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

In the matter of an appeal in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996

SC/CHC/APPEAL NO: 25/2022
High Court No: HC (Civil) 508/15/MR

Nations Trust Bank,
No. 242, Union Place,
Colombo 2.

PLAINTIFF

- Vs -

N. Gamage Niruka Sudarshani Perera,
No. 285, Modara Street,
Colombo 15.

DEFENDANT

And now between

Nations Trust Bank,
No. 242, Union Place,
Colombo 2.

PLAINTIFF – APPELLANT

- Vs -

N. Gamage Niruka Sudarshani Perera,
No. 285, Modara Street,
Colombo 15.

DEFENDANT – RESPONDENT

Before: **Arjuna Obeyesekere, J**
K. Priyantha Fernando, J
Dr. Sobhitha Rajakaruna, J

Counsel: Chandaka Jayasundere, PC with Rehan Almeida for the Plaintiff – Appellant

Samhan Munzir with Uthpala Karunasinghe for the Defendant – Respondent

Argued on: 23rd October 2025

Written Submissions: Tendered on behalf of the Plaintiff – Appellant on 13th January 2026

Tendered on behalf of the Defendant – Respondent on 24th November 2025

Decided on: 17th February 2026

Obeyesekere, J

(1) The Plaintiff – Appellant [the Plaintiff] is a licensed commercial bank. It filed action in the High Court of the Western Province holden in Colombo [the Commercial High Court/High Court] on 11th September 2015 against the Defendant – Respondent [the Defendant] seeking to recover a sum of Rs. 8,788,610.71 and interest at the rate of 26% per annum on a sum of Rs. 8,677,350.44 from 19th March 2015 until the date of judgment. Pursuant to the raising of admissions and issues, the Plaintiff led the evidence of one of its Officers while the Defendant led the evidence of the Registrar of the Magistrate's Court, Kadawatha.

(2) By its judgment delivered on 25th November 2020, the High Court dismissed the action of the Plaintiff. This appeal arises from the said judgment.

Facts – as pleaded by the parties

(3) The Plaintiff stated in its plaint that the Defendant had opened Current Account No. 0211 0801 0690 at its Kadawatha Branch on 1st July 2013, and that the Defendant had signed the Personal Account Opening Form [**P5**] at the time she opened the account. According to the Statement of Account relating to the above account [**P7**] certified in accordance with Section 90C of the Evidence Ordinance, (a) the Defendant had deposited a sum of Rs. 15,000 on 1st July 2013, (b) a cheque book had been issued to her on 2nd July 2013, and (c) the account balance as at 8th July 2013 stood at Rs. 14,750.

(4) The Plaintiff stated further that on 8th July 2013, the Plaintiff had honoured a cheque drawn by the Defendant for a sum of Rs. 5,000,000 thereby permitting the Defendant to overdraw her account, followed by a further cheque in a sum of Rs. 5,705,000 on the next day. According to the Plaintiff, the Defendant had made several cash deposits to her account to reduce the overdrawn balance as well as carried out further withdrawals by presenting cheques drawn on her account. The transactions referred to by the Plaintiff are reflected in P7. This practice of depositing and withdrawing monies from the current account and in the process overdrawing the account had continued until December 2014, during which period the Defendant had withdrawn a sum of Rs. 37,573,350 and deposited a sum of Rs. 28,896,000.

(5) The last withdrawal in a sum of Rs. 500,000 had been made on 3rd December 2014 by a cheque on which date the debit balance stood at 8,435,690.45. The Defendant had not carried out any further transactions thereafter. Together with interest due until 28th February 2015, the amount outstanding as at 28th February 2015 was Rs. 8,677,350.44. The amount of 8,788,610.71 referred to in the plaint was arrived at after adding the interest for the period 1st March – 18th March, 2015.

(6) The Plaintiff had stated further that during this entire period, monthly statements containing the details of the transactions carried out on the said account of the Defendant for that month had been sent to the Defendant and that the Defendant did not dispute the accuracy of such statements. It transpired in evidence that the monthly bank statements are dispatched not by the branch where the account was maintained but by a separate office of the Plaintiff.

(7) The Plaintiff had thereafter demanded the payment of the aforementioned sums by letter dated 23rd March 2015 [**P9**]. The Defendant replied P9 by letter dated 30th March 2015 [**V1**] and denied that she had obtained overdraft facilities from the Plaintiff.

(8) The Defendant stated in her answer that Kusal Rajapakse who at the time relevant to this case was the Manager of the Kadawatha Branch of the Plaintiff [the Manager] and whom she referred to by name, had visited her residence situated in Modara Street, Colombo 15 and having informed her that the Bank is carrying out a

promotion to enlist new customers and that she can attend to her banking activity from her residence, obtained her signature on P5. The Defendant had stated further that P5 had not been duly filled at that time. However, it must be noted that P5 had been signed in the presence of another bank officer, most probably at the branch office of the Plaintiff at Kadawatha.

(9) The Defendant had also stated the following matters in her answer:

(a) Although she signed P5, she had no necessity to have opened an account at the Kadawatha Branch of the Plaintiff;

(b) She had never visited the Kadawatha Branch;

(c) She did not request any financial facilities from the Kadawatha Branch;

(d) She did not withdraw any monies by presenting any cheques;

(e) Her account had been maintained by the Manager who had acted fraudulently by overdrawing her account; and

(f) She had been informed by an officer at the Kadawatha Branch that the Manager had cheated the Plaintiff Bank as well and that he has left the Country.

(10) There are two matters that I must advert to. The first is, if this was the position of the Defendant, then, the first opportunity she had of taking it up was in her reply to P9. In my view, the reaction of a reasonable man who had not sought any financial facility from a bank but from whom a large sum of money was being demanded and who was alleging fraud would have been to lodge a complaint with law enforcement authorities or at the least to have raised it with the higher management of the bank. While the Defendant has done neither, the language of V1 does not indicate that the Defendant was overly concerned with the demand made by the Plaintiff.

(11) The claim that the Manager had misappropriated funds of the Plaintiff Bank was correct. However, the Manager did so by allowing customers to overdraw their accounts by keeping as security fixed deposits of other customers and not in the

manner claimed by the Defendant. However, with the Defendant taking up the position that she was a victim of a fraud perpetrated by the Manager and that her account had been maintained and overdrawn fraudulently by the Manager in spite of the Defendant not having visited the Kadawatha branch nor having requested any financial facilities or withdrawing any monies by presenting cheques, I am of the view that the burden of establishing these matters pleaded by the Defendant in her answer was with the Defendant.

(12) This being the position pleaded by the parties, admissions and issues were framed on 12th January 2018, with the Defendant admitting that she signed P5. While the issues of the Plaintiff was centered on the granting of the overdraft facility and that there remained outstanding a sum in excess of Rs. 8m, the Defendant raised thirteen issues, with most of them based on her pleaded position that she never asked for overdraft facilities and that she had been the subject of a fraud perpetrated by the Manager.

(13) In order to place in perspective the burden of proof of each party, I shall first set out the nature of an overdraft facility and its constituent elements.

Overdraft facilities

(14) In **Gunawardana v Indian Overseas Bank** [(2001) 2 Sri LR 113; at pages 119-120] Wigneswaran, J described an overdraft facility in the following manner:

> "*overdraft facility is afforded by a bank by permitting a customer to overdraw his current account up to certain limits. The current account being operative and in force the facility too will continue to be operative until cancelled and or unless the money due to the bank is demanded by it. If the customer does not take steps to pay-off the overdrawn amount, interest will accrue on such overdrawn amount and shall continue to be a debt due to the bank until there is a repayment of the debt or cancellation of the debt. The overdraft facility itself will come to an end, as stated above, on the cancellation of the facility or when the bank demands repayment. This would be generally so unless there are special arrangements to the contrary*."

(15) In **Bank of Ceylon v Aswedduma Tea Manufacturers (Pvt) Limited** [SC Appeal 175/2015; SC Minutes of 6th October 2017], cited by Murdu Fernando, J [as she then was] in **Sampath Bank PLC v Kaluarachchi Sasitha Palitha** [SC Appeal 196/2011; SC Minutes of 9th September 2019], Anil Gooneratne, J referred with approval to two English judgments that dealt with the basic features of an overdraft facility.

(16) The first was **Peter Royston Voller v Lloyds Bank PLC** [No. B3/99/1177; 19th October 2000] where Justice Wells of the Court of Appeal (Civil Division) held that:

> "*In my judgment, the position is very simple and well established as a matter of banking law and practice. It is this. If a current account is opened by a customer with a bank with no express agreement as to what the overdraft facility should be, then, in circumstances where the customer draws a cheque on the account which causes the account to go into overdraft, the customer, by necessary implication, requests the bank to grant the customer an overdraft of the necessary amount, on its usual terms as to interest and other charges. In deciding to honour the cheque the bank, by implication accepts the offer*."

(17) The second was **Barclays Bank Ltd v W.J. Simms Son and Cooke (Southern) Ltd and Another** [(1980) 1 QB 699] where Goff, J held as follows:

> "*It is a basic obligation owed by a bank to its customer that it will honour on presentation cheques drawn by the customer on the bank**, provided that there are sufficient funds in the customer's account to meet the cheque**, or **the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque**. Where the bank honours such a cheque, it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque, and further that the bank's payment is effective to discharge the obligation of the customer to the payee on the cheque, because the bank has paid the cheque with the authority of the customer.*
>
> *In other circumstances, the bank is under no obligation to honour its customer's cheques. If however a customer draws a cheque on the bank without funds in his*

account or agreed overdraft facilities sufficient to meet it, ***the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque****. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer.* ***If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities****; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque*." [emphasis added]

(18) Thus, it would be seen that while a written agreement is not a *sine qua non* for the granting of an overdraft facility, a bank could allow a customer to overdraw his or her account by accepting a cheque drawn by such customer on his or her account.

(19) In **People's Bank v Jagoda Gamage Nishantha Pradeep Kumara** [SC Appeal No. 234/2017; SC minutes of 12th December 2022] this Court, having referred to the above cases, identified the following as being the constituent elements of a cause of action based on an overdraft:

"*(1) Did the Defendant have and maintain a current account with the Plaintiff?*

(2) Has the Defendant made a request that he be permitted to overdraw his account?

(3) Has the Plaintiff acted on the said request of the Defendant and permitted him to overdraw his account?

(4) Has the Defendant settled the overdrawn amount or part thereof?

(5) What is the amount outstanding to the Plaintiff from the overdrawn amount?

(6) Has the Plaintiff demanded the repayment of the outstanding sum of money?"

(20) Even though the Defendant admitted that she signed P5, she denied any further involvement with the account after its opening. The High Court held that the Plaintiff had not established on a balance of probability that the deposits and the withdrawals from the account of the Defendant had been carried out by the Defendant, and for that reason the Plaintiff was not entitled to judgment as prayed for.

(21) The principal submission of the learned President's Counsel for the Plaintiff was that the evidentiary burden cast on the Plaintiff has been successfully discharged and that the High Court erred when it arrived at the conclusion that the Plaintiff has not established its case.

(22) Therefore, the first issue that must be determined is whether the Plaintiff has established on a balance of probability that the Defendant made a request/s to overdraw her account by the presentation of the cheque/s referred to in P7 and whether at the time the Plaintiff permitted the account of the Defendant to be overdrawn, it was acceding to a request of the Defendant.

(23) This requires me to briefly examine Chapter VI of the Evidence Ordinance that deals with bankers books.

Chapter VI of the Evidence Ordinance

(24) Section 90A has defined a 'bankers' book' and a 'certified copy' as follows:

> " *'Bankers' book' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of a bank and includes data stored by electronic, magnetic, optical or other means in an information system in the ordinary course of business of a bank.*"
>
> " '*certified copy' means a copy of any entry in the books of a bank, together with a certificate written at the foot of such copy that it is a true copy of such entry; that such entry is contained in one of the ordinary books of the bank, and* ***was made in the usual and ordinary course of business****; and that such book is still in*

the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title and where the bankers books consist of data stored by electronic, magnetic, optical or other means in an information system, includes a printout of such data together with an affidavit made in accordance with Section 6 of the Evidence (Special Provisions) Act, No. 14 of 1995, or such other document of certification as may be prescribed in terms of any law for the time being in force relating to the tendering of computer evidence before any court or tribunal."

(25) Section 90C reads as follows:

"*Subject to the provisions of this Chapter, a certified copy of any entry in a banker's book shall in all legal proceedings be received as* ***prima facie evidence of the existence of such entry****, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and* ***to the same extent as the original entry itself is now by law admissible****, but not further or otherwise*."

(26) The legal recognition that must be afforded to a certified copy of a bankers book was considered in **Chandra Gunasekera v People's Bank and others** [(2019) 1 Sri LR 20], where Aluwihare, PC, J stated as follows:

"*I wish to, however, at the outset address the circumstances under which documents, that come within the definition of the term "banker's books" as defined in Section 90A, could become admissible.*

It would, in my view, be pertinent to refer to the historical background of these provisions, so that any ambiguity as to the application of the provisions in Chapter VI could be eliminated. In the scheme of the Evidence Ordinance, the general rule is that the original document must be produced to prove the contents of such document. The Evidence Ordinance, however, provides certain exceptions to that rule. One such exception is 'public documents' and the other is 'banker's books'. The significance in the latter is that unlike public documents, banker's books are

private documents. E.R.S.R. Coomaraswamy (Law of Evidence, Vol II book I, at page 156) states;

> *"[N]evertheless, certain cogent, practical reasons have induced the legislature to equate those private documents to the exceptional position of public documents in the matter of their proof in the Courts and to confer a limited immunity on the bankers."*

The immunity conferred on banker's books is embodied in subsection 3 of Section 130 of the Evidence Ordinance. …

The effect of this provision is that an original of a document, which falls within the meaning of "banker's books" can be produced under Section 90D; effectively shutting out the mandatory application of the general provisions. The rationale behind this provision is that any document which falls within the meaning of "banker's books" can be proved by producing a certified copy as stipulated in Section 90C of the Evidence Ordinance.

The "stand-alone nature" of these provisions can be further gleaned from the wording in Section 90C;

Thus, a "certified copy" of a document (banker's books) in terms of Section 90C,

*a) Constitutes **prima facie evidence** of the existence of such entry, and*

*b) Shall **be admitted as evidence** of the matters stated, **as the original entry itself**.*

I also must point out that the Appellant raised no objection when the document was sought to be admitted in evidence by the Plaintiff Bank, when witness Mohamed testified. Furthermore, every party if it is so desired is afforded an opportunity to have the originals inspected, in terms of Section 90E of the Evidence Ordinance, which right the Appellant could have exercised before the trial Judge."

(27) This position was affirmed in **People's Bank v Jagoda Gamage Nishantha Pradeep Kumara** [supra] where this Court, having considered the rationale for introducing Sections 90A and 90C, stated as follows:

> "*The composite effect of the above two provisions is that the ledger or bankers book itself on which the relevant entries have been recorded need not be produced, and that a copy thereof shall be* ***prima facie evidence of the existence of such entries*** *provided the copy is certified in the manner stipulated in Section 90C*." [emphasis added]

Burden of proof – the Plaintiff

(28) There are two sections of the Evidence Ordinance that are relevant in determining the burden of proof cast on the Plaintiff. The first is Section 101 which reads as follows:

> "*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person*."

(29) As expressed in the maxim *ei incumbit probatio, qui dicit, non qui negat*, the burden of proof lies on him who affirms, and not upon him who denies – cited in **Rodrigo v Central Engineering Consultation Bureau** [(2009) 1 Sri LR 248] and followed in **Dehiwattage Rukman Dinesh Fernando v Union Apparel (Pvt) Ltd** [SC Appeal No. 19/2015; SC minutes of 28th October 2021], **Brandix Apparel Solutions Limited (Formerly Brandix Casualwear Ltd) v Kachchakaduge Frank Romeo Fernando** [SC Appeal 60/2018; SC Minutes of 5th May 2022] and **Kanthi Fernando v W. Leo Fernando (Maddagedara) Estates Company Limited** [SC Appeal (CHC) No. 84/2014; SC minutes of 24th January 2024].

(30) It is the Plaintiff who stated that the Defendant presented cheques and overdrew her account. If it failed to establish this fact, the case of the Plaintiff shall fail. Thus,

the burden of proving that the Defendant overdrew her account was entirely on the Plaintiff. Illustration (b) of Section 101, reproduced below, supports the above position:

> *"A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true. A must prove the existence of those facts*."

(31) The second section that is relevant is Section 102, in terms of which, "*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side*."

(32) Referring to Section 102, E.R.S.R. Coomaraswamy has stated in his treatise, **The Law of Evidence** [Vol II Book 1; page 255] that, "*This section deals with the incidence of the burden. It places the burden of proof on the party who desires the court to intervene and to determine the rights of the parties in a manner different from the position that would arise if matters were left in status quo. It regulates the incidence of the overall burden.*"

(33) The application of Section 102 is borne out by Illustration (b) thereof, which reads as follows:

> "*A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed, and the fraud is not proved. Therefore the burden of proof is on B*"

(34) The evidence-in-chief of the Plaintiff's witness, Mohammed Safras, Manager, Special Assets Management Division was presented by way of an affidavit. The Plaintiff formally marked P5, the signing of which had been recorded as an admission, through this witness. I must perhaps state that the Defendant, realising that admitting P5 can affect her defence attempted to resile from the said admission but the High Court has clearly rejected such attempt and held that P5 has been admitted by the Defendant.

(35) The simple position of the witness was as follows:

(a) The Defendant was a customer of the Kadawatha Branch and had a current account under her name;

(b) The Manager had permitted the Defendant to overdraw her account on several occasions upon the presentation of cheques issued by the Defendant;

(c) Statements relating to the account had been sent to the Defendant every month;

(d) Since the Defendant had not settled the amount due as at 3rd December 2014, the Plaintiff filed action to recover the balance outstanding after having demanded the said sum.

(36) The Plaintiff produced the Statement of Account marked P7 without any objection being taken thereto. This was critical to the success of the Plaintiff's case since in my view, the Defendant ought to have called for strict proof of the contents thereof, in view of the defense taken by her that she did not operate her account. While P7 was *prima facie* evidence of the existence of the entries thereon, the Plaintiff did not produce the cheques by which the withdrawals had been done nor the deposit slips by which monies had been deposited, even though they formed part of the list of documents. It is clear from the judgment of the High Court that this failure to produce the deposit slips and the cheques influenced the High Court in arriving at its conclusion that the Plaintiff had not proved its case.

(37) During the hearing, this Court inquired from the learned President's Counsel for the Plaintiff whether the Plaintiff ought to have produced the cheques by which the monies had been withdrawn. He submitted that while the cheques were listed on its list of documents, the Defendant did not object to the marking of P7 when it was formally tendered in evidence with the affidavit of the witness and that P7 was therefore *prima facie* proof of its contents. Thus, he submitted that the existence of the cheques and the fact that the transactions on P7 had been carried out had not

been challenged by the Defendant and that in such a situation, the necessity for the Plaintiff to have marked the cheques did not arise.

(38) **People's Bank v Jagoda Gamage Nishantha Pradeep Kumara** [supra] was a case where the plaintiff did not produce the statement of account relating to the account of the defendant. Referring to that fact, this Court stated as follows:

> "*As a request to temporarily overdraw a current account need not be in writing, the submission of a written request with the plaint cannot be made mandatory in order to establish that the Defendant made a request to overdraw his account. Therefore, while oral evidence is sufficient to establish that the request for an overdraft was in fact made, evidence of such request in the form of the relevant ledger on which the entry relating to the withdrawal was recorded, and where available the cheque presented must be produced in order to establish that the Plaintiff acted on the said request and that the Plaintiff proceeded to honour the cheque*."
>
> "*Hence, while the production of the cheque by which the said sum of Rs. 1,268,000 was withdrawn would have been proof of the fact that the Defendant presented such a cheque on the date claimed by the Plaintiff and that the said cheque was honoured, it was imperative for the Plaintiff to have produced the original ledgers or the bankers books on which the transactions relating to the Defendant's account had been maintained, in order to establish that:*
>
> *(a) the bank acceded to the request made by the Defendant to overdraw his account;*
>
> *(b) as a result of the cheque being honoured, the Defendant had overdrawn his account; and*
>
> *(c) a sum of Rs. 565,742.56 is due and owing to the Plaintiff, as claimed by the Plaintiff, as a result of the said overdrawing."*

(39) Thus, P7 being a certified copy of a banker's book, in terms of Section 90C, it was *prima facie* evidence of the existence of the transactions reflected in it. In other words, P7 was *prima facie* proof of the fact that the bank acceded to the request made by a cheque drawn on the Defendant's account to overdraw the account and as a result of the cheque being honoured, the account of the Defendant had been overdrawn. With P7 not being objected to by the Defendant, the necessity for the Plaintiff to have tendered the deposit slips by which monies had been deposited or the cheques by which the monies had been withdrawn to prove the said transactions reflected in P7 did not arise. In any event, to impose such a burden on a bank would make it impossible for a bank to prove that a customer has overdrawn his/her account.

(40) Therefore, I am in agreement with the submission of the learned President's Counsel for the Plaintiff that it was not mandatory for the Plaintiff to have tendered in evidence the cheques presented by the Defendant, even though the tendering of the cheques may have assisted the case of the Plaintiff in view of the position pleaded by the Defendant in her answer. I must state that the High Court had not considered the applicability of Sections 90C, 101 and 102 when it arrived at its conclusion that the Plaintiff had not proved its case.

(41) In these circumstances, I am satisfied that the Plaintiff had presented a *prima facie* case through the evidence-in-chief of its witness that a request had been made by the Defendant to overdraw her account and that such request had been acceded to by the Plaintiff. The Plaintiff was therefore entitled to succeed unless the Defendant was able to demonstrate through cross examination of the Plaintiff's witness that the narration of the Plaintiff was not credible, or else evidence was given to the contrary by the Defendant to establish her claim that she never asked for overdraft facilities and that she had been the subject of a fraud perpetrated by the Manager.

<u>Burden of proof – the Defendant</u>

(42) With the existence of the cheques not being in issue, it is the Defendant who claimed in her answer that she had neither presented nor signed the cheques by which monies were withdrawn from her account and that her account had been

maintained and overdrawn fraudulently by the Manager of the Kadawatha Branch. This being her primary defense, as submitted very correctly by the learned President's Counsel for the Plaintiff the burden of proof of that fact accordingly was with the Defendant.

(43) The submission of the learned President's Counsel is consistent with Section 103 of the Evidence Ordinance, which reads as follows:

> "*The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*
>
> *Illustration - A prosecutes B for theft, and wishes the court to believe that B admitted the theft to C. A must prove the admission. B wishes the court to believe that at the time in question, he was elsewhere. He must prove it*."

(44) Referring to the inter-relationship between Sections 101 and 103, E.R.S.R. Coomaraswamy in **The Law of Evidence** has stated as follows [supra; page 258]:

> "*Section 101 is the general provision while Section 103 is a particular application of that rule. Section 101 deals with the duty to prove the case as a whole. It deals with the legal or overall burden. Section 103 is concerned with the proof of particular facts, such as the proof under Section 105 of particular fact by an accused to bring him within a general exception like private defense or a special exception, like exceeding the right of private defense or grave and sudden provocation. An example in the civil law of the distinction is between the burden under section 101 on the plaintiff to prove the elements for defamation, and the burden on the defendant under Section 103 to establish a defense of privilege or justification or fair comment. Thus, it may be said that by Section 101, the party has to prove the whole of the facts which he alleges to entitle him to judgment when the burden of proof is on him, while section 103 provides for the proof of particular facts, which a person asserts*".

Cross examination of the Plaintiff's witness

(45) The witness for the Plaintiff was cross examined extensively over three days on six matters. The first was with regard to the alleged discrepancy relating to the date on which the current account was opened, which the High Court had opined was due to an error on the part of the Defendant. The second was whether the deposit slips by which the monies were deposited contained the name of the Defendant or the person who made the deposit. The third matter was with regard to the manner in which interest had been calculated and the rate of interest. The fourth was that the Manager could only have permitted overdraft facilities up to a sum of Rs. 50,000 and that the Manager could not have permitted the Defendant to overdraw her account above that sum on his own. The fifth was whether an overdraft could have been given without the account holder having signed an agreement or without approval of the head office. None of these matters went into the core issue to be determined.

(46) The sixth matter on which the witness was questioned was with regard to the conduct of the Manager. The witness admitted that the Plaintiff Bank had made a complaint to the Police regarding the fraudulent conduct of the Manager where he had granted overdraft facilities to customers keeping as security fixed deposits of other customers. The Defendant marked as V2 the case record pertaining to the proceedings instituted against the Manager in the Magistrate's Court, Mahara. While the 'B' Reports that have been filed does not contain the account of the Defendant, the said reports do show that some of the customers who had overdrawn their accounts had agreed to settle the debit balances in their accounts.

(47) Thus, on the one hand, the Defendant who lived in Modara Street, Colombo 15 and who had agreed to open an account in the Kadawatha branch of the Plaintiff, too could have been a customer who benefitted from the scam run by the Manager and/or an accomplice of the Manager. On the other hand, the Defendant could well have been an innocent person who had been deceived into opening an account by the Manager and whose account had thereafter been operated by the Manager.

(48) With P7 not having been objected to and therefore being *prima facie* proof of the existence of its contents, the important issue was whether the transactions contained in P7 including the withdrawals were carried out upon a request made by the Defendant herself or as a result of the fraudulent acts of the Manager as claimed by the Defendant. The determination of this is contingent upon whether the cheques by which the monies had been withdrawn were presented by the Defendant and/or bore the signature of the Defendant. The best person who could have answered this question was of course the Defendant. The High Court failed to appreciate this fact when it considered the evidence.

(49) With the Plaintiff not having tendered the cheques although listed, the Defendant could have pursued in two ways the position she had taken up in her answer and on which issues had been raised that she had not signed the cheques. The first was to question the witness during cross examination if the cheques by which the withdrawals were made were available. According to the proceedings of 2nd November 2018, the witness had been questioned if Cheque No. 0483462 had been presented to the Bank on 13th September 2013. The witness having answered the question in the affirmative, was thereafter asked the date of the cheque. The witness had replied that he had not brought the cheque to Court that day..

(50) Thereafter, Court had questioned the witness if the said cheque and/or an image of the cheque is available in the office and the witness had answered both questions in the affirmative. Proceedings had been immediately adjourned to enable the witness to inform Court on the next day, the date of the cheque. However, when cross examination resumed on 12th June 2019, the witness was not asked whether he had brought the particular cheque to Court nor did the Counsel for the Defendant pursue this issue.

(51) The witness had however been cross examined as follows on 12th June 2019:

> "ප්‍ර : එතකොට මහත්මයා මේ අයිරාගත කරලා මුදල් ලබා ගත්තා යන්න චෙක්පත් ඉදිරිපත් කරලා තියෙන්නේ කවුද කියන කාරණය මහත්මයාට ගරු අධිකරණයට කියන්න පුළුවන්ද ඒ චෙක්පත් බලලා?
>
> උ : ඔව් ස්වාමිණි, කියන්න පුළුවන්.
>
> ප්‍ර : ඒ චෙක්පත් මහත්මයා සතුව තියෙනවාද?
>
> උ : ඔව් ස්වාමිණි."

(52) With the witness admitting that the cheques were available and that he can state as to who has produced the cheques to the bank, the Defendant's Counsel, probably realising that his fishing expedition may have gone wrong, had not asked any questions thereafter with regard to the availability and/or production of the cheques or who presented the cheques to the Bank.

(53) Instead, the Counsel for the Defendant had posed the following questions:

"ප්‍ර : එතකොට මහත්මයා චෙක්පතක් බැංකු කවුන්ටරයට ඉදිරිපත් කරනකොට මුලික වශයෙන් බලන්න ඕන මොකක්ද? චෙක්පතේ ලියලා තියෙන මුදල ගැන බලන්න ඕන නේද?

උ : ඔව් ස්වාමිණි.

ප්‍ර : එය රේඛණය කරලා තියෙනවාද නැද්ද කියන කාරණයත් බලන්න ඕන නේද?

උ : ඔව් ස්වාමිණි.

ප්‍ර : **ඒ වගේම චෙක්පතේ තියන අත්සන පරීඡනකයේ තියෙනවාද කියලත් සැහිමකට පත් වෙන්න ඕන?**

උ : **ඔව් ස්වාමිණි.**

ප්‍ර : ඒ වගේම මුදල් ඉල්ලන එක්කෙනාගේ ජාතික හැඳුනුම්පත් අංකයත් ලබාගෙන බලන්න ඕන නේද?

උ : ඔව් ස්වාමිණි."

(54) The only document that the Defendant admits to signing is P5 and it is safe to assume that the signature on P5 was the signature that was on the computer system. With the witness stating that a comparison of the signature on the cheque is done with the signature that appears on the computer system prior to honouring the cheque, therefore implying that the signature on the cheque tallied with the signature of the Defendant that was on the system and that being the reason for the cheque to be honoured, the Counsel for the Defendant did not demand that the cheque/s be produced or that the signature of the Defendant that appeared on the system be produced, nor was it suggested to the witness that the signature on the system and/or the cheques were not that of the Defendant.

(55) The following questions posed to the witness by the Counsel for the Defendant and his answers further strengthened the position of the Plaintiff that the cheques had been signed by the Defendant:

"ප්‍ර : නමුත් මේ චෙක් වල සඳහන් කරලා තියෙන විදියට කුසල් රාජපක්ෂ මහත්මයා මේ චෙක්පත් අනුව මුදල් ලබාගන්නකොට මේ මිලියන ගණන් මුදල් 50,000/- ඉක්මවලා මිලියන ගණන් මුදල් වලින් තමයි මේ චෙක්පත් වලට මුදල් ලබාගෙන තියෙන්නේ නේද?

ඵ : **මුදල් ලබා දිලා තියෙන්නේ ගනුදෙණුකරුට ස්වාමිණි.**

ප්‍ර : දැන් මහත්මයා කොහොමද ගනුදෙණුකරුට මුදල් ලබා දුන්නා කියලා ඔය පැ.6 ලේඛනය බලලා කියන්නේ?

ඵ : **චෙක්පත අත්සන් කරන්නේ ගිණුම් හිමියා ස්වාමිණි.**"

(56) Thus, the Defendant had not only squandered the opportunity that she had of challenging the signature on the cheques and even of moving for a commission on the genuineness of her signature, she even failed to suggest to the witness the position pleaded in the answer, except perhaps the suggestion that she never visited the Bank, which of course meant nothing when one considers the fact that the account holder need not personally present the cheques to the Bank.

(57) Be that as it may, it was still open for the Defendant to have given evidence and explain her position especially since whether it was the Defendant who deposited monies and whether it was the Defendant who signed the cheques as well as the other matters that I have referred to in paragraphs 8 and 9 of this judgment were all matters that were within the knowledge of the Defendant. The Defendant however opted to stay away from the witness box.

(58) The position that has arisen in this case can be summed up by the following passage from the judgment of Aluwihare, PC, J in **Chandra Gunasekera v People's Bank and others** [supra]:

"*I am also of the view that this is a fit instance to apply the principle laid down in the case of L. Edrick De Silva v L. Chandradasa De Silva, 70 NLR 169. In the said case (at page 174) Chief Justice H.N.G Fernando held:*

> *"But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional "matter before the Court", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted."*

When a party is afforded an opportunity to challenge any evidence produced in Court, and does not exercise that right, it would be reasonable for the Court to

infer that the party did not do so, because the party was not capable of challenging the same."

(59) With the Plaintiff having met the evidentiary burden cast on it and with the position of the Defendant being that that she never asked for overdraft facilities and that she had been the subject of a fraud perpetrated by the Manager, the burden was on the Defendant to establish such facts. The Defendant however failed to discharge this burden cast upon her and thereby the Defendant has failed to challenge the very basis of the Plaintiff's case.

Conclusion

(60) In the above circumstances, I am of the view that the High Court erred when it held that the Plaintiff has not established its case on a balance of probability. While the issues raised by the Plaintiff are accordingly answered in the affirmative, the issues raised by the Defendant must necessarily be answered against her.

(61) The judgment of the High Court is set aside and the Plaintiff shall be entitled to judgment as prayed for, together with costs fixed at Rs. One Hundred Thousand. The High Court is directed to enter decree accordingly.

JUDGE OF THE SUPREME COURT

K. Priyantha Fernando, J

I agree.

JUDGE OF THE SUPREME COURT

Dr. Sobhitha Rajakaruna, J

I agree.

JUDGE OF THE SUPREME COURT