THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal to the Supreme Court from the judgment pronounced on 12. 10. 2016 by the Civil Appellate High Court of the Western Province sitting in Colombo in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 read with Article 127 of the Constitution.

National Development Bank Limited
No.40, Nawam Mawatha,
Colombo 2.

Plaintiff

S.C. Appeal No.31/2017
SC/HCCA/LA No. 566/2016
Provincial High Court Appeal
Case No. WP/HCCA/COL 84/2011
District Court of Colombo
Case No. 17820/MB

Vs.

1. Kongodage Upul Sampath
   Ratnaloka Bake House
   "Ratnaloka"
   No.01, 2nd Kilo Meter Post,
   Punagala Road, Bandarawela.

2. Katugaha Bandaranayake Herath
   Mudiyanselage Conrad Sena Katugaha
   "Promises",
   No. 37/1B, Hospital Road,
   Melrose Place, Wevatanne,
   Bandarawela.

Defendants

In the matter of an Appeal

National Development Bank Limited
Presently called and known as National
Development Bank PLC
No.40, Nawam Mawatha,
Colombo 2.

Plaintiff-Appellant

Vs.

1. Kongodage Upul Sampath
Ratnaloka Bake House
"Ratnaloka"
No.01, 2nd Kilo Meter Post,
Punagala Road, Bandarawela.

1st Defendant-Respondent

2. Katugaha Bandaranayake Herath
Mudiyanselage Conrad Sena Katugaha
"Promises",
No. 37/1B, Hospital Road,
Melrose Place, Wevatanne,
Bandarawela.

2nd Defendant-Respondent

AND NOW BETWEEN

National Development Bank Limited
Presently called and known as National
Development Bank PLC
No.40, Nawam Mawatha,
Colombo 2.

Plaintiff-Appellant-Petitioner

Vs.

Katugaha Bandaranayake Herath
Mudiyanselage Conrad Sena Katugaha
"Promises",
No. 37/1B, Hospital Road,
Melrose Place, Wevatanne,
Bandarawela.

2nd Defendant-Respondent-Respondent

AND NOW IN THE MATTER OF A SUBSTITUTION BY AND BETWEEN

National Development Bank Limited
Presently called and known as National
Development Bank PLC
No.40, Nawam Mawatha,
Colombo 2.

Plaintiff-Appellant-Petitioner-Appellant

Vs.

Katugaha Bandaranayake Herath
Mudiyanselage Conrad Sena Katugaha
"Promises",
No. 37/1B, Hospital Road,
Melrose Place, Wevatanne,
Bandarawela.

2nd Defendant-Respondent-Respondent

[deceased]

2A. Christine Jennifer Denis
No. 37/1B, Hospital Road,
Melrose Place, Wevatanne,
Bandarawela.

2B. Micheal Sena Vadim Katugaha
No. 37/1B, Hospital Road,
Melrose Place, Wevatanne,
Bandarawela.

2**A and 2B Substituted-Defendant-Respondent-**R**espondent**

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BEFORE	:	**P. PADMAN SURASENA, CJ.** **A.H.M.D. NAWAZ , J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Geethaka Goonewardena P.C. with Rishan Vidanapathirana for the Plaintiff-Appellant-Petitioner- Appellant. Dr. Sunil Cooray with Sudarshani Cooray for the 2A and 2B substituted Defendant-Respondent- Respondents
ARGUED ON	:	14th July, 2021
DECIDED ON	:	07th November, 2025

ACHALA WENGAPPULI, J.

The Plaintiff-Appellant-Petitioner-Appellant Bank (hereinafter referred to as the Plaintiff Bank) filed an action before the District Court of *Colombo* to recover a sum of Rs. 496,568.50 with interest fixed at 12.58 % *per annum*, and also a sum of Rs. 1,215,032.67 *per annum* and legal interest, from the 1st Defendant-Respondent and the 2nd Defendant-Respondent-

Respondent (hereinafter referred to as the 1st and 2nd Defendants) on the basis they are jointly and severally liable to pay.

The 1st Defendant did not appear before the District Court. The Court proceeded to try the 1st Defendant *ex parte*. The 2nd Defendant contested the claim against him. After trial, the trial Court dismissed the action of the Plaintiff Bank in relation to the 2nd Defendant. Being aggrieved by the said judgment, the Plaintiff Bank preferred an appeal to the Provincial High Court. The Provincial High Court of Civil Appeal proceeded to dismiss the appeal of the Plaintiff Bank after affirming the judgment of the trial Court.

Thereupon, the Plaintiff Bank sought Leave to Appeal from this Court against the judgment of the Provincial High Court of Civil Appeal. After affording a hearing to the parties, this Court, on 15.02.2017, decided to grant Leave to Proceed to the Plaintiff Bank on the following questions of law:

a. In civil actions, upon production of a Letter of Demand as evidence by the Plaintiff;
    i. Does the burden of proof shift to the Defendant to establish and/or lead evidence that it was not received by him?
    ii. Does the burden of proof shift back to the Plaintiff only if the Defendant elicits evidence that he had not received such letter?
b. Was there any evidence before Court to determine that the Letters of Demand had not been sent to the Defendants, when the

2nd Defendant had failed and/or refused to give evidence to the effect that he had not received such Letters of Demand?

c. Has the Provincial High Court of the Western Province erred in law in holding that the letter P29 cannot be considered as a reply to Letters of Demand P25 & P28 [both dated 06.06.2005], when there was no evidence to the contrary given by the Defendant to the effect that P29 was in reply to some other letter?

d. Has the Provincial High Court of the Western Province erred in law in properly evaluating the evidence led in the case?

The learned President's Counsel, in his submissions to this Court, contended on behalf of the Plaintiff Bank that the two causes of action on which the Defendants were sued, accrued when the Defendants defaulted payment of loan instalments that are due at the end of each month. Therefore, in the absence of an "*on demand*" clause in the mortgage bond, there was no necessity for the Plaintiff Bank to make a demand to any of the Defendants, by way of a Letter of Demand addressed and served on them. In support of the said contention, the learned President's Counsel relied on a particular section of text quoted from the treatise on *The Law of Contracts*, by Professor *C.G. Weeramantry*, where it is stated (Vol. 2, Section 874, page 834) "*[A] bond for the performance of an agreement becomes prescribed ten years from the breach of conditions but not otherwise …*".

The learned Counsel for the 2nd Defendant, submitted that his consistent position before the trial Court was that he did not receive any of the two Letters of Demand said to have been sent by the Plaintiff Bank under registered cover, and as such no demand had been made in terms of the applicable conditions of the loan transaction. During the trial, the 2nd

Defendant disputed the contents of the letters informing him of any dues, or the Letters of Demand, which were all therefore marked subject to proof. But the Plaintiff Bank failed to prove any such document by calling relevant witnesses.

When the two contrasting positions presented to the trial Court by the Plaintiff Bank as well as the 2nd Defendant are considered after placing them side by side, it must be observed that the contention presented before this Court by the former was not the position taken before the trial Court. The Plaintiff Bank, although now takes up the position that no demand was necessary for its cause of action to accrue against the 2nd Defendant, the case presented by it before the trial Court, was in fact made on the basis that such demands were made, which the 2nd Defendant chose to ignore.

But before I proceed to consider them, it is necessary to make a brief reference to the transaction history between the parties that led to the institution of the instant action.

The 1st Defendant secured two loan facilities from the Plaintiff Bank in the sums of Rs. 700,000.00 and Rs. 200,000.00, upon accepting the terms and conditions contained in the Offer Letter dated 09.07.2002 (P2). These two loans were secured by the property belonging to the 2nd Defendant, who pledged the same to the Plaintiff Bank as a primary mortgage. On 09.07.2002, the 2nd Defendant entered into an Immovable Bond No. 511, in respect of the said property with the Plaintiff Bank. On 16.11.2006, the 1st Defendant obtained another loan facility from the Plaintiff Bank on top of the one he had already obtained, along with the 2nd Defendant, by

presenting themselves as the "BORROWERS", in terms of another Letter of Offer (P10). The 2nd Defendant signed on a secondary mortgage bond No. 291 as an "OBLIGOR" on the same day and thereby pledged the same property to the Plaintiff Bank to secure the said subsequent facility also. The 2nd Defendant also executed Deed of Renunciation No. 292, by which he renounced the benefit of Section 46 of the Mortgage Act as amended, along with mortgage bond No. 291.

These loans were obtained by the 1st Defendant for the purpose of upgrading his bakery industry. The 1st Defendant who owned the bakery, was married to the 2nd Defendant's daughter. After several instalments were paid on these facilities, it is alleged that the Defendants have defaulted. The several attempts made by the Plaintiff Bank to secure payment of the defaulted loan instalments from either the 1st and/or the 2nd Defendants, even after engaging them in a series of correspondence, proved unsuccessful. In the continued failure on the part of the Defendants to fulfil their payment obligations, the Plaintiff Bank thereupon issued several Letters of Demand on them. But there was no attempt made on the part of the Defendants to comply with any of these demands.

Eventually, the Plaintiff Bank decided to sue the two Defendants "*jointly and severally*" on two causes of action. The Plaintiff Bank filed its Plaint in the District Court of *Colombo* on 25.10.2006. In paragraph 10 of the said Plaint, the Plaintiff Bank averred that "… *after giving credit for the part payments made by the Defendants as at 30.09.2006 there is a sum of Rs. 496,568.50 due owing and payable from the Defendants to the Plaintiff as shown in the Statement of Accounts filed herewith marked as "P5" which sum or any part thereof the Defendants have failed and neglected to pay and settle the Plaintiff*

though thereto obliged to and though thereto demanded." In paragraph 19 of the Plaint the Plaintiff Bank also averred that "… *after giving credit for the part payments made by the Defendants as at* ***30.09.2006*** *there is a sum of* ***Rs. 1,215, 032.67*** *due owing and payable from the Defendants to the Plaintiff as shown in the Statement of Accounts filed herewith marked as "****P8"*** *which sum or any part thereof the Defendants have failed and neglected to pay and settle to the Plaintiff though thereto obliged to and though thereto demanded*".

Since the question of law in relation to this aspect is pivoted on the fact of production of Letters of Demand sent by the Plaintiff Bank to the 2nd Defendant during the trial, the determination on whom the burden of proof of service of those Letters of Demand lies, is very relevant at this stage, in order to inquire into the position taken up by the 2nd Defendant, in view of the nature of evidence presented before the trial Court. This is a necessary task that must be undertaken even before this Court proceeds to analyse the impugned judgment of the Provincial High Court of Civil Appeal along with the judgment of the trial Court, in the light of the contentions presented by the Plaintiff Bank.

The 2nd Defendant, in his answer has taken up the position that he did not receive any of the Letters of Demand said to have been sent under registered cover by the Plaintiff Bank. In his answer, the 2nd Defendant averred (at paragraph 13) that " **මෙම විත්තිකරු තවදුරටත් කියා සිටින්නේ, මෙම නඩුව පැවරීමට ප්‍රථම හෝ, 1 වන විත්තිකරු අදාළ ගෙවීම් නොගෙවා පැහැර හැරී අවස්ථාවකදී එකී මුදල් ප්‍රමාණයක් මෙම විත්තිකරුගෙන් පෙර ඉල්ලීමක් මගින් පැමිණිලිකරු ඉල්ලා නොසිටීම මත කෙසේවත් පැමිණිලිකරුට මෙම විත්තිකරුට එරෙහිව පැමිණිල්ල පවරා පවත්වාගෙන යා නොහැකි බව මෙම විත්තිකරු කියා සිටී**".

In line with the position taken up in his answer by the 2nd Defendant, issues Nos. 14(1) and 14(2) were raised by him to the effect that whether, prior to the institution of the action, the Plaintiff Bank demanded from the 2nd Defendant the payment of relevant sum, defaulted by the 1st Defendant, and if not, could the Plaintiff Bank have and maintain the action against the 2nd Defendant.

After trial, in dismissing the action of the Plaintiff Bank against the 2nd Defendant, the trial Court, in its judgment answered issues No. 14(1) as "*not demanded*" and issues No. 14(2) as "*cannot maintain the action*". The examination of the process of reasoning, adopted by the trial Court to provide the said answers, indicated that the Letters of Demand, marked as P27 and P28 were marked subject to proof but the Plaintiff Bank failed to present relevant evidence to establish that they were in fact sent to the 2nd Defendant informing him of the amount demanded from him. The trial Court also considered the letter dated 11.06.2005 (P29), sent by the 2nd Defendant to the Plaintiff Bank "*without prejudice*" and decided that it could not be accepted as a document that indicated the 2nd Defendant was duly notified by the Plaintiff Bank of its demand for payment by Letters of Demand P27 and P28.

The appeal preferred by the Plaintiff Bank against the said judgment was dismissed by the Provincial High Court of Civil Appeal after affirming the said line of reasoning and the conclusion reached thereupon by the trial Court. The Appellate Court also rejected the submission of the Plaintiff Bank that the contents of the letter P29, although sent with the qualification "without prejudice", could be relied upon, provided that it was not written with a view to settling the dispute. The Court concluded

that in fact P29 was written by the 2nd Defendant to achieve that very purpose.

I now turn to the question of law that this Court is called on to answer, in relation to Letters of Demand, which reads as follows;

> "*In civil actions, upon production of a Letter of Demand as evidence by the Plaintiff;*
>
> i. *Does the burden of proof shift to the Defendant to establish and/or lead evidence that it was not received by him?*
> ii. *Does the burden of proof shift back to the Plaintiff only if the Defendant elicits evidence that he had not received such letter*?"

The question of law on this particular aspect of the appeal commenced with the sentence; "*[I]n civil actions, upon production of a Letter of Demand as evidence by the Plaintiff…*". It appears that the said question of law was framed rather in an abstract form, as it does not make any reference to the circumstances presented before this Court in the instant appeal. The set of circumstances that were considered by the Courts below, in order to arrive at their respective findings, are now being impugned in these proceedings. The words "*[I]n civil actions, upon production of a Letter of Demand as evidence by the Plaintiff…*" creates the impression in one's mind, if an answer is provided by this Court to same, that pronouncement would meant to be applicable to the whole gamut of civil actions, rather than an answer provided to an action based on a particular set of facts and

circumstances, on which the lower Courts have applied relevant principles of law, when arriving at their respective findings.

It is already noted that the learned President's Counsel contended that the Plaintiff Bank was not under any obligation to make a demand of the sums due to it. It was submitted that as and when the monies became due on a specific date, in terms of the agreement, the failure of the Defendants to fulfil their part, accrues the requisite cause of action. In the preceding paragraphs, dealing with the factual situation, it was already noted that the averments contained in paragraphs 10 and 19 of the Plaint have indeed described the manner in which the two causes of action were accrued on the Defendants. The action was founded on the fact that demands were made but disregarded.

With both these averments, the Plaintiff Bank presented its case on the footing that it had, in fact made demands of the sums due, as mentioned in the several Letters of Demand (P25, P26, P27, P28, P32 and P33) sent to the two Defendants, which they have chosen to ignore. This is indicative from the words that "…*the Defendants have failed and neglected to pay and settle to the Plaintiff though thereto obliged to and though thereto demanded.*" The reliance placed on the Letters of Demand issued on the Defendants in order to institute an action against them was not due to an oversight on the part of the Plaintiff Bank but for a very valid reason.

The Letters of Offer (P2 and P10), by which the two Defendants have undertaken the terms and conditions under which the loan facilities were disbursed by the Plaintiff Bank, contained a clause with the title "*Breach by the Borrowers*" that read (Clause 7) " *[I]n the event of the Borrowers*

committing any breach of the terms and conditions set out therein the Bank shall be entitled at any time to cancel the facilities and to demand and recover payments of all its claims on the BORROWERS" (emphasis added). Similarly, the Immovable Bond No. 511 (P6A) also contained in Clause 8(d) that "… *in the event of the OBLIGOR and/or MORTGAGOR committing any breach of the terms and conditions set out herein the BANK shall at any time to cancel the facilities and to demand and recover payments of all its claims on the OBLIGOR"* (emphasis added).

The Immovable Bond No. 511 (P6A), by which the 2nd Defendant pledged his property as security too contained a similar undertaking by the Plaintiff Bank. In Clause 8(d) of P6A, it was agreed among parties that "*… in the event of the OBLIGOR and/or the MORTGAGOR committing any breach of the terms of conditions set out herein the BANK shall be entitled at any time to cancel the facilities and to demand and recover payment of all of its claims on the OBLIGOR"* (emphasis added).

Thus, in the event of any breach of the terms and conditions contained in any of these instruments by the Defendants, it was obligatory on the part of the Plaintiff Bank to make demand of payments from them. Moreover, this factor is further confirmed upon perusal of the Immovable Bond No. 511 (P6A) which also contained a Clause, stating that if any notice or demand were to be made on any of the parties, the manner in which such notice or demand shall be served. The said Clause 5(i) of P6A,

reads as follows;

> *" … that every notice or demand under these presents may be effectually made by notice in writing and every such notice*

summons or any legal process of any kind whatsoever in connection with any action suit or other proceeding taken under these presents shall be taken and be deemed to have been duly served on the OBLIGOR and the MORTGAGOR if the same be sent by post under registered cover addressed to the OBLIGOR to its registered office at Sole Proprietor of "Rathnaloka Bake House", at No.37/1B, Hospital Road, Melrose Place, Wevathanne, Bandarawela and to the MORTGAGOR to No. 37/1B, Hospital Road, Melrose Place, Wevathanne, Bandarawela".

In its impugned judgment, the Provincial High Court of Civil Appeal considered this aspect in detail. The appellate Court, having quoted from Prof *Weeramantry's* treatise (supra) where it was stated "*[A] bond for the performance of an agreement becomes prescribed ten years from the breach of conditions but not otherwise and prescription will not begin to run until a demand for performance has been made and refused",* and reminded itself of the general principle enunciated in the judgment of ***Seylan Bank Ltd., v Intertrade Garments (Pvt) Ltd.,*** (2005) 1 Sri L.R. 80 (at p. 87-88), proceeded to hold that " … *proof of demand as a precursor to filing the action is a sine qua non for successful prosecution of the same."*

In view of the several factors referred to in the preceding paragraphs, I am of the considered view that the Provincial High Court of Civil Appeal was correct in making the said determination. Thus, it was incumbent upon the Plaintiff Bank to establish the fact that it was more probable that it had made the demand from the 2nd Defendant by sending Letters of Demand P27 and P28 under registered cover to the specified

address set out in the Letters of Offer. With that conclusion, I next turn to the evidence presented by the Plaintiff Bank in discharging that burden.

There was no dispute to the fact that the 2nd Defendant had resided at all times at the address given in that instrument (P6A), to which all notices or, more importantly the demands, could have been sent under registered cover.

During the examination in chief of the witness, called and relied on by the Plaintiff Bank, who gave evidence on this aspect of the case as to the compliance of this requirement. According to him, the Defendants have defaulted the payment of loan instalments and as such " **එසේ නොගෙවීම මත 2005.06.06 වන දින 1 වන විත්තිකරුටත්, 2වන විත්තිකරුටත්, එන්තරවාසි දෙකක් යවා තිබෙනවා එය පැ25 සහ පැ 26 ලෙස ලකුණු කර සිටිනවා. පැ25 සහ පැ 26 පිටපත් යවා තිබෙනවා 2වන විත්තිකරුට. (පැ25 සහ පැ 26 ඔප්පු කිරීමේ බාරයට යටත්ව බාරගන්නා ලෙස ඉල්ලා සිටී.) පැ25 සහ පැ 26 එන්තරවාසි යවා තිබෙන්නේ මේ නඩුවේ 1වන නඩු නිමිත්ත සම්බන්ධයෙන් අයවිය යුතු මුදල් සඳහා. 2වන නිමිත්තේ අයවිය යුතු මුදල් සඳහා 1, 2 විත්තිකරුවන්ට ජුනි සහ ජූලි ලිපි දෙකක් යවා තිබෙනවා.**" It is clear from that evidence, that the witness was not personally involved with either the preparation of the said Letters of Demand or was involved with the posting of the same under registered cover to the address of the 2nd Defendant. In the absence of any personal involvement, the witness obviously had to rely on a record kept by the Plaintiff Bank to make that statement. However, during cross-examination, when the 2nd Defendant questioned the witness over the service of Letters of Demand, he answered that question in the following manner;

> " **ප්‍ර: තමන්ට එසේ මෙම පැ 32 සහ 33 ලේඛණ විත්තිකරුවන්ට යැවුව කියන්න යම්කිසි සාක්ෂියක් ගරු අධිකරණයට ලැයිස්තුගත කරලා තියෙනවාද?**
>
> **උ: ඒ ගැන මම නොදනී.**
>
> **ප්‍ර: මම තමන්ට යෝජනා කර සිටින්නේ මේ පැ 32 සහ 33 කියන ලේඛණ**

විත්තිකරුවන් වෙත යැවුව නම්, ඒ සම්බන්ධයෙන් තමා කිසිදු සාක්ෂියක් තමාගේ ලේඛණ ලැයිස්තුව සඳහා තමා ගොනු කර නෑ කියල?

උ: මම නොවෙයි ගොනු කළේ නීතිඥ මහත්තයා. ඒ ගැන මම නොදනී."

This segment of evidence, reproduced above from the witness's testimony for the Plaintiff Bank, is indicative of the position that there were no records available with the bank for the witness to make that factual statement, when he sought to affirm the fact of posting Letters of Demand to the 2nd Defendant's address. The only reference made to this issue during re-examination of the witness was to ask him whether the Defendant had admitted the receipt of the Letters of Demand.

Since the trial Court considered only the Letters of Demand, marked as P27 and P28, it is prudent to examine the contents of these letters in relation to the issue at hand. P27 is a Letter of Demand issued on 06.07.2005, whereas P28, the other Letter of Demand, was issued on 06.06.2005. Both these letters, carry the names and addresses of the 1st and 2nd Defendants and, are titled "එන්තරවාසිය". The letters also contain the words to denote that they are sent under registered cover. Other than these two documents and the brief oral account of the witness, there is no other evidence presented by the Plaintiff Bank for the consideration of Court that it had fulfilled its part of the obligation by making a formal 'demand' from the 2nd Defendant.

The issue as to whether there was a demand made from the 2nd Defendant or not had been a disputed fact in issue since the institution of the action which continued to the trial. In line with the position taken up by the 2nd Defendant in his answer, issues Nos. 14(1) and 14(2) were raised

by him and the trial Court were to make a determination on those issues. The Plaintiff Bank was adequately placed on notice by the 2nd Defendant that he disputes the fact that a demand was made. As already noted earlier on in this judgment, these two issues were raised by the 2nd Defendant to the effect; that whether, prior to the institution of the action, the Plaintiff Bank demanded the relevant sum from the 2nd Defendant, and if not, could the Plaintiff Bank have and maintain the instant action against the 2nd Defendant. The Plaintiff Bank had ample notice of the fact that the 2nd Defendant disputes the reception of the Letters of Demand said to have been sent to his address. But the Plaintiff Bank was complacent with the sufficiency of evidence it had presented before the trial Court, which are reproduced above, and apparently expected the trial Court to answer those two issues against the 2nd Defendant.

These two documents, by their mere appearance, seem to be photo copies of the original Letters of Demand, which were said to have been sent to the two Defendants by the Plaintiff Bank. Section 61 of the Evidence Ordinance states that the contents of documentary evidence may be proved either by primary evidence or by secondary evidence. Section 63(2) makes such photo copies made from the original, qualify to be taken as secondary evidence of the original, as such copies were made from the original, by a mechanical process, which in itself ensures the accuracy of the copy. Since the originals of P27 and P28 are expected to be in the custody of the 2nd Defendant, after being delivered to him under registered cover to his address, the Plaintiff Bank had the opportunity to make an application to Court to issue notice on the 2nd Defendant, under Section 66 of that Ordinance. This is because Section 66 restricts the admissibility of

secondary evidence of a document, unless the party proposing to give such secondary evidence has previously given to the party in whose possession the document is, notice to produce it. There was no such evidence placed before the trial Court by the Plaintiff Bank that the photo copy of the original, in the absence of the original, should be received in evidence, due to the failure of the 2nd Defendant to produce the same, even after notice was issued on him to do so.

In addition to these multiple factors tend to indicate that the Letters of Demand P27 and P28 were not properly admitted as evidence before the trial Court. More importantly, it must also be noted that the 2nd Defendant objected to these Letters of Demand being produced and admitted in evidence, when the witness for the Plaintiff Bank tendered them in trial Court. They were accordingly tendered to Court by the Plaintiff Bank with the qualification "*subject to proof*". The said objection of the 2nd Defendant to receive the Letters of Demand as admissible evidence was once more taken at the close of the case of the Plaintiff Bank.

Section 162 of the Civil Procedure Code states that *when a document, the admission of which is objected to, is put forward as the copy of an absent original, it is not proved until both such evidence as is sufficient to prove the correctness of the copy, and also such evidence as would be sufficient to prove the original, had it been tendered instead of the copy, has been given.* In the absence of such evidence to satisfy the trial Court by proving the correctness of the copy as well as to prove the original, the trial Court rightly answered the issues Nos. 14(1) and 14(2) in favour of the 2nd Defendant and against the Plaintiff Bank. In appeal, this finding of fact was affirmed by the Provincial

High Court of Civil Appeal which decided to dismiss the appeal, preferred by the Plaintiff Bank against the judgment of the trial Court.

In view of the reasoning contained in the preceding paragraphs, I am of the opinion that the Courts below have acted rightly in terms of the applicable principles of law in coming to the conclusions they did eventually reach on this particular point. Those Courts have reached the said conclusions after applying those very principles to the factual assertions made by the witness for the Plaintiff Bank.

The requirement of establishing the assertion made by the 2nd Defendant that none of the Letters of Demand were received by him arises, only after the Plaintiff Bank fulfilled its part by establishing that the two letters, which informed him of the demand to pay were posted to the address given, in compliance with the terms and conditions contained in the Letters of Offer and the Immovable Bond No. 511. The 2nd Defendant pointed out during his submissions that neither the testimony of the Attorney-at-Law who prepared the Letters of Demand nor the receipts of posting were offered as evidence tendered before Court in support of the position that a demand had been made.

In the absence of any admissible evidence presented before the trial Court by the Plaintiff Bank, in order to establish that the Letters of Demand P27 and P28 were sent to the address of the 2nd Defendant under registered cover, as required in terms of the applicable terms and conditions with regard to the granting of loan facilities, there cannot arise a corresponding obligation imposed on the latter to establish the negative. Therefore, the contention presented by the Plaintiff Bank that, by the

marking of Letters of Demand through its witness *prima facie* establishes that those letters were sent to the address of the 2nd Defendant under registered cover cannot succeed.

The factual position of the instant appeal is clearly distinguishable to the ones on which ***Edrick Silva v Chandadasa*** 70 NLR 169, ***Cinemas Ltd v Soundararajan*** (1998) 2 Sri L.R. 19, ***Rajapakshe v Weerakoon*** (SC Appeal No. 120/09 – decided on 01.08.2017 and ***Chandra Gunasekara v Peoples Bank*** *2020 [B.L.R] 143* were decided and the principle enunciated in them, to the effect where one party to a litigation leads *prima facie* evidence and the adversary fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, then it is a matter falling within the definition of the word 'proof' in the Evidence Ordinance.

Moving on to the other contention of the Plaintiff Bank that the 2nd Defendant had admitted the receipt of the Letters of Demand by his reply letter marked P29, which was sent under "without prejudice" by the 2nd Defendant fulfils the requirement of the demand being made. The learned President's Counsel placed heavy reliance on the judgment of ***Oceanbulk Shipping & Trading SA v TMT Asia Ltd., and Others*** [2010] UKSC 44, where the Supreme Court of the United Kingdom considered the exceptions to the "*without prejudice rule*".

Before considering the contention of the Plaintiff Bank that the contents of letter P29, qualify to be considered as an exception to the said rule, as it was written in reply to the Letters of Demand P27 and P28, it is necessary to make a superficial reference to the contents of each of these documents.

P27 is a Letter of Demand which carries the date 06.07.2005. It demands Rs. 1,001,645.48 from the 1st and 2nd Defendants as the dues from the capital and interest of a loan of Rs, 1,000,000.00 with an annual interest rate of 15.5%. It is addressed to the 1st and 2nd Defendants. Letter of Demand P28 is dated 06.06.2005. It is a letter through which the Plaintiff Bank demanded from the 1st and 2nd Defendants a sum of Rs. 988,872.54 due to it over a loan facility of Rs. 1,000,000.00 with an annual interest rate of 15.5%.

Letter P29 is a letter written by the 2nd Defendant addressed to the Plaintiff Bank with an insertion of the words "without prejudice" at its top part. This letter was written by the 2nd Defendant as a reply to two letters he received from the Plaintiff Bank dated 06.06.2005. It speaks of three loans. The amounts of these loans that are indicated by the 2nd Defendant in P29 refer to Rs. 1,000,000.00, Rs. 700,000.00 and Rs. 200,000.00 respectively. P29 is dated 11.06.2005.

Of the two Letters of Demand sent by the Plaintiff Bank, only P28 predates the letter P29. P27, carrying a date of 06.07.2005 sent only after P29 was written by the 2nd Defendant. Thus, even if the contents of P29 are accepted as an admission of the demand made by the Plaintiff Bank by ignoring the fact that it was written without prejudice, it then applies to the Letter of Demand P28 only. Letter of Demand P28 refers to a loan of Rs. 1,000,000,00. But the 2nd Defendant, in replying to two letters dated 06.06.2005 refers to three loans of Rs. 1,000,000.00., Rs. 700,000.00 and Rs. 200,000.00 granted to the 1st Defendant. Of the copies of many Letters of Demand, tendered to Court as P25, P26, P27, P28, P32 and P33, only P25 and P28 are dated 06.06.2005. P25 is addressed to the 1st Defendant

informing of the demand of the Plaintiff Bank. The name of the 2nd Defendant only appears at the end of the letter and that too after the signature of the Attorney-at-Law, indicating it was sent to him, merely for the purpose of being a recipient of a copy of that letter. Therefore, P25 cannot be taken as a Letter of Demand by which the 2nd Defendant was called upon by the Plaintiff Bank to make payments of the dues he owed to the latter. It is interesting to note that in P25 there is reference to three loans obtained and the demand made over them from the 1st Defendant.

Letter of Demand P28 refers to a demand made to recover dues of a loan of Rs. 1,000,000.00 and it does not make any reference to any other loan facilities granted either to the 2nd Defendant or to the 1st Defendant. The 2nd Defendant clearly referred to in P29 that he replies to both letters dated 06.06.2005, which indicated that he was granted three loans, a fact he disputed in the said reply. Thus, it is more likely that P29 was not sent, as a reply to P28, but in reply to two other letters received by the 2nd Defendant, which is in line with his claim that he never received P27 and P28.

The trial Court considered these factors in its determination of the issues Nos. 14(1) and 14(2) and the Provincial High Court of Civil Appeal concurred with the view taken by the trial Court that P29 does not contain any admission on the part of the 2nd Defendant that he did receive Letters of Demand P27 and P28. The conclusions reached by the Courts below are the reasonable conclusions that could be reached on the available evidence and therefore are affirmed. In view of these findings, this Court finds no necessity to consider the instances where the Courts would make an exception to the general rule applied on letters written subject to "*without*

prejudice" for the reason highlighted by Lord *Clarke* quoting Lord *Hope* (as reproduced in para 28 of the judgment of ***Oceanbulk Shipping & Trading SA v TMT Asia Ltd., and Others***);

> "*The essence of [the rule] lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during tis period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection.*"

In these circumstances and in view of the above reasoning; the questions of law that were raised by the Plaintiff Bank in relation to the instant appeal are answered as follows;

a. *In civil actions, upon production of a Letter of Demand as evidence by the Plaintiff;*
    i. *Does the burden of proof shift to the Defendant to establish and/or lead evidence that it was not received by him*?

    In view of the fact that the Plaintiff Bank had failed to establish the demand was made to the 2nd

Defendant, this question does not arise for consideration in relation to the instant matter.

ii. *Does the burden of proof shift back to the Plaintiff only if the Defendant elicits evidence that he had not received such letter?*

In view of the answer provided to the previous question, this question too does not arise for consideration.

b. *Was there any evidence before Court to determine that the Letters of Demand had not been sent to the Defendants, when the 2nd Defendant had failed and/or refused to give evidence to the effect that he had not received such Letters of Demand?*

There was no evidence that the Letters of Demand were sent to the 2nd Defendant.

c. *Has the Provincial High Court of the Western Province erred in law in holding that the letter P29 cannot be considered as a reply to Letters of Demand P25 & P28 [both dated 06.06.2005], when there was no evidence to the contrary given by the Defendant to the effect that P29 was in reply to some other letter?*

The Provincial High Court of the Western Province made no error in law in holding that P29 cannot be considered as a reply to Letters of Demand P25 and P28.

d. *Has the Provincial High Court of the Western Province erred in law in properly evaluating the evidence led in the case?*

The Provincial High Court of the Western Province made no error in law or in fact, in evaluating the evidence led in the case.

The judgment of the Provincial High Court of Civil Appeal is therefore affirmed along with that of the District Court and the appeal of the Plaintiff Bank is accordingly dismissed.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, CJ.

I agree.

CHIEF JUSTICE

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT