has observed while graciously quoting Soertsz, J.

> *"Such requirements must be put before the interests of individuals and Courts have no power to absolve from them"*

In ***De Silva v. Seenathumma***[14] it was held that the time limit in preferring an appeal should reasonably be complied with and Court has no power to absolve the party from failing to adhere to the peremptory requirements of the law.

Article 138 of the Constitution confers the Court of Appeal jurisdiction to exercise appellate and revisionary jurisdiction. The said jurisdiction had been conferred to the

[8][2008]1 Sri LR.260.
[9][2002] 2 Sri LR. 78.
[10]SC/HC/CA/LA/134/2016, SC Minutes of 07.09.2018.
[11][1998] B.L.R. Vol. VII, part II, p. 32-33.
[12][2001] 1 Sri LR 270.
[13][1978-1979]2 Sri LR 65 at p.71.
[14](1940) 41 NLR 241, 16 CLW 105.

Provincial High Court under Section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 56 of 2007.

Section 5A of the Act reads thus;

'*(1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court, Family Court or Small Claims Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such of a District Court, of a Family Court or of a Small Claims Court, as the case may be.*

(2) The provisions of sections 23 to 27 of the Judicature Act, No. 2 of 1978 and sections 753 to 760 and sections 765 to 777 of the Civil Procedure Code and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court, of a Family Court or of a Small Claims Court, as the case may be, within a Province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province:

Provided that no judgment or decree of a District Court, of a Family Court or of a Small Claims Court, as the case may be, shall be reversed or varied by the High Court on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.'

Hence, the Civil Appellate High Court is vested with the jurisdiction to deal with appeals which initially vested with the Court of Appeal by Article 138 of the Constitution. The procedure in preferring an appeal to exercise the said jurisdiction is provided in the Civil Procedure Code. Therefore, any failure in procedure in

invoking the jurisdiction of the Civil Appellate High Court is not patent but latent lack of jurisdiction.

It is settled law that in case of latent lack of jurisdiction objection should be raised at the earliest possible opportunity. In ***Jalaldeen v. Rajaratnam***[15] it was held that.

"*An objection to jurisdiction must be taken at the earliest opportunity. Further, issues relating to the fundamental jurisdiction of the Court cannot be raised in an oblique or veiled manner but must be expressly set out. The action was within the general and local jurisdiction of the District Court. Hence its decision will stand until the wronged party has matters set right by taking the course prescribed by law."*[16]

In ***David Appuhamy v. Yassassi Thero*** [17] the Court of Appeal has held that if no objection was taken at the outset with regard to the jurisdiction, the Court is vested with the power to proceed and make a valid order. Therefore, failure to follow a procedural step in invoking the jurisdiction of Court result in lack of latent jurisdiction which if not is raised at the outset, cannot be raised thereafter. Accordingly, in ***Par marketers (Pvt) Ltd v. Hatton National Bank Ltd***[18] it was held that no objection could be raised with regard to the validity of an affidavit in an application seeking leave to appeal where leave was granted. The very issue as in this case arose for consideration in the case of ***Nawinna Kottage Dona Lalitha Padmini and Another v. N.K.D. Pradeepa Nishanthi Kumari and others*** *(Supra)* it was held that an objection on lapse of time in preferring a petition of appeal to the High Court cannot be raised for the first time in the Supreme Court without offering proper explanation for failure to raise such an objection. Justice Priyantha Jayawardena, P.C. has observed that;

[15][1986] 2 Sri LR 201 at 204.
[16]See also *Oliver v. The Ceylon Company Limited* 3 N.L.R. 182, *Andris v. Siriya* et al 27 N.L.R. 70.
[17][1987] 1 Sri LR 253.
[18][2004] 3 Sri L.R 397.

"*No satisfactory explanation was given by the Petitioners for not raising the time bar objection before the Provincial High Court. Furthermore, there is no material to show that the Provincial High Court deprived the Petitioners of raising such an objection.*

I am of the view that by not raising an objection to the maintainability of the appeal before the Provincial High Court and participating in the hearing of the appeal without raising an objection, the Petitioners have acquiesced in the process and waived their right to raise the said objection. Therefore, now the Petitioners are estopped from raising the said objection before this Court."

I am in total agreement with the said *dictum* and as the Defendant has failed to raise the objection in the High Court, he has waived such right and is precluded from raising the same before this Court.

Could the new points on failure to present the note for payment and notice of dishonour be raised for the first time in appeal?

Before I deal with the requirements of presentment of a bill of exchange for payment and offering notice of dishonour, I will refer to the objection raised as to whether the said issues could be raised for the first time in appeal.

The learned Counsel for the Plaintiff submitted that these issues cannot be considered as those are new matters which were never raised in the original Court.

The Superior Courts have set out the criteria in granting leave to raise new matters for the first time in appeal in numerous judicial precedence. (***Jayawickrama v. Silva*** ((1973) 76 NLR 427), ***Leechaman Com. v. Rangalle Consolidated*** ((1981) 2 SLR 373), ***Rev. Pallegalama Ghanarathana v. Rev. Galkiriyagama Soratha Thero*** ((1988)1 Sri LR 99))

In ***Somawathie v. Wilmon and others***[19], Dr. Shirani Bandaranayake J, (as she then was) having analyzed ***Talagala v. Gangodawila Co-operative Stores Society Ltd***[20], where attention was paid to several decided cases[21] observed that an Appellate Court could consider a point raised for the first time in appeal, if the following requirements are fulfilled;

(a) The question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact;

(b) The question raised for the first time in appeal is an issue put forward in the Court below under one of the issues raised; and

(c) The Court which hears the appeal has before it all the material that is required to decide the question.

In ***Neville Fernando v. Sanath Fernando***[22] this court has held that even a question of fact that was not raised in the original court could be considered in appeal, but only in limited circumstances. Accordingly, Justice Mahinda Samayawardhena in ***Neville Fernando*** case has observed;

"A Party to an action is subject to specific constrains in presenting his case before Court. There must be consistency in how the case is presented from the original Court to the final Court. (...) Thirdly once judgment is pronounced by Court, the losing party cannot present a different case before the appellate court from what was presented in the Court below, unless the new ground is a pure question of law and not a question of fact or a mixed question of fact and law. However, a practice has

[19] [2010] 1 Sri. L.R. 128 at p. 135.
[20]48 N.L.R. 472.
[21] *Gunawardena v. Deraniyagala and others* S. C. (Application) No. 44/2006, S.C. Minutes of 3.6.2010, *Seetha v. Weerakoon* 49 NLR 225, *Manian v. Sanmugam and Arulampillai v. Thambu* (1944) 45 NLR 457.
[22]S.C. Appeal No: 180/2015 S.C. Minutes dated 19.7.2024.

developed in our courts to entertain questions of fact for the first time on appeal subject to strict conditions."

Chelliah Ramachandran and others vs HNB and Another[23] Mahinda Samayawardhena J. having analysed the judgments in ***The Tasmania*** ((1890) 15 App. Cases 223 at 225) and ***Appuhamy v. Nona*** *(1912) 15 NLR 311)* set out the criteria in allowing a question of fact to be raised for the first time in appeal. He has observed (at pages 9 and 10)

"*The cumulative effect of these two leading decisions (i.e. The Tasmania and Appuhamy v. Nona) is that a question of fact can be raised for the first time in appeal if:*

(a) "it might have been put forward in the Court below under someone or other of the issues framed"; and

(b) "if it is satisfied beyond doubt" that

> *(i) "it [the appellate Court] has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial"; and*
>
> *(ii) "no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box*".

[23] SC/CHC/APPEAL/3/2012, SC Minutes of 12.02.2024.

The Supreme Court in ***Donald Jason Ranaveera and another v. Bank of Ceylon***[24] it was held that an objection with regard to failure of presentment and dishonor should be raised at the commencement of the case. Justice Pathirana has observed,

"I propose to uphold his preliminary objection that Mr. de Silva should not be permitted to raise for the first time in appeal that the promissory note sued upon was one for which presentment for payment or notice of dishonour was necessary and that the plaintiff should have pleaded these matters or that these matters were excused or dispensed with on the facts of this case. If this point was allowed to be argued I have no doubt it would put the plaintiff in irreparable disadvantage and cause considerable damage and prejudice to his case, The plaintiff had due to this deliberate omission of the defendants, been deprived of the opportunity to meet this defence, if necessary, by an amendment of the pleadings and by leading evidence at the trial."

Upon careful examination of the criteria set out in the said cases, I am of the view that the new points sought to be raised for the first time on appeal are not pure questions of law. They are mixed with facts and should have been raised in the District Court, affording the Plaintiff an opportunity to lead the necessary evidence. As was held in ***Sirimevan Maha Mudalige Kalyani Sririmevan v. Herath Mudiyanselage Gunarat Manike***,[25] if the Defendant is allowed to raise the new points for the first time in appeal, it will deprive the Plaintiff of the opportunity to lead evidence to meet with the same. Hence, I am of the view that the Defendant should not be allowed to raise the said issues for the first time in appeal.

However, for the purpose of clarity, and as the said points were put in issue, I will now deal with them.

[24] 79 II N.L.R. 482.
[25] SC/APPEAL/47/2017, SC Minutes of 10.05.2024.

Noncompliance with Section 45 of the Bills of Exchange Ordinance.

Section 45 of the Bills of Exchange Ordinance provides as follows;

"45. *Subject to the provisions of this Ordinance a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.*

A bill is duly presented for payment which is presented in accordance with the following rules: -

1) Where the bill is not payable on demand, presentment must be made on the day it falls due."

It was argued by the learned Counsel for the Plaintiff that a promissory note does not fall within the meaning of a bill of exchange.

Bills of Exchange Ordinance applies to every bill of exchange whether it be a cheque or a promissory note. Section 2 of the Ordinance in its interpretation grants the following interpretation to the term 'Bill'.

"Bill" means a bill of exchange and *"Note"* means a promissory note.

Section 3 (1) provides;

*"**3 (1)** A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or deter-minable future time, a sum certain in money to or to the order of a specified person, or to bearer."*

(2)-(4) (...)

However, Section 91 (1) provides;

"***91 (1)*** *Subject to the provisions in this Part, and except as by this section provided, the provisions of this Ordinance relating to bills of exchange apply, with the necessary modifications, to promissory notes.*"

(2)-(4) (...)

Accordingly, the provisions containing in Part II in the Ordinance applicable to bills of exchange applies to promissory notes as well, subject to necessary qualifications. Therefore, I am unable to agree with the learned Counsel for the Plaintiff on this point.

However, in presentment for payment should the promissory note itself be physically presented to the drawer who is well aware of the note? If the promissory note is endorsed and given to another person for payment, obviously it should be presented. But, did the legislature in enacting Section 45, really intended physical presentment of a bill? In ***Pedro Pulle v. Mu. Ku***.[26] a promissory note was endorsed and was given to the endorsee. The endorsee refused payment and the drawer was noticed of dishonor who asked for time to pay. However. The payment was not made and it was held by the Supreme Court that the subsequent promise to make the payment was strong proof in the Plaintiff of dispensation of presentment.

In the instant case there was sufficient evidence to the effect that the Plaintiff sought payment from the Defendant who had sought time to pay.[27]

This evidence of the plaintiff was not contradicted by the Defendant in cross examination. A material fact that was stated in evidence, if not contradicted by the opposing party, it is deemed to have admitted by the later. [See ***Edrick De Silva v.***

[26]Ramanathan's Reports 1863-68 at p. 334-335.
[27]At pages 78 and 79 of the appeal brief.

Chandradasa De Silva (70 N.L.R. 169); ***Cinemas Ltd. v. Sounderarajan*** (1998) 2 Sri. L. R. 16 at 19 and ***Gnanapala Weerakoon Rathnayake v. Don Andrayas Rajapaksa and Another***, S.C. Appeal No. 120/2009, S.C. Minutes dated 01.08.2017 at page 5].

In fact, the Defendant in his evidence has admitted the Plaintiff having a quarrel with him on this dispute. Added to this, the Plaintiff has sent the letter of demand marked 'P 2' receipt of which was admitted by the Defendant.[28]

The Defendant has not replied and disputed the claim therein. It is settled law that in commercial transactions a letter of demand should be replied and failure to do so proceeds to support the proposition that the opposing party acknowledged the claim.

The following dictum of Lord Esher M.R. in ***Wiedeman v. Walpole***[29] was quoted with approval in ***Colombo Electric Tramways and Lighting Co. Ltd v. Pereira.***[30]

"*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 Court of Appeal has reiterated the rule of law that the silence on the part of a receiver of a letter of demand leads to the inference that the charge was impliedly

[28]At pages 139 and 140 of the Appeal brief.
[29] (1891) 2 QB 534.
[30] (1923) 25 NLR 193 at 195.

admitted. In ***Saravanamuttu v. de Mel***[31] it was held that in commercial transactions letters of demands should be replied.

In ***Seneviratne v. Orix Leasing Company*** [32] Wimalachandra J, in the Court of Appeal has observed as follows; "*The Defendants have merely denied the Plaintiff's claim. In my view, mere denial is not sufficient. When they have failed to respond to the letter of demand sent by the Plaintiff demanding the said sum in the promissory note.*"

In ***Abeysingha v. Commercial Bank***[33] De Silva J, in the Court of Appeal has observed; "*In business matters in certain circumstances the failure to reply a letter amounts to an admission of a claim made therein*"

Similarly in the case of ***Metal Packaging Ltd. and Another v Sampath Bank Ltd*** [34] Justice Eric Basnayake quoted dicta in ***Saravanamuttu v De Mel*** (Supra) as follows;

"*Mere denial is not sufficient when they have failed to respond to the letter of demand sent by the plaintiff demanding the said sum. In business matters, in certain circumstances, the failure to reply to a letter amounts to an admission*"

In the case of ***Disanayaka Mudiyanselage Chandrapala Meegahaarawa vs Disanayaka Mudiyanselage Samaraweera Meegahaaraw***[35] Samayawardhena J., observed that;" *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 claim made therein* […]

However, I must add that although it is a general principle that failure to answer a business letter amounts to an admission of the contents therein, this is not an

[31] (1948) 49 NLR 529.
[32] [2006]1 Sri LR 240.
[33][2008]1 Sri LR 360, at p. 372.
[34] [2008] 1 Sri LR 356 at 362-363.
[35]SC Appeal 112/2018, Supreme Court minutes dated 21.5.2021.

absolute principle of law. In other words, failure to reply to a business letter alone cannot decide the whole case. It is one factor which can be taken into account along with other factors in determining whether the Plaintiff has proved his case. Otherwise, when it is established that the formal demand, which is a sine qua non for the institution of an action, was not replied, Judgment can ipso facto be entered for the Plaintiff. That cannot be done. Therefore, although failure to reply to a business letter or a letter of demand is a circumstance which can be held against the Defendant, it cannot by and of itself prove the Plaintiff's case. The impact of such failure to reply will depend on the facts and circumstances of each case. Vide the Judgment of Weeramantry J. in Wickremasinghe v. Devasagayam (1970) 74 NLR 80."

Hence, the failure on the part of the Defendant is an acknowledgment of the liability of the plaintiff`s claim.

Therefore, I am of the view that, irrespective of lack of evidence establishing presentment of the promissory note, the Defendant has acknowledged his liability distancing the Plaintiff`s burden of presentment of the note for payment. In fact, he has impliedly acknowledged the same.

Failure to give notice in terms of Section 48 of the Bills of Exchange Ordinance

Section 48 reads thus;

"48. *Subject to the provisions of this Ordinance, when a bill has been dishonoured by non- acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:*

Provided that-

(a) where, a bill is dishonoured by non-acceptance, and notice of

dishonour is not given, the rights of a holder in due course subsequently to the omission, shall not be prejudiced by the omission;

(b) where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted."

It is argued by the learned Counsel for the Defendant that the Plaintiff has not given the notice of dishonour.

The notice of dishonor is not required to be in writing. Sub Section (5) of Section 49 provides;

"49. *Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules: -*

(1)-(4) (...)

***(5)** The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.*

(6)-(15) (...)"

Hence, the personal communication other than writing is sufficient. In the instant case as I have quoted the Plaintiff has met the Defendant and demanded payment. The Defendant has not only acknowledged liability but has sought extension of time. Therefore, it appears to me, that a further notice of dishonour is not required.

Section 50 (c) provides;

"50. *(1) (...)*

(2) (a), (b) - (...)

(c) As regards the drawer in the following cases, namely-

(i) where drawer and drawee are the same person,

(ii) where the drawee is a fictitious person or a person not having capacity to contract,

(iii) where the drawer is the person to whom the bill is presented for payment,

(iv) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill,

(v) where the drawer has countermand payment;

(d) (i),(ii), (iii) - (...)

The learned Counsel for the Defendant has drawn our attention to ***Karuppen Chetty v. Palaniappa-Chetty***[36] and ***Eastern Garage and Collets Taxi Club Company Limited v. De Silva***[37] in support of his contention.

In ***Senanayake v. Abdul Cardar***[38] Justice Weeramanthri has observed that a Plaintiff must adduce sufficient evidence to prove that service of notice was not required on the given facts as follows;

> *"It has been held in English law that an averment of notice of dishonour is an essential averment in a statement of claim against the drawer (May v. Chidley 3 (1894) 1 Q. B. 451; Roberts v. Plant 4 (1895) 1 Q. B. 597). So also in all cases where the plaintiff relies upon the fact that notice of dishonour had been dispensed with, the matter of excuse or dispensation is a material fact and must be averred whether in the statement of claim (Burgh v. Legge 5 (1839) 5 M. & W. 418) or in a special indorsement (Fruhauf v.*

[36]10 N.L.R. 228.
[37]23 N.L.R.509.
[38]74 N.L.R. 255 at page 259-260.

Grosvenor 6 (1892) 61 L. J. Q. B. 717 ; see also Halsbury, 3rd ed., vol. 3, p. 220 ; Bullen & Leake, Precedents and Pleadings, 11th ed., pp. 123 and 135). Likewise, where the plaintiff relies upon a matter of excuse for non-presentment he must state such matter of excuse in the statement of claim (Bullen & Leake, Precedents & Pleadings, 11th ed., p. 132). With particular reference to the special procedure of proceedings by specially indorsed writ, corresponding broadly with summary procedure upon liquid claims under our law, Byles observes (Byles on Bills, 21st ed., p. 344) that where proceedings in the High Court are instituted by specially 'indorsed writ under Order 3, Rule 6, the special indorsement must aver performance of the conditions necessary to entitle the plaintiff to payment, such as presentment, protest and notice of dishonour or the excuses for non-performance, in default of which the plaintiff would not be entitled to summary judgment. Reference may also be made to the Appendices to the Rules of the Supreme Court, 1883, Part V, Appendix C of which contains specimen statements of claim which may be likened to those appearing in our Civil Procedure Code. A number of these specimens show that averments of presentment and notice of dishonour, or of excuses therefor, must be made."

In the instant case it is the Plaintiff who is the drawer as well as the drawee. As provided in section 50(2)(c) (i), no notice of dishonor was required. The Defendant who refuses payment or avoids payment is not entitled a further opportunity of having notice of dishonor served.

Therefore, I answer the questions of law stated in the petition numbered 18b and the question of law formulated by law on May 23, 2023 as follows;

18b. The Defendant have waved objection to the petition of appeal being received and therefore, I answer the issue in the negative.

Question of law formulated by law this Court on May 23, 2023;

> While holding that the objection cannot be raised for the first time before this Court, I answer the issue in the negative.

Accordingly, the appeal is dismissed with cost in the District Court, Civil Appellate High Court and this Court.

JUDGE OF THE SUPREME COURT

Janak De Silva, J.
I Agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J
I Agree.

JUDGE OF THE SUPREME COURT