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

In the matter of an appeal under and in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended

SC Appeal No. 08/2014
SC/HCCA/LA/144/2013
WP/HCCA/GAM/208/2003(F)
D.C Negombo 2157/SPL

Hapuarachchige Don Berty Anslem,
No. 394/1, Daluwakotuwa, Kochchikade

PLAINTIFF

Vs.

Y.B. Alecman,
No. 19, Pallansena, Kochchikade

DEFENDANT

And Between

Y.B. Alecman,
No. 19, Pallansena, Kochchikade

DEFENDANT – APPELLANT

Vs.

Hapuarachchige Don Berty Anslem,
No. 394/1, Daluwakotuwa,
Kochchikade

PLAINTIFF – RESPONDENT

Hapuarachchige Don Douglas Martin Appuhamy,
No. 294/2, Silver Sands Road,
Daluwakotuwa, Kochchikade.

SUBSTITUTED PLAINTIFF – RESPONDENT

And now Between

Y.B. Alecman,
No. 19, Pallansena, Kochchikade

DEFENDANT – APPELLANT – APPELLANT

1. Mahabadalage Gnanawathie

2. Y.B. Ajantha Kamal Nasantha.

   Both of:
   No. 19, Pallansena Road, Kochchikade.

3. Geethani Chitramali,
   No. 26/7, 3/3, Good Hope Residencies,
   De Saram Road, Mt. Lavinia.

4. Niranthi Chithramali,
   No. 27, Gemunu Mawatha,
   Borupana Road, Ratmalana.

SUBSTITUTED DEFENDANT – APPELLANT – APPELLANTS

Vs

Hapuarachchige Don Douglas Martin Appuhamy,
No. 294/2, Silver Sands Road,
Daluwakotuwa, Kochchikade.

SUBSTITUTED PLAINTIFF – RESPONDENT – RESPONDENT

Before: **E.A.G.R. Amarasekera, J**
Yasantha Kodagoda, PC, J
Arjuna Obeyesekere, J

Counsel: Kuwera De Zoysa, PC with Ameer Maharoof and Pasindu Bandara for the Substituted Defendant – Appellant – Appellants

Dr Sunil Cooray with Sudharshani Cooray for the Substituted Plaintiff – Respondent – Respondent

Argued on: 24th January 2023 and 24th February 2023

Written Submissions: Tendered by the Substituted Defendant – Appellant – Appellants on 23rd October 2014 and 3rd April 2023

Tendered by the Substituted Plaintiff – Respondent – Respondent on 7th October 2014 and 6th April 2023

Decided on: 30th May 2025

Obeyesekere, J

This is an appeal filed by the Defendant – Appellant – Appellant [the Defendant] against the judgment delivered by the Civil Appellate High Court of the Western Province holden in Gampaha [the High Court]. By the said judgment, the High Court affirmed the judgment delivered by the District Court of Negombo [the District Court] in favour of the Plaintiff – Respondent – Respondent [the Plaintiff]. Leave to appeal was granted on three questions of law to which I shall advert to later in this judgment.

This judgment has been prepared in four parts. I shall in the first part refer to the admitted facts and the facts as pleaded by the parties in their respective pleadings in order to give an outline of the case of each party and context to the questions of law. This will be followed by a discussion on the law relating to the second and third questions of law. In the third part, I shall consider in detail the evidence given at the trial, both oral and documentary in order to place in its proper perspective the conclusions of fact reached by both the District Court and the High Court. I shall finally analyse the judgments of the District Court and the High Court in the light of the applicable law, the evidence and the questions of law.

Partnership between the Plaintiff and the Defendant

The Plaintiff, the Defendant and five others had entered into Deed of Partnership No. 1124 dated 23rd July 1976 [the Agreement] with the purpose of the partnership being to commence and carry out a cinema hall under the name of 'Elite Cinema' at Welihena, Daluwakotuwa. While the said Agreement did not contain details relating to the ownership of the land on which the cinema was situated, the Agreement provided that:

(a) The Plaintiff and his wife shall invest a sum of Rs. 75,000, the Defendant and his wife a sum of Rs. 150,000 and the other five persons in aggregate a further sum of Rs. 75,000;

(b) The Defendant shall be the Managing Partner;

(c) The partners shall be entitled to receive 8% as interest on their investment and thereafter to a division of the profits according to the ratio of their investment, with the profits being paid by way of a dividend once a year;

(d) The partnership shall commence on 16th July 1975 and be valid for a period of ten years; and

(e) The partnership may be terminated by one partner giving six months notice in writing of such termination to the other partners.

Over the years, the shares held by the partners other than the Plaintiff had been purchased by the Defendant and the wife of the Plaintiff had transferred her share to the Plaintiff, leaving the Plaintiff and the Defendant as the only partners. The ratio of the investment held by the Plaintiff and the Defendant in the partnership stood at Rs. 75,000 : Rs. 225,000 at the time the dispute that culminated in this appeal arose.

There is no evidence to suggest that a fresh agreement was executed with the departure of the other partners nor has the Agreement been renewed in writing at the end of the ten year period. However, there is no dispute that (a) the Plaintiff and the Defendant continued with the operation of the cinema in partnership with one another, (b) the terms of the said Agreement relating to the payment of profits/dividends was adhered to by the

Defendant, and (c) both parties proceeded on the basis that the partnership is valid and effective.

It is admitted between the parties that:

(a) The cinema was managed by the Defendant without any involvement or interference by the Plaintiff;

(b) The Plaintiff would meet the Defendant each year at the latter's office to collect the annual profits of the said partnership;

(c) On each of the above occasions when payment was made, the Plaintiff signed a receipt acknowledging the receipt of the money;

(d) A copy of such receipt which specified the details of the payment that was being made was handed over to the Plaintiff; and

(e) The Plaintiff was paid *inter alia* the following sums of money as dividends/profits by way of cheques:

Accounting year	Paid on	Sum paid – Rs.	Receipt
1982/83	4th March 1986	8277.52	P 9
1983/84	4th March 1986	3101.40	P10
1985/86	2nd December 1986	17,459.32	P11
1986/87	1st November 1987	14,662.00	P12 (V2)
1987/88	4th January 1989	2681.46	P13
1989/90	24th April 1991	11,582.00	P14
1990/91	18th November 1991	14,979.76	P15

<u>Meeting on 17th October 1992 and events thereafter – as pleaded</u>

It is the position of the Plaintiff that on 17th October 1992, he received a message from Danatunga, an employee of the Defendant informing him that the Defendant wanted to meet him. This was the customary way of informing the Plaintiff to call over to collect his share of the profits, except that unlike in previous years where the transaction took place

at the office of the Defendant, on this occasion, the Plaintiff was asked to call over at the residence of the Defendant.

The Plaintiff states that he accordingly visited the house of the Defendant that evening in the expectation of being paid the profits of the said business for the year 1991/92. The Plaintiff admits that (a) he met the Defendant over a cup of tea and that he was handed over a cheque post-dated to 2nd November 1992 in a sum of Rs. 134,644 [**P7**], and (b) he signed a receipt acknowledging payment and a few other documents. However, unlike on previous occasions, the Plaintiff claims that he was not given a copy either of the receipt or of the other documents signed by him.

Upon returning home, the Plaintiff had handed over the said cheque to his son-in-law, Ranjith Hettiarachchi with instructions to deposit the said cheque on the due date. Having seen the value of the cheque and realising that the sum paid as 'profits' was unusually high compared with previous years, Hettiarachchi had asked the Plaintiff for a breakdown of the said sum. The Plaintiff claims that he declared at that point that he was not given a breakdown, and had accordingly instructed Hettiarachchi to obtain it from Danatunga.

On 18th October 1992, Hettiarachchi claims that he had visited the house of Danatunga and requested for a breakdown of the said sum of Rs. 134,644. Danatunga is said to have handed over to Hettiarachchi on the 19th, a document written by Danatunga marked **P8** on which the following breakdown of the aforesaid sum of Rs. 134,644 had been written:

Share of the Plaintiff	Rs. 75000
Arrears	Rs. 21602
Profits for 1991-92	Rs. 18042
Refund of money obtained for the curtain	Rs. 20000

Although in terms of P8, the Plaintiff's share of Rs. 75,000 had been returned to the Plaintiff, it is the position of the Plaintiff that he never agreed to sell his share in Elite Cinema to the Defendant. Accordingly, on his instructions, his Attorney-at-Law had sent a letter of demand dated 21st October 1992 to the Defendant [**P19**], which is just four days after the alleged incident, stating *inter alia* as follows:

“ පසුගිය සෙනසුරාදා දින හෙවත්, 17 වන දින ඔබගේ සේවකයකු වන ධනතුංග නමැති අය මාගේ සේවාදායකට දන්වා සිටියේ භවුල් ව්‍යාපාරයේ කොටස් මුදල ගෙවීම සඳහා කළමණාකාර කොටස්කරු වන ඔබ වැක්පත ලියා සකස්කොට ඇති බවත්, ඔබගේ නිවසට පැමිණ මගේ සේවාදායක විසින් එම වැක්පත ලබාගත යුතු බවත්ය. මේ අනුව එදින සවස මාගේ සේවාදායක ඔබගේ නිවසට පැමිණ චෙක්පත ලබා ගන්නා ලදි. එනම්, රු: 134,644/-ක් සඳහා සිමාසහිත ලංකා වාණිජ බැංකුව (මිගමුව) වෙත ලියනලද අංක 647155 සහ 1992.11.02 දිනය දරණ චෙක්පතවේ. සාමාන්‍යයෙන් වාර්ෂිකව ගෙවන කොටස් මුදල මෙතරම් විශාල නැති නමුත්, හිඟ මුදලද, එකතුව්, ජපානයෙන් ටිදි තිරය ගෙන්වීම සඳහා ඔබට ණයට දුන් මුදල්ද එකතුව් එම විශාල මුදල සැදි ඇතැයි වයස අවුරුදු 75ක් පමන වන මාගේ සේවාදායක අදහස් කලේය.

ඔබද, ඔබගේ එකි සේවකද, එම චෙක්පත මාගේ සේවාදායකට බාරදි ලේඛණ කිහිපයකට ඔහුගෙන් අත්සන් ලබාගෙන ඇත. මාගේ සේවාදායක එම ලේඛණ අත්සන් කලේ එම චෙක්පතින් ලැබූ මුදල ඔහු ලබා ගත් බවට ඔහු විසින් එසේ අත්සන් කල යුතු යැයි ඔහුට ඒත්තු ගැන්වු බැවින්ය.

මට ලැබී ඇති උපදෙස් පරිදි ඔබට දන්වා සිටින්නේ එම භවුල් ව්‍යාපාරයේ මාගේ සේවාදායකගේ භවුල් අයිතිය විකිනීමේ අදහසක් ඔහු තුල නොතිබුනු බවත්, එවැනි විකිණීමක් පිලිබඳව එදින හෝ ඊට පෙර ඔබ සහ ඔහු අතර කිසිම කතාබහක් සිදුවී නැති බවත්ය. ඇත්ත වශයෙන්ම ඔහුගේ අයිතිය දරුවන්ට පවරණ බවට ඔහු ඔවුන්ට දන්වා ඇත. තවද, වෙන අවුරුදුවල කොටස් මුදල දෙන විට ඔහු අත්සන් කර දුන් ලදු, පතේ අනුපිටපතක් ඔහුට රැගෙන යාමට සිරිතක් වශයෙන් ඔබ විසින් ඔහුට දෙන ලද නමුත් මෙම අවස්ථාවේදි ඔබ එසේ කර නැත.

එම ධනතුංග එවිට ලිඛිතව සැපයූ විස්තරය අනුව එම මුදල් වැඩි ප්‍රමාණය වන රු.75,000/- ක් “කොටස් මුදල” යනුවෙන් හඳුන්වා ඇත. තවද, මගේ සේවාදායකගේ අයිතිය ඔබට පවරා ඇති බවට ඔබ සඳහන් කර ඇතැයි මාගේ සේවාදායකට ආරංචි වී ඇත. මේ අනුව පෙනී යන්නේ ඔබ විසින් එම අවස්ථාවේදි මාගේ සේවාදායකව රවටා ඔහු නොමග යවා ඔහුගේ ලේඛණ වලට අත්සන් ගෙන භවුල් ව්‍යාපාරයේ ඔහුගේ අයිතිය ඔබට පවරා ඇති බවට ව්‍යාජ ලෙස ඔබ කියා පාන බවය.”

Thus, the position of the Plaintiff, just four days after the incident, was that the Defendant had misled him [නොමග යවා] and cheated him [රවටා] as a result of which he had signed a receipt together with several other documents, and accepted P7 even though he had no intention of selling his share in the partnership.

The response of the Defendant is found in the letter dated 2nd November 1992 sent through his Attorney-at-Law [**P20**] where it was stated *inter alia* that:

“*The allegations contained in your letter that my client had by misrepresentation and false inducement got your client to sign documents on the 17th October 1992 is totally false. In fact, your client had on many prior occasions expressed his intention to retire from this partnership and it was agreed that my client would pay him his dues on 17th October. On the evening of that day your client met my client by arrangement at my client’s residence. On my clients instructions his Clerk Danatunga*

had prepared a receipt for the sum of rupees 134,644 and a letter to the Registrar of Business Names confirming that he was leaving the partnership and that he had collected his dues. Copies of the letter and documents were also prepared to be sent to the Manager, People's Bank, Kochchikade and the Inland Revenue Department. ***All these documents your client read through before he signed. He was fully aware of what he was signing and doing****. …* ***When your client accepted the cheque he was in no doubt as to the fact that he was ceasing to be a partner***."

The position of the Defendant was thus fourfold. The first was that it was the Plaintiff who wanted to sell his share, a claim which has been denied by the Plaintiff. The second is that several documents including the receipt were signed by the Plaintiff, and that the Plaintiff read these documents prior to signing. The third was that the Plaintiff accepted the cheque with the full understanding of what he was doing. The fourth and perhaps the most important was the denial of the allegation of misrepresentation and cheating.

P20 has not been replied by the Plaintiff.

Action in the District Court

Action was instituted in the District Court on 23rd November 1992. The plaint contained the above narration of facts and that:

(a) the Plaintiff had no intention of selling his share;

(b) similar to previous occasions, the Plaintiff **did not examine** the documents; and

(c) **the Defendant had cheated him and misled him**.

The Plaintiff had however acknowledged that he signed several documents including a receipt [**V1**] and a letter addressed to the Registrar of Business Names [**P17**].

The relief claimed in the plaint was as follows:

"(අ) පැමිණිලිකරුට එලයිට් සිනමාව නැමැති හවුල් ව්‍යාපාරයේ හිමි කොටස් සහ අයිතිවාසිකම් විත්තිකරුට පැවරීමේ අදහසින් කිසිම ලේඛනයකට අත්සන් කර නැති බවට ප්‍රකාශයක් ලබාගැනීම සඳහාද,

(ආ) එලයිට් සිනමාව නැමැති ව්‍යාපාරයේ පැමිණිලිකරුට හිමි අයිතිවාසිකම් ඔහු විසින් විත්තිකරුට පවරන බවට සඳහන් කරන හෝ අඟවන ලේඛණයකට අත්සන් කර තිබේ නම් පැමිණිලිකරුගේ අත්සන එයට ලබා ගෙන ඇත්තේ පැමිණිලිකරුව **විත්තිකරු විසින් රැවටීමෙන්** බවද ඒ හේතුවෙන් එම ලේඛන ශූන්‍ය සහ බලරහිත බවට ප්‍රකාශයක් ලබා ගැනීම සඳහාද,

(ඇ) පැමිණිලිකරු තවදුරටත් සහ තවමත් එලයිට් සිනමා නැමැති හවුල් ව්‍යාපාරයේ 1/4 ක කොටස් හිමි හවුල් කරුවකු බවට ප්‍රකාශයක් ලබා ගැනීම සඳහාද,"

Paragraph (ආ) was the first indication that the Plaintiff may have agreed to transfer his share by V1 and that if it was so, that is as a result of the Defendant having cheated him.

The position taken up by the Defendant in his answer was that the Plaintiff had discussed with him on several occasions his desire to terminate the partnership, that the meeting on 17th October 1992 was a pre-arranged meeting, and that the Plaintiff had signed several documents that day to give effect to the decision of the Plaintiff to move out as a partner. There was however no denial of the allegation that the Defendant had misled and/or cheated the Plaintiff.

The trial before the District Court commenced on 20th November 1996. After the evidence of several witnesses including that of the Plaintiff had been led, due to a change in the Judge before whom the evidence was led, the Defendant had moved that proceedings commence *de novo*. In the absence of any objection by the Plaintiff, trial *de novo* had commenced on 27th October 1999.

The Plaintiff had raised the following issues:

"(1) පැමිණිලිකරු හවුල් ව්‍යාපාරයේ අයිතිය පැවරීමේ අදහසින් කිසිම ක්‍රියාවක් කර නොමැතිද?

(2) පැමිණිලිකරු හවුල් ව්‍යාපාරයේ තම අයිතිය අන්සතු කර නැද්ද?

(3) ඉහත විසඳිය යුතු ප්‍රශ්න පැමිණිල්ලේ වාසියට තීරණය කෙරේනම් පැමිණිල්ලේ ආයාචනයේ ඉල්ලා ඇති පරිදි නඩු තීන්දුවක් ඇතුලත් කල යුතුද?"

Thus, the Plaintiff **did not put in issue** the fact that the Defendant misled and/or cheated him, nor did the Plaintiff raise a specific issue that the Plaintiff made a mistake when he signed the documents. The issue that is closest to a claim that the Plaintiff made a mistake when he signed the necessary documents transferring his share to the Defendant is Issue No. 1 – i.e. the Plaintiff had no intention to transfer his share, even though he signed a

receipt and accepted P7. It is this issue that has now transformed itself through the plea of *non est factum* as the second and third questions of law.

The Defendant raised only one issue, that being, "උත්තරයේ 10 වැනි ඡේදයේ දක්වා ඇති කරුණුවලට අනුව පැමිණිලිකරුට මෙම නඩුව පවරා පවත්වාගෙන යාමට හැකිද?". Paragraph 10 of the answer referred to the fact that the Plaintiff had given up his rights as a partner by virtue of having signed a receipt to that effect. Thus, the issue raised by the Defendant was whether the Plaintiff could maintain the action having transferred his share.

The Plaintiff's case commenced with the evidence of his son-in-law, followed by Don Herbert Nihal [a nephew of the Plaintiff who was an employee of the Defendant], Danatunga, the Plaintiff and finally an employee of the accountancy firm that audited the accounts of the partnership. The Defendant did not give evidence nor did he lead the evidence of any other person. However, three documents [V1 – V3] were marked by the Defendant during cross examination. Of these three documents, V1 is the receipt that was admitted at the trial to have been signed by the Plaintiff on 17th October 1992.

By its judgment delivered on 22nd August 2003, the District Court accepted the position of the Plaintiff that when he signed V1 and accepted P7, his intention was only to accept the profits for that particular year and that the Defendant had failed to contradict the position of the Plaintiff. The District Court accordingly held with the Plaintiff and granted the aforementioned relief. Aggrieved, the Defendant had appealed to the High Court which had upheld the judgment of the District Court by its judgment delivered on 1st March 2013.

P7 being the cheque that was issued was not deposited by the Plaintiff. As a result, the monies have remained with the Defendant since October 1992. If a decision is reached in favour of the Defendant, that would not only mean that the Plaintiff is not entitled to any share in the partnership but would also result in the Defendant not making any payment for the share of the Plaintiff. In order to avoid the Defendant being unjustly enriched in such an eventuality, the Plaintiff shall be entitled to the said sum of Rs. 134,644.

Questions of law

The Defendant had sought and obtained leave to appeal on the following three questions of law:

1) Has the Civil Appellate High Court of Gampaha erred in law in holding that the **Defendant has deceived the Plaintiff** into placing his signature on the documents marked and led in evidence as V1 and P17 at the trial?

2) Has the Civil Appellate High Court of Gampaha erred in law by holding in favour of the Plaintiff when negligence in the conduct of the Plaintiff disentitles the Plaintiff to claim the benefit of the plea of *non est factum* in respect of documents marked V1 and P17?

3) Has the Civil Appellate High Court of Gampaha failed to consider that the burden of proof was with the Plaintiff in establishing the plea of *non est factum* as well as establishing a cause of action in terms of Sections 101 and 102 of the Evidence Ordinance?

This brings me to the second part of this judgment.

The plea of *non est factum*

In order to answer the second and third questions of law, I shall at the outset consider what is meant by *non est factum*, whether a plea of *non est factum* is vitiated by the negligence or carelessness of the person relying on the said plea and the evidentiary burden that must be satisfied in order to succeed with the plea.

Non est factum is a defence available to someone who has been misled into signing a document which is fundamentally different from what he or she intended to execute or sign. Accordingly, where the defence is established, the signing party may be able to escape the effect of the signature by arguing that the agreement was void for mistake.

In **Chitty on Contracts** [Thirty First Edition (2012), Volume 1], it has been stated that:

> "*The doctrine of mistake in the law of contract deals with two rather different situations. In the first, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law. Cases in this category are now usually referred to as "common" mistake, for normally the mistake is legally relevant only if both parties have contracted under the same misapprehension. In the second, there is some mistake or misunderstanding in the communications between the parties which prevents there being an effective agreement [for instance if the parties misunderstand each other] or at least means that there is no agreement on the terms apparently stated. This second category of mistake includes … 'unilateral mistake', where only one of the parties is mistaken, over the terms of the contract … .* " [paragraph 5-001]
>
> "*There is, however, a third type of mistake which might be seen as a variant of unilateral mistake, but which for convenience will be placed in a separate category. It is peculiar to the law of written contracts, and it allows a party who has executed a document under* ***a fundamental misapprehension*** *as to its nature to plead that it is "not his deed". This is the defence of non est factum.*" [paragraphs 5-002]
>
> "***The general rule is that a person*** *is estopped by his or her deed, and although there is no such estoppel in the case of ordinary signed documents, a party* ***of full age and understanding is normally bound by his signature*** *to a document,* ***whether he reads or understands it or not****. If, however,* ***a party has been misled*** *into executing a deed or signing a document essentially different from that which he intended to execute or sign he can plead non est factum in an action against him. The deed or writing is completely void in whosesoever hands it may come. In most of the cases in which non est factum has been successfully pleaded* ***the mistake has been induced by fraud****.*" [paragraph 5-102] [emphasis added]

The limited extent to which Court will accept the defence of *non est factum* was considered in **Muskham Finance Ltd v Howard and another** [(1963) 1 Q.B. 904; at page 912] where Donovan L.J held that "*The plea of non est factum is a plea which must necessarily be kept within narrow limits. Much confusion and uncertainty would result in*

the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he had signed."

The law on *non est factum* was completely reviewed and restated by the House of Lords in **Saunders v Anglia Building Society** [1971 AC 1004] and the modern boundaries of the plea have been set out therein.

In that case, the 1st defendant, Lee had placed before the plaintiff a deed for her to sign. The plaintiff had broken her spectacles and could not read effectively without them. She asked what the deed was, and Lee said, in the presence of the nephew of the plaintiff and without any dissent from him, that the deed was to do with the gift to the nephew of the house of the plaintiff. The plaintiff, not having asked her nephew to read the deed to her or give his explanation of it, but assuming that her nephew and Lee knew what they were doing, and desiring to help her nephew in the way that he wished, signed the deed.

Lord Reid, with whom the other four Law Lords agreed, stated that [pages 1015 – 1016]:

> "*The plea of non est factum obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed.* ***Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity****. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.*
>
> *But that does not excuse them from taking such precautions as they reasonably can. …* ***So there must be a heavy burden of proof on the person who seeks to invoke this remedy.*** *He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available*

to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not think he can be heard to say that he signed in reliance on someone he trusted. But, particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.

***The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document**. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any enquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. **He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief**. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case.*

We find in many of the authorities statements that a man's deed is not his deed if his mind does not go with his pen. But that is far too wide. It would cover cases where the man had taken no precautions at all, and there was no ground for his belief that he was signing something different from that which in fact he signed. I think that it is the wrong approach to start from that wide statement and then whittle it down by excluding cases where the remedy will not be granted. It is for the person who seeks the remedy to show that he should have it."

In a separate opinion, Lord Pearson stated as follows [page 1034]:

"*In my opinion, the plea of non est factum ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is **not capable of both reading and sufficiently understanding** the deed or other document to be signed. By "sufficiently understanding" I mean understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer had believed it to be."*

Thus, a person who has read the impugned document prior to signing as well as a person of sufficient understanding cannot rely on the defence of *non est factum.*

This position was emphasised by the High Court of Australia in **Petelin v Cullen** [(1975) 132 CLR 355] where it was stated that the narrow class of persons who are entitled to rely on the defence are those who are unable to read owing to blindness or illiteracy or some disability and who through no fault of their own are unable to have any understanding of the purport of a particular document and who must therefore rely on others for advice as to what they are signing.

The plea of *non est factum* has been considered on many occasions by our Courts. In **Mercantile Credit Ltd v B.H. Silva** [76 NLR 193; at page 194] Chief Justice H.N.G. Fernando, held that:

> "*This defence [of non est factum] is usually taken in conjunction with the plea that a party was induced to sign a document by fraud or duress; but no such plea was taken in the instant case. Alternatively, the defence may be based on mistake, namely misapprehension as to the nature and substance of the transaction (Pollock on Contracts, 13th Edition, p. 383).*
>
> *The equivalent in the Roman-Dutch law is the plea of justus error. The term explicitly carries the connotation of mistake or misapprehension*, …."

In **Mercantile Credit Ltd v Thilakaratne** [(2002) 3 Sri LR 206; at pages 211 and 212], Nimal Dissanayake, J cited with approval the following passage from Weeramantry on 'The Law of Contracts' [1999 reprint, vol. 1 at page 300] where the learned author had enunciated the rule 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.

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*."

Thus, the plea of *justus error* is stricter in its application than the plea of *non est factum*.

<u>*Non est factum* and negligence</u>

In **Chitty on Contracts** [supra; paragraph 5-107] it has been pointed out that:

"***A person who signs a document may not be permitted to raise the defense of non est factum where he has been guilty of negligence in appending his signature****. It was formerly held in a number of cases … that negligence was only material where the document actually signed was a negotiable instrument, for there was not otherwise any duty of care owed by the person executing the document to an innocent third party who acted in reliance on it. But these cases were much criticized, both by the courts and by writers, and they were eventually considered by the House of Lords in Saunders v Anglia Building Society. … It was held that no matter what class of document was in question, negligence or carelessness on the part of the person signing the document would exclude the defence of non est factum. This does not depend on the principal of estoppel but on the principle that no man can take advantage of his own wrong.*" [Emphasis added]

On the issue of negligence of the party raising the plea, Lord Pearson had this to say in **Saunders** [supra; page 1036-1037]:

> "*It is clear that by the law as it was laid down in Foster v. Mackinnon [(1869) L.T. 4 C.P 704] a person who had signed a document differing fundamentally from what he believed it to be would be disentitled from successfully pleading non est factum if his signing of the document was due to his own negligence. The word "negligence" in this connection had no special, technical meaning. It meant carelessness, and in each case it was a question of fact for the jury to decide whether the person relying on the plea had been negligent or not*."

Lord Pearson thereafter cited with approval [at page 1038] the following statement by Salmon, L.J., from the judgment of the Court of Appeal in **Saunders** [Gallie v Lee and another (1969) 2 Ch 17; at page 48]:

> "*If ... **a person signs a document because he negligently failed to read it**, I think he is precluded from relying on his own negligent act for the purpose of escaping from the ordinary consequences of his signature. In such circumstances he cannot succeed on a plea of non est factum. This is not in my view a true estoppel, but an illustration of the principle that no man may take advantage of his own wrong*."

In **Nimalasena v L.B. Finance Company Ltd and others** [CA Case No. 831/2000 (F) – CA Minutes of 6th February 2017], A.H.M.D. Nawaz,J, having considered the plea of *non est factum* in detail stated that, *"I also find that the 2nd defendant appellant was a technician and a tradesman on his own admission. The witness came through as a man of the world who could not have been so naive as to be unaware of the implications of placing one's signature to a guarantee. If he knew that the act of signing a guarantee would spell for him disastrous consequences of monetary burdens, he should have exhibited prudence. So his assertion that he only signed as a witness and not as a guarantor does not inspire confidence in this Court. The necessity to exercise prudence was emphasized by the House of Lords in the context of the plea of non est factum."*

Thus, the plea of *non est factum* is not available to a man who does not exhibit prudence or is negligent in his actions.

Non est factum and the burden of proof

There is one final matter that I must advert to, that being the burden of proof cast on a person relying on the plea of *non est factum.*

In **Chitty on Contracts** [supra; paragraph 5-109], having referred to with approval the statement by Lord Reid in **Saunders** [supra; page 1016] that there is "*a heavy burden of proof on the person who seeks to invoke this remedy.*", it goes on to state that, "*It will be a rare case in which a person who does not suffer from a disability will be able to plead non est factum when he has signed a document without checking to see what it is, or in what capacity he is signing it*."

Thus, while the plea of *non est factum* requires clear and positive evidence before it can be established, it was held by Lord Pearson in **Saunders** [supra; page 1038] that, "*The person who has signed the document knows with what knowledge or lack of knowledge and with what intention he signed the document, and how he was induced or came to sign it. He should have the burden of proving that his signature was not brought about by negligence on his part*."

This position is consistent with Sections 101 and 102 of the Evidence Ordinance. In **Mercantile Credit Ltd v Thilakaratne** [supra; page 209], the District Court had concluded that the clause relating to the renunciation of the benefits to which guarantors are entitled to by law had not been explained to the guarantors. Dissanayake, J stated that:

> "*The burden of proving that the clauses relating to the renouncing of all benefits and privileges to which sureties are entitled to by law were not understood by him is a special fact within the knowledge of the person alleging it and by virtue of section 101 of the Evidence Ordinance the burden of proving that fact is with the person who asserts that fact. In this case since it was the position of the 2nd defendant respondent that the conditions of the agreement relating to renunciation of the rights and benefits of the guarantors were not understood by him, the burden of proof of that fact lies with the 2nd defendant respondent who alleges it.*
>
> *It is well to be borne in mind that under section 102 of the Evidence Ordinance, the burden of proof lies on that person who would fail if no evidence at all were given on either side*."

Considering the above, it is clear that the plea of *non est factum* is extremely narrow in its application. With the Plaintiff neither being blind nor illiterate, in order to succeed with the plea, he was required to satisfy the following:

(1) That he was under a fundamental misapprehension as to the nature of the document that was signed with such document being radically different from the one the Plaintiff intended to sign, as a result of being misled or induced by deception practiced on him;

(2) The Plaintiff must not have been negligent.

It is hard to envisage of a case where a person of full capacity would be able to succeed with the plea, for the reason that if someone has taken reasonable care to ascertain what he was signing, it would be most unusual if he does not realise what the document actually is.

The evidence

Having set out what the Plaintiff must prove in order to establish *non est factum,* I shall now proceed to the third part of this judgment where I shall consider in detail the evidence that was led by the Plaintiff.

Taking into consideration the evidence that was led at the trial, the factual circumstances can be divided into three components. The first component is what transpired at the meeting held on 17th October 1992. The final outcome of this appeal depends entirely on what took place at the said meeting and therefore the evidence in this regard is critical. There were three persons who were present at the said meeting, namely the Plaintiff, the Defendant and Danatunga. The Defendant did not give evidence while the other two did.

The second component is whether the Plaintiff and the Defendant had any discussions prior to 17th October 1992 relating to the transfer of the Plaintiff's share to the Defendant or whether the Plaintiff was taken by surprise when he found out on receiving P8 on 19th October 1992 that he had transferred his share. The third component is what transpired after 17th October 1992. This includes the version of the Plaintiff that he found out that

he had transferred his share to the Defendant only after his son-in-law obtained the breakdown from Danatunga [**P8**] and the steps taken thereafter. While the Plaintiff and Danatunga gave evidence with regard to the second component, the Plaintiff, his son-in-law and Danatunga spoke of the third. I must state that the second and third components do not stand on their own and are important only to the extent of corroborating the position of the Plaintiff that he had no intention of transferring his share in Elite Cinema to the Defendant when he signed V1.

Evidence of the Plaintiff – events of 17th October 1992

The Plaintiff was 83 years of age at the time he gave evidence in 2002. He stated that:

(a) he had known the Defendant for about 25 – 30 years;

(b) **he and his son were engaged in money lending**;

(c) he has had financial transactions with the Defendant on several occasions;

(d) he received a message from Danatunga asking him to call over at the residence of the Defendant;

(e) he went to the residence of the Defendant.

The following questions posed during the evidence-in-chief of the Plaintiff and his answers contain the version of the Plaintiff as to what happened once he met the Defendant:

"ප්‍ර: පැ.7 චෙක්පත තමාට දෙනකොට තමා කිව්ා නේද තමාගෙන් ලේබන කිපයකට අත්සන් ගත්තා කියා.

උ: ඔව්.

ප්‍ර: ඔය තමාගෙන් අත්සන් ගත් ලේබන වලට තමා අත්සන් කරන කොට මේ හවුල් ව්‍යාපාරයේ තමාගේ හවුල විත්තිකරුට පවරන අදහසින් අත්සන් කලාද?

උ: එහෙම එකකට අත්සන් කලේ නැහැ. මා එහෙම කරන්නෙත් නැහැ.

ප්‍ර: තමාගේ හවුල් ව්‍යාපාරයේ කොටස විකිනිම හෝ පැවරීම කරන්නේ නම් තමා කරන ක්‍රියා මාර්ගය මොකක්ද?

උ: මා නිතිඥ මහතා ලඟට ගිහින් එයාගේ භාරයේ තමයි ඒ කටයුත්ත කරන්නේ."

With regard to what his intention was at the time his signature was obtained, the evidence of the Plaintiff was as follows:

"ප්‍ර: තමා ගරු අධිකරණයට කියන්නේ මේ එලයිට් සිනමා කියන ව්‍යාපාරයේ තමාගේ කොටස තමා කවදාවත් කෙනෙකුට විකුණන්න හෝ පවරන්න අවශ්‍යතාවයක් තිබුනද?

උ: මට එහෙම එකක් තිබුනේ නැහැ. එහෙම ඕනැකමක් තිබුනේ නැහැ මට.

ප්‍ර: විත්තිකරු තමාගෙන් යම්කිසි ලේඛන වලට අත්සන් අරන් 'එලයිට් සිනමා හලේ' තමාගේ කොටස විත්තිකරුට පවරලා තිබෙනවා කියා විත්තිකරු කියනවා තමා ඒක පිලිගන්නවාද?

උ: මා පිලිගන්නේ නැහැ.

ප්‍ර: ඒ වගේම විත්තිකරු තමාගේ අත්සන එවන් ලේඛනයට ලබාගෙන තිබෙනවා නම් ඒක **තමාගේ දැනිමකින් තොරව ලබාගත්නා කියා තමා කියා සිටිනවා.**

උ: ඔව්."

Thus, even though the Plaintiff has admitted that he signed several documents on the 17th, he had stated in no uncertain terms that he had no intention to sell his share.

It is important to note that:

(a) Even though the Plaintiff met the Defendant at his residence, and even had a cup of tea, the Plaintiff did not divulge during his evidence-in-chief the details of the conversation that the Plaintiff had with the Defendant;

(b) The Plaintiff did not claim during his evidence-in-chief that the Defendant informed him that what was being paid by cheque was the customary payment of profits or that the Defendant misled him in any manner or that the Defendant misrepresented facts and induced him to sign V1 and accept the cheque P7;

(c) Even if the Defendant claims that the Plaintiff signed some documents, the Plaintiff had no knowledge of their contents.

The Plaintiff was cross examined thereafter.

Did the Plaintiff read V1 before signing

I have already referred to the fact that the Plaintiff was paid dividends each year and that he acknowledged the receipt thereof by signing a receipt [P9 – P15] which contained the details of the payment that was being made. The Plaintiff was accordingly questioned as follows:

ප්‍ර: තමා වී 2 [P12] රිසිට් පත දෙන්න පෙර ඒක කියවා අත්සන් කලා නේද? අත්සන් කල අවස්ථාවේදි වී.2 [P12] රිසිට් එක තමා කියවා අත්සන් කලාද?

උ: සමහර වෙලාවට මා කියවා බලන්නේ නැහැ.

ප්‍ර: තමා රිසිට් පත වී.2 [P12] අත්සන් කරන්නට පෙර කියවා නේද අත්සන් කරන්නේ.

උ: කියවලා.

ප්‍ර: පැ.13, පැ.14, පැ.15 කියන රිසිට් පත්‍ර තමා අත්සන් කරන්න පෙර කියවා නේද අත්සන් කරන්නේ.

උ: ඔව් කියවලා තමයි.

ප්‍ර: **තමා තමාගේ අත්සන් තමාගේ ලිපියට රිසිට් එකට දාන්න පෙර ඒක කියවා බලා නේද අත්සන් කරන්නේ?**

උ: **ඔව්**

ප්‍ර: **කියවන්නේ නැතිව තමාට පුරුද්දක් තිබෙනවාද රිසිට් ලියා අත්සන් කරන්න.**

උ: **නැහැ.**

ප්‍ර: (<u>වී.1 සාකිෂිකරුට පෙන්වයි</u>)

මේක තමාගේ අත්සනද?

උ: **ඔව්.**

ප්‍ර: මේක අත්සන් කරන්න පෙර තමාට රුපියල් 1,34,644/-ක චෙක් පතක් ලැබුනාද?

උ: ලැබුණා.

ප්‍ර: **ඒ චෙක්පත බලා තමා වී.1 අත්සන් කලා?**

උ: **ඔව්.**

V1 is re-produced below:

> "කොව්වකඩේ දලුවාකොටුව සිල්වසැන්ඩ් පාරේ පදිංචි හපුආරච්චිගේ දොන් බර්ට් ඇන්සලම් සහ වර්නකුලසුරිය ඇග්නස් ප්‍රනාන්දු, වන අපි කොව්වකඩේ දලුවකොටුව එලයිට් සිනමා හවුල් ව්‍යාපාරයේ කොටස් කරුවන් වශයෙන් මෙපමන කලක් රුඳි සිට් බවත් **අද දින එම හවුල් ව්‍යාපාරයෙන් අප සිය කැමැත්තෙන්ම ඉල්ලා අස්වුන බවත් මෙයින් සහතික කර සිටිම්.**
>
> තවද ආදායම්බදු, උපදේශකවරුන් වන මීගමුවේ ක්‍රෙස්ටන් සමාගමේ ආදායම් බදු, වාර්ථා අනුව පහත සඳහන් පරිදි අපට ලැබිය යුතු **ලාභ සහ කොටස් මුදල් සඳහා** අංක 647155 දරණ මීගමුව ලංකා වානිජ බැංකුවේ චෙක් පතකින් රු: 134,644/- රුපියල් එක්ලක්ෂ තිස්හතරදාස් හයසිය හතලිස් හතරක්

භාරගත් අතර **අද දින සිට එලයිට් සිනමා ආයතනය සමග අපගේ කිසිම හවුල් ව්‍යාපාරික සම්බන්ධ කමක් නැති බවද** වැඩි දුරටත් දන්වා සිටිමි.

කොටස් මුදල	**- රු:**	**75,000.00**
කලින් වාර්ථා අනුව දිය යුතු හිඟ මුදල	- රු.	21,602.00
1991/1992 ලාභ කොටස් මුදල	- රු:	18,042.00
තිරය සඳහා ගත් අතමාරු මුදල	- රු:	20,000.00

	රු:	134,644.00

රුපියල් එක්ලක්ෂ තිස්හතර දාස් හයසිය හතලිස් හතරක් පමණයි"

To my mind, V1 makes it clear that the Plaintiff is voluntarily leaving the partnership, that he is being paid his investment of Rs. 75000 together with profits, arrears and his contribution towards the screen, and that the Plaintiff would no longer have any connection with Elite Cinema. The question was whether the Plaintiff had read V1, similar to what he had done in respect of P9-P15, prior to signing V1.

V1 having been read over, the Plaintiff was cross examined further as follows:

ප්‍ර: වි.1 කියා තිබෙන්නේ හවුල් ව්‍යාපාරයෙන් තමා ඉල්ලා අස්වුනා කියා.

උ: එහෙම මා ඉල්ලා අස්වුනේ නැහැ එහෙනම් මා නිතිඥ මහත්මයෙක් ලගට ගිහින් තමයි ඒක කටයුත්ත කරන්නේ

ප්‍ර: වි.1 බලන්න තමාගේ අත්සන තිබෙනවාද කියා - වි.1 මුද්දරයක් උඩ තිබෙන්නේ තමාගේ අත්සනද?

උ: ඔව්.

(<u>වි.1 භාෂා පරිවර්ථක මහතා විසින් කියවයි</u>)

ප්‍ර: **වි.1 හරි නේද?**

උ: ඒ වුනාට මා එහෙම එකක් දුන්නේ නැහැ. එහෙම එකක් මා කරනවා නම් නිතිඥ මහත්මයෙක් ලගට ගිහින් මා මේක පවරලා දෙනවා .

ප්‍ර: **වි.1ට තමා අත්සන් කරන්න පෙර වි.1 කියවලා බැලුවාද?**

උ: **ඔව්.**

ප්‍ර: **තමා වි.1 කියවලා නේද අත්සන් කලේ**

උ: **කියවලා තමයි වි.1 අත්සන් කලේ.**

ප්‍ර: **අත්සන් කරන අවස්ථාවේදි තමාට වෙක් එක දුන්නා**

උ: **ඔව්.**

Thus, the Plaintiff admitted that he read V1, thereafter signed V1 and that the cheque P7 was handed over only thereafter.

The most important question and answer however was the following:

"ප්‍ර: ඇයි තමා වී. 1 කියවලා ඇයි අත්සන් කලේ.

උ: මට ඒක හරියට කියන්න බැහැ. මා ඒක මොන දුර්වලකමකින් කලාද කියා."

The Plaintiff was thus afforded the opportunity of explaining the reason for him to have signed V1 after reading it and thereby fill the lacuna in his evidence. The Plaintiff however did not claim that he did not understand the contents of V1 or that the Defendant misled him or cheated him or that there was a fundamental misapprehension on his part with regard to the nature of V1.

<u>V1 was for a much higher value</u>

The maximum payment that the Plaintiff had received prior to P7 was Rs. 17459.32 and a payment of Rs. 134,644 should certainly have made the alarm bells ring. The Plaintiff was cross examined on that issue, as borne out by the following:

"ප්‍ර: සෑම අවුරුද්දේම ලාභය රුපියල් 20,000/- කට අඩුවෙන් තමයි දිලා තිබෙන්නේ?

උ: එයා දිලා තිබෙන එක තමයි.

ප්‍ර: කොයි අවස්ථාවකවත් තමාට රුපියල් ලක්ෂයකට වැඩිය වෙක් පතක් ලැබුනේ නැහැ.

උ: නැහැ.

ප්‍ර: 1976 නේද මේ බිස්නස් එක පටන් ගත්තේ?

උ: ඔව්

ප්‍ර: **1976 සිට 1992 දක්වා අවුරුද්දක් රුපියල් 25,000/-කට වැඩිය වෙක්පත් ලැබිලා තිබෙනවා?**

උ: **ලැබිලා නැහැ.**

ප්‍ර: **1992 දහවැනි මාසේ රුපියල් 134,644/- ක තමාට වෙක්පතක් දෙනකොට තමා පුදුම වුණාද?**

උ: **ඔව්**

ප්‍ර: **ඇයි?**

උ: ඇයි මගේ ලාභය කියා තිරේ සල්ලි

ප්‍ර: ඒ කියන්නේ ඒ වෙක් එක ලාභය විතරක් නොවෙයි.

උ: ලාභය කියා තමයි මට කිවේ. හාමුදුරුවනේ අර මගේ තිරේ සල්ලි."

Although the Plaintiff did not claim in his evidence-in-chief that he was misled or cheated by the Defendant and although an issue in this regard had not been raised, he was asked during cross examination whether he was cheated to which he answered in the affirmative. The Plaintiff did not however elaborate on how he was cheated nor did he refer to any representation that the Defendant made that induced him to sign V1. This answer of the Plaintiff was not pursued any further in re-examination and the matter ended there.

Be that as it may, having been confronted with the answers to the aforementioned question, the following leading question was asked in re-examination:

"ප්‍ර: වි.1 කියන ලේඛනයේ කරුණු තමාට සම්පූර්ණයෙන් තේරුනා නම් තමා එය ලේඛනයට අත්සන් කරනවාද?

උ: මම අත්සන් කරන්නේ නැහැ. "

No further explanation was however forthcoming.

Summary of the Plaintiff's evidence

The evidence of the Plaintiff with regard to what took place on 17th October 1992 can be summarised as follows:

1) The Plaintiff called over at the residence of the Defendant at the latter's invitation.

2) The Plaintiff was given several documents to sign, which by itself was unusual since on previous occasions he only signed one document.

3) **The Plaintiff read V1 which clearly stated that he was leaving the partnership**. With this admission, the defence of *non est factum* fails.

4) **The Plaintiff signed V1 as well as the several other documents only thereafter**.

5) The Plaintiff was then handed over a cheque for Rs. 134,644.

6) The value of P7 was unusually high, given the fact that on previous occasions, the highest amount he had received as dividend/profit was Rs. 17,459.32. The Plaintiff

states that he thought that the Rs. 20,000 he had given towards the purchase of the screen was being returned. That did form part of P7. However, the aggregate of the two amounted to only Rs. 37,459.32 which was less than 30% of what the Plaintiff was now being given by way of P7. Yet, the Plaintiff did not question the Defendant.

7) The Plaintiff was given a cheque and not cash. Furthermore, the cheque was post-dated by 15 days. To my mind, this evidence is critical for the reason that handing over of a post-dated cheque does not demonstrate the conduct of a person who is trying to mislead or deceive another person to do something which he otherwise would not have done.

There is no evidence to suggest that the Plaintiff who was or had been engaged in money lending was illiterate or did not apprehend the nature of V1 or that the Defendant in any way misrepresented facts to the Plaintiff or made an erroneous explanation, nor is there any evidence that any other person misrepresented the contents of V1 to the Plaintiff in any way.

There were several signals that ought to have triggered alarm bells in the mind of the Plaintiff including the value of P7 and the number of documents that the Plaintiff was asked to sign, and of course the fact that the Plaintiff read V1. The Plaintiff ignored these warning signals and even if his version is accepted, it is clear that the Plaintiff has not acted with prudence. The Plaintiff has therefore only himself to blame.

The Plaintiff's evidence taken at its best cannot support a conclusion that the Plaintiff (a) did not sufficiently understand what he was doing, and (b) was under a fundamental misapprehension with regard to the nature of V1. This is aggravated by the failure of the Plaintiff to explain the manner in which he was misled, either by word, act or conduct, by the Defendant, to sign V1 and to accept P7. The nail on the coffin so to say is the failure on the part of the Plaintiff to act prudently. If the Plaintiff had no intention to sell his share, and with V1 being clear, to yet have signed V1 and accept P7 was negligent conduct on the part of the Plaintiff. In these circumstances, I am of the view that the Plaintiff cannot claim that he did not have the intention to transfer his share in the partnership to the Defendant.

Evidence of Danatunga

For the sake of completeness, I shall also consider the evidence of Danatunga as this clearly demonstrates that the two lower Courts could not have held with the Plaintiff.

Although Danatunga was still in the employment of the Defendant and was listed as a witness by the Defendant, Danatunga was summoned as a witness by the Plaintiff. Thus, for all intents and purposes, Danatunga became a witness of the Plaintiff.

Danatunga admitted in his evidence-in-chief that, (a) he wrote the cheque P7 drawn on an account of Elite Motor Works owned by the Defendant, (b) on previous occasions, the value of the dividend was much less than P7, (c) on those previous occasions, a receipt was issued setting out the details of the payment that was being made, and (d) the receipt V1 [marked through Danatunga] was signed by the Plaintiff in his presence.

The next issue was whether V1 had been issued to the Plaintiff and if so, when. The following questions posed to Danatunga during his evidence-in-chief are important:

ප්‍ර: පැ.7 චෙක්පත නිකුත් කල අවස්ථාවට පෙර මුදල් චෙක්පත් මඟින් ඒ ඒ අවස්ථාවලදි ගෙවන විට සිරිතක් වශයෙන් චෙක්පතේ සඳහන් මුදල කොහොමද ගණනය කරන්නේ කියලා දානවාද?

උ: ඔව්

ප්‍ර: රුපියල් එක්ලක්ෂ ගණන දෙන අවස්ථාවේදි එම කොලයත් දිලා යන්නේ

උ: **චෙක්පත දෙන අවස්ථාවේදි බර්ට් ඇන්සලම් මහතාට දිලා තියෙනවා ගණුදෙනුව වුනු හැට්.**

ප්‍ර තමන්ට ඒ ගැන නිශ්චිතව කියන්න බැහැ?

උ: **කියන්න පුළුවන්. විස්තර මට කියන්න පුළුවන්.**

ප්‍ර: මොකද්ද අත්සන් කරල දිලා තියෙනවා කියන එක.

උ: දුන්නා. **චෙක්පත සමග සියළු දේ අඩංගු ලිපියක් එයාට දුන්නා අතට.**

ප්‍ර: **එය දුන්නේ එදා ද ඊට පසුදිනද?**

උ: **එදා සවස.**

ප්‍ර: පැමිණිලිකරු අතටද, පැමිණිලිකරුගේ බෑනා රංපිත් අතටද දුන්නේ?

උ: **බර්ට් ඇන්සලම් අතට දුන්නේ.**

The following questions posed to Danatunga during cross examination and his answers confirm the above:

“ප්‍ර: පැමිණිලිකරු එම ලේඛනය අත්සන් කලාද?

උ: ඔව්.

(වී.1 පෙන්වයි)

ප්‍ර: මෙම ලිපිය පැමිණිලිකරු අත්සන් කල ලිපියක්ද? 92.10.17 දින, විත්තිකරු සහ තමන් ඉදිරියේ?

උ: ඔව්.

ප්‍ර: පැ.7 සහ වී.1 දෙකම එක වෙලාවේ දුන්නේ?

උ: ඔව්.

ප්‍ර: පැමිණිලිකරු එය භාරගෙන ගෙදර ගියා?

උ: ඔව්.

Thus, the Plaintiff's own witness stated that V1 was given to the Plaintiff together with P7 on 17th October 1992. This goes to the root of the Plaintiff's case that (a) he was not given a breakdown of the value specified in P7 on the 17th, thus necessitating his son-in-law to visit Danatunga the next day, and (b) he did not know that he had signed a document transferring his share in the partnership until he received P8 on 19th October 1992.

Danatunga was thereafter questioned if there was a prior arrangement between the Plaintiff and the Defendant with regard to the transfer of shares. Danatunga stated that the Plaintiff discussed with him the transfer of his share to the Defendant prior to 17th October 1992 and informed him a few days prior to the 17th that he would call over at the residence of the Defendant and to prepare the documents that were necessary to transfer his share. The evidence of Danatunga, as expected I would say, cuts across the version of the Plaintiff that the Plaintiff was a victim of a deception practiced upon him by the Defendant.

His evidence on this matter is as follows:

(වී.1 පෙන්වයි)

ප්‍ර: 1 වන රු. 75,000/- මොකක්ද?

උ: බර්ට් ඇන්සලම් මහතා දාපු කොටස් මුදල.

ප්‍ර: පැමිණිලිකරුට ඉල්ලා අස්වෙන්න ඕනෑ කියා ඒ ගණන එයාට ගෙව්වා?

උ: ඔව්.

ප්‍ර: ඒ ගෙව්වේ කාගේ ඉල්ලීම පිටද?

උ: බර්ට් ඇන්සම් මහතාගේ ඉල්ලීම පිට.

ප්‍ර: පැමිණිලිකරුගේ ඉල්ලීම පිට?

උ: ඔව්.

ප්‍ර: මෙම මුදල ඕනෑ නිසා තමයි පැමිණිලිකරු 1992.10.17 දින විත්තිකරුගේ නිවසට ආවේ?

උ: ඔව්.

ප: **එයා එකඟවුනා හවුල් වයාපාරයෙන් අස්වීමට.**

උ: **ඔව්.**

ප්‍ර: ඒ නිසා තමයි පැ.17 එයා ගත්තේ?

උ: ඔව්.

ප්‍ර: **ඒ නිසාද, එයා වි.1 අත්සන් කලේ?**

උ: **කියවා බලා අත්සන් කලා.**"

Thus, the evidence of Danatunga:

(a) Contradicted the version of the Plaintiff that there was no prior arrangement with regard to the sale of his share;

(b) Contradicted the position of the Plaintiff that he did not have any intention to transfer his share and therefore goes to the root of the Plaintiff's version of events and the basis of his action;

(c) Completely cuts across the evidence of the Plaintiff and his son-in-law with regard to the third component of the factual circumstances that being the Plaintiff was unaware of the breakdown of the value of P7 until his son-in-law collected P8 from Danatunga on 19th October 1992.

Thus, an already weak case for the Plaintiff was completely destroyed with the evidence of Danatunga.

I must also state that according to the Plaintiff, P8 was issued by Danatunga after his son-in-law spoke to Danatunga on 18th October 1992. Danatunga admitted that he prepared P8 but he was not questioned any further on P8, including the circumstances under which P8 was issued. Thus, the Plaintiff failed to connect the link that was required to establish his version and that of his son-in-law with regard to P8.

Judgment of the District Court – revisited

I shall now consider the judgments of the two Courts in the final part of this judgment.

I must, in fairness to both the District Court and the High Court state that even though Issue No. 1 had an element of the defence of mistake in it, the plea of *non est factum* was not raised directly before both Courts and came to the forefront only at the point that leave to appeal was granted on the second and third questions of law. Be that as it may, except in very limited circumstances, the law does not permit a person who places his signature on a document to later claim that he did not intend to sign such document and therefore is not bound by such document. In that background, it should have been clear to both Courts that the basis for Issue No. 1 was the defence of mistake.

It was therefore the task of the District Court to consider very carefully (a) the circumstances relating to all three factual components and in particular the first component, and (b) the evidence of the Plaintiff and Danatunga who had been involved during each factual component of the case. Once an appeal was lodged, it became the task of the High Court to consider if the District Court has fulfilled its task and consider the judgment of the District Court in the light of the evidence led before the District Court. The High Court has failed to do so, and has instead not only relied almost entirely on the findings of the District Court but also proceeded beyond its mandate and come to a finding that the Defendant had cheated the Plaintiff when such an issue was neither raised before the District Court nor borne out by the evidence. This error on the part of the High Court resulted in this Court granting leave on the first question of law. Due to the aforementioned failure on the part of the High Court, I shall first consider the findings of the District Court and thereafter the findings of the High Court.

Having examined the judgment of the District Court, I observe that even though the District Court has considered the events that occurred on 17th October 1992, its decision on the Plaintiff's assertion that he did not have the intention to transfer his share has been influenced by what transpired after the 17th, namely that the Plaintiff acted expeditiously soon after the 17th, the issuance of P8, that the letter of demand was sent four days later and that action was filed soon thereafter.

Quite apart from the failure of the District Court to consider the entirety of the evidence of the Plaintiff with regard to what transpired on 17th October 1992, there are four matters on which the District Court erred which goes to the root of its judgment.

The first relates to the Plaintiff having read V1 prior to signing it. Even though it re-produced in its judgment the evidence of the Plaintiff where he admitted having read V1, the District Court disregarded that evidence on the basis that the Plaintiff was old and did not know what he was doing. While the age of the Plaintiff is admitted, the evidence of the Plaintiff does not support a finding that the Plaintiff did not have sufficient understanding as to what he was doing when he read and signed V1 in 1992. The law is very clear on this point. A person who has read the impugned document cannot later claim that his mind did not align with his hand. Commerce cannot work if a person is allowed to resile from his acts so easily.

The second matter on which the District Court erred was when it failed to consider the evidence of Danatunga who was involved in all three factual components of this case, especially his evidence that (a) the Plaintiff discussed the sale of his share prior to 17th October 1992, and (b) a copy of V1 was handed over to the Plaintiff together with P7 at the residence of the Defendant on the 17th itself. This evidence was critical as it contradicts the Plaintiff's version on all three factual components of this case.

The third error is that the District Court relied on the evidence of the son-in-law of the Plaintiff and P8 in spite of (a) the evidence of Danatunga that the Plaintiff was aware of the breakdown since a copy of V1 was issued to the Plaintiff at the time he left the residence of the Defendant on the 17th, and (b) Danatunga not having been questioned on the circumstances that led to the issuance of P8.

The Plaintiff also stated that had he wanted to transfer his share, he would have gone before an Attorney-at-Law. Quite apart from the fact that the transfer of his wife's share to him was not carried out before an Attorney-at-Law, the fact remains that the period of the Agreement had come to an end, even though the Plaintiff and the Defendant continued their partnership to operate the cinema. The District Court was however influenced by this evidence of the Plaintiff. This is the fourth error committed by the District Court.

Judgment of the High Court – revisited

I must reiterate that the High Court erred when it failed to consider if the findings of the District Court are supported by the evidence and instead blindly followed the judgment of the District Court. In the course of its judgment, the High Court arrived at the following erroneous findings:

(a) The breakdown of the money which was usually given to the Plaintiff was not given;

(b) The documents were signed by the Plaintiff without reading them;

(c) The documents signed by the Plaintiff had been prepared fraudulently and he was deceived by the Defendant. This is a grave error. Quite apart from the fact that no issue had been raised with regard to fraud or deception, the Plaintiff did not explain in his evidence as to the manner in which he was deceived. Furthermore, V1 had been prepared by Danatunga but no suggestion was made to him in this regard. Thus, there was no basis at all for the High Court to conclude that the Plaintiff had been deceived by the Defendant;

(d) Danatunga has admitted that the Plaintiff signed V1 without knowing the exact contents of V1;

(e) The evidence of the witnesses of the Plaintiff has corroborated the Plaintiff's version that he was not aware of the contents of V1 when he signed it, whereas the evidence of Danatunga was to the contrary.

Furthermore, the High Court erred when it drew an adverse inference against the Defendant on the basis that he failed to give evidence challenging the position of the Plaintiff. I am in agreement with the submission of the learned President's Counsel for the Defendant that, (a) the burden of proof in establishing the plea of *non est factum* was on the Plaintiff, (b) the Plaintiff had failed to discharge such burden, (c) the necessity for the Defendant to give evidence did not arise in view of the evidence of Danatunga, and (d) in the absence of any evidence that the Defendant misled and/or cheated the Plaintiff, there was no case that required the Defendant to step inside the witness box and meet.

There is one other matter that I must address prior to concluding. I stated at the outset that the sum of Rs. 134,644 has remained with the Defendant since October 1992 for the reason that P7 was never deposited by the Plaintiff. To allow the appeal without affording the Plaintiff any remedy would amount to the Defendant having the share of the Plaintiff at no cost. That would amount to an unjust enrichment on the part of the Defendant. I am accordingly of the view that the Substituted Plaintiff shall be entitled to the said sum of Rs. 134,644.

Conclusion

In the above circumstances, I answer the three questions of law in the affirmative. The judgment of the District Court and the High Court are set aside, this appeal is allowed, and the action of the Plaintiff shall stand dismissed, subject to the direction that the Substituted Defendants shall pay the Substituted Plaintiff a sum of Rs. 134,644.

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara, J

I agree.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT