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

In the matter of an application for Special leave to Appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/Appeal No. 0197/2015
SC Spl/LA /181/2014
CA. No. 1114/98(F)
D.C. Hambantota Case No. 1669/M

Ceylon Petroleum Corporation
No. 113, Galle Road,
Colombo 3.

PLAINTIFF

vs

H.M. Sugathadasa
No. 85, New Town,
Kataragama.

DEFENDANT

AND BETWEEN

Ceylon Petroleum Corporation
No. 113, Galle Road,
Colombo 3.

PLAINTIFF-APPELLANT

vs

H.M. Sugathadasa
No. 85, New Town,

Kataragama.

DEFENDAN T – RESPONDENT

AND NOW BETWEEN

H.M. Sugathadasa
No. 85, New Town,
Kataragama.

DEFENDANT - RESPONDENT - PETITIONER

vs

Ceylon Petroleum Corporation
No. 113, Galle Road,

Colombo 3.

And now at

No.609, Dr. Danister de silva

Mawatha, Colombo 09.

PLAINTIFF- APPELLANT – RESPONDENT

AND NOW BETWEEN

H.M. Sugathadasa
No. 85, New Town,
Kataragama.

DEFENDANT-RESPONDENT-PETITIONER
(deceased)

1. Indika Surangi
   No. 31, T.R. Banis Appu Mawatha,
   New Town,
   Kataragama.

2. Wicramarathne Wengagappuli Vidhana
   Arachchige Indra

No. 31, T.R. Banis Appu Mawatha,
New Town,
Kataragama.

SUBSTITUTED-DEFENDANT-RESPONDENT-PETITIONERS-APPELLANTS

vs

Ceylon Petroleum Corporation
No. 113, Galle Road,
Colombo 3.
And now at
No.609, Dr. Danister de silva
Mawatha, Colombo 09.

PLAINTIFF-APPELLANT-RESPONDENT-RESPONDENT

BEFORE : S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J
M. Sampath K. B. Wijeratne J.

COUNSEL : Navin Marapana P.C., with Saumya Hettiarachchi and Uchitha Wickremesinghe instructed by Taranatha Palliayaguruge for the Substituted Defendant-Respondent -Petitioners-Appellants.

Yuresha De Silva, DSG, instructed by Ms. Nimalika Wickramasinghe, SA, for the Plaintiff-Appellant-Respondent-Respondent.

ARGUED ON : 15.07.2025

DECIDED ON : 17.12.2025

M. Sampath K. B. Wijeratne J.

Factual background

The Plaintiff-Appellant-Respondent (hereinafter referred to as the "Plaintiff-Respondent") instituted this action against the Defendant-Respondent-Appellant (hereinafter referred to as the "Defendant-Appellant") in the District Court of Hambantota, alleging that the cheques issued by the Defendant-Appellant as payment for goods sold to him by the Plaintiff-Respondent were dishonoured by the bank. The Defendant-Appellant filed an answer denying, in general, all the averments in the plaint, except admitting that he had, at one time, been a dealer in petroleum products of the Plaintiff-Respondent Corporation. Subsequently, the Plaintiff-Respondent filed a replication refuting the allegations contained in the answer.

At the trial, two admissions were recorded, the second of which was ambiguous. Issues Nos. 1 to 31 and additional issues Nos. 41 to 60 were framed on behalf of the Plaintiff-Respondent, while issues Nos. 32 to 40 were framed on behalf of the Defendant-Appellant. Thereafter, the case proceeded to trial.

The Plaintiff-Respondent, having failed to file a list of witnesses and documents within the prescribed time, made an application on the fifth date of trial seeking permission to file such a list, which was objected to by the Defendant-Appellant. The learned District Judge allowed the Plaintiff-Respondent's application subject to the pre-payment of costs. This order was appealed to the Court of Appeal by the Defendant-Appellant, and by its judgment dated August 25, 1994, in C.A.L.A. Application No. 128/94, the Court of Appeal set aside the order of the learned District Judge permitting the filing of the list of witnesses and documents. The Court further observed that the proviso to Section 175 of the Civil Procedure Code is intended solely to vest the learned District Judge with discretion, in special circumstances and in the interests of justice, to permit the examination of a witness whose name has not been included in the list already filed.

On November 14, 1994, the Plaintiff-Respondent sought to call the Accountant of the Ceylon Petroleum Corporation to give evidence on behalf of the Plaintiff Corporation, which was objected to by the Defendant-Appellant. The Plaintiff-Respondent submitted that, since it is a corporation, its directors, managers, or principal officers are entitled to be called to give evidence on its behalf.

Subsequently, on June 19, 1995, the learned District Judge granted permission to call a Director of the Corporation. However, the witness who was called to give evidence was the Accountant of the said Corporation. At the time he gave evidence-in-chief, no objection was raised by the Defendant-Appellant. During cross-examination, however, he was asked whether he was a Director of the Corporation, to which he replied in the negative.

Who can testify on behalf of a corporate entity?

The categories of persons who may be called as witnesses to give evidence on behalf of a company were discussed in ***Hatton National Bank Limited vs Warawitage and Others***[1] (C.A.), where it was specifically stated that an accountant is one such person.

"The second proviso to section 175(1) applies where the party to the action is a natural person (i. e., a human being). In this case the plaintiff was Hatton National Bank Limited, which is a corporate body and a legal person so that the plaintiff cannot be called as a witness but will have to give evidence through a natural person (i.e., a human being). It may be a Director, the Manager, the Accountant or the Secretary of the Bank "

The same issue was further clarified in ***Science House (Ceylon) Limited vs I.P.C.A. Laboratories Private Limited***[2] (S.C.), where the Supreme Court adopted a broader approach and held that *"when the action is brought by a corporation, board, public body, or company, then any principal officer of such corporation, board, public body or company may be allowed by the court to make an affidavit in these matters instead of the plaintiff."*

1 [1992] 1Sri L.R. 358.
2 [1989] 1 Sri L.R. 155.

At the argument, the learned President's Counsel for the Defendant-Appellant submitted that the evidence of the Accountant of the Plaintiff-Respondent Corporation should be entirely rejected, as it was contrary to the order of the learned District Judge permitting a Director of the Corporation to be called to give evidence. However, this objection had not been raised either in the District Court at the closure of the case or in the appeal before the Court of Appeal against the final judgment. Accordingly, the present application is belated.

The involuntary closure of the case.

The cheques and invoices were first produced as part and parcel of the plaint and were marked through the Plaintiff-Respondent's witness at the trial. At the time of marking, learned Counsel for the Defendant-Appellant moved that they be marked subject to proof.

After the evidence of the said witness was concluded, learned Counsel for the Plaintiff-Respondent made an application for a postponement in order to call a witness to prove the documents, namely, the cheques and invoices, which had been marked 'subject to proof'. This application was objected to by learned Counsel for the Defendant-Appellant. The learned District Judge rejected the application of the Plaintiff-Respondent on the ground that the judgment of the Court of Appeal in *C.A.L.A. Application No. 128/94* did not permit the calling of witnesses while acting under Section 175 of the Civil Procedure Code. The Court of Appeal had rightly interpreted the proviso to Section 175(1) of the Civil Procedure Code as conferring on the learned District Judge a discretion, in exceptional circumstances and in the interests of justice, to allow the examination of a witness whose name has not been included in the list previously filed.

By the aforesaid order of the learned District Judge, the case of the Plaintiff-Respondent came to an involuntary end, without being intentionally concluded. Thereafter, learned Counsel for the Defendant-Appellant informed Court that the Defendant-Appellant's case would be closed without leading any evidence. The learned District Judge then fixed the matter for written submissions and, subsequently, delivered judgment on August 10,

1998, dismissing the action of the Plaintiff-Respondent on the ground that neither the cheques nor the invoices, which had been produced in evidence subject to proof, were proved. The counterclaim of the Defendant-Appellant was also dismissed.

The learned District Judge, in his judgment, observed that Counsel for the Plaintiff-Respondent had not formally closed his case after reading the documents in evidence, and consequently, the Defendant-Appellant had not recorded any objection to the documents that had been tendered in evidence subject to proof. Accordingly, he observed that the facts of this case were distinguishable from those in ***Sri Lanka Ports Authority and Another vs Jugolinija–Boal East***[3] and held that the principle laid down in the said case was not applicable to the present matter.

Being aggrieved by the judgment dated August 10, 1998, of the learned District Judge, the Plaintiff-Respondent appealed to the Court of Appeal. The learned Judges of the Court of Appeal, by their judgment dated September 5, 2014, allowed the appeal, set aside the judgment of the learned District Judge, and directed that judgment be entered in favour of the Plaintiff-Respondent, granting the reliefs prayed for in the plaint. Being aggrieved by the said judgment of the learned Judges of the Court of Appeal, the Defendant-Appellant sought leave to appeal to this Court against the said judgment, and leave was granted on following questions of law.

> i. Have Their Lordships of the Court of Appeal erred in law in holding that the documents ‘A1 to A7’ and ‘B1 to B7’ did not require to be proved by the Respondent even though the said documents had been marked 'subject to proof'?
>
> iv. Have Their Lordships of the Court of Appeal erred in holding that the dicta of His Lordship Samarakoon C.J in ***Sri Lanka Ports Authority vs Jugolinija-Boal East (1981) 1 Sri.L.R. 18*** to the effect that "If no objection is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of the law” applied to the facts of this case?

3 (1981) 1 Sri. L R. 18.

vi. Have Their Lordships of the Court of Appeal erred in law in not following the findings of the Supreme Court in ***Jamaldeen Abdul Latheef vs. Abdul Majeed Mohamed Mansoor and Other (2010) 2 SLR 333)*****,** which specifically held that it was mandatory to read the documents in evidence at the conclusion of the trial?

On January 22, 2017, the original Defendant-Appellant passed away while the appeal was pending determination. Consequently, by a motion dated July 3, 2018, the deceased Appellant's heirs, his wife and daughter, were substituted in his place as 1(a) and 1(b) Defendant-Appellants.

Analysis

The Plaintiff-Respondent's action comprised seven causes of action, each based on an individually dishonoured cheque. At the trial, the seven cheques were marked as "B1" to "B7", and the corresponding invoices were marked as "A1" to "A7". At the time of marking both the cheques and the invoices, learned Counsel for the Defendant-Appellant moved that the documents be marked "subject to proof". However, no reason whatsoever was adduced to justify such a course of action, nor was it specified which aspect of the documents required proof. The objection was, therefore, devoid of any legal or factual basis. Despite the absence of any valid ground, the learned District Judge, as a matter of routine and without applying his judicial mind to the objection raised, merely recorded *verbatim* the statement of the defence that the documents should be marked "subject to proof." Such a mechanical adoption of a party's assertion, without the application of judicial mind to the issue or an independent determination of its necessity or propriety, amounts to a clear misdirection and a failure to exercise judicial discretion in accordance with law.

As stated above, the Plaintiff-Respondent instituted this action against the Defendant-Appellant in respect of seven cheques.

According to Section 50 of the Civil Procedure Code:

"*If a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint*"

Accordingly, the Plaintiff-Respondent submitted the seven cheques together with the corresponding invoices along with the plaint filed against the Defendant-Appellant.

Section 75 of the Civil Procedure Code sets out the requisites of an answer. Section 75(d) provides that every answer shall contain "*a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence; (...)"*

Under the said provision, the answer must contain a statement admitting or denying the various allegations set out in the plaint, together with a clear, concise, and descriptive account of the facts, legal issues, and circumstances on which the defendant intends to rely in support of his defence. The requirements stipulated in Section 75 are mandatory and are designed to compel a defendant to specifically admit or deny the allegations in the plaint, thereby enabling the Court to identify the precise issues that must be determined at the hearing. A defendant who fails to comply with these mandatory provisions cannot be permitted to benefit from his own breach of the statute. Allowing such conduct would undermine the procedural framework established by the Civil Procedure Code[4]. Furthermore, permitting such a course of action would inevitably place an unnecessary burden upon the Plaintiff and, consequently, upon the Courts, in resolving issues that are otherwise unwarranted.

It is important to observe that the Defendant-Appellant, in his answer, did not specifically deny any of the causes of action relating to the seven cheques set out in paragraphs 5 to 46 of the plaint, but instead made a general denial of all the averments therein. Such a general denial does not comply with the requirements of Section 75(d). Furthermore, the Defendant-Appellant failed to deny the Plaintiff-Respondent's other monetary claims stated in paragraph 47, as well as the total claim set out in paragraph 48 of the plaint.

4 *Fernando vs Samarasekere* 49 NLR 285.

Interestingly, the Defendant-Appellant has also not specifically denied paragraph 49 of the plaint, wherein the cause of action against him is pleaded. Be that as it may, the Defendant-Appellant has instead raised issues relating to misjoinder of causes of action[5], the alleged improper termination of the agreement between the Plaintiff-Respondent and himself, the prescription of the causes of action in law, and has also counterclaimed against the Plaintiff-Respondent for unlawfully terminating his dealership without valid cause.

The issues raised by the Defendant-Appellant were based on the aforesaid grounds but were not pursued at the trial. More importantly, these issues fall outside the questions of law presently before this Court.

Marking of documents "subject to proof"

The legal foundation for this procedure is embodied in Section 136(1) of the Evidence Ordinance, which provides as follows:

> *136 (1) when either party proposes to give evidence of any fact, the judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.*
>
> *(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the court is satisfied with such undertaking.*

5 As it was held in *Adlin Fernando and Another v. Lionel Fernando and Others* 1995 2 Sri LR 25, as per section 22 of the Civil Procedure Code, objections on misjoinder of causes of action has to be raised at the earliest opportunity, before pleading. The procedure as set out in *London and Lancashire Fire Insurance Company v. P & O Company Et Al*., 18 NLR 15 is by way of a motion. But, in the case at hand, the objection was raised in the answer.

(3) (...)

However, it has now become a common practice among some lawyers to object to the marking of documents by merely stating “subject to proof,” often without offering any substantive reason. In such instances, both the Judge and the opposite party are left uncertain as to what exactly requires proof, whether it concerns admissibility, authenticity, or relevance. It is possible that even the Counsel who moves to have the document marked “subject to proof” may be in the same predicament, though he makes the application as a matter of routine.

In my view, it is time to put an end to such practices that have led to confusion and undue delay in the final resolution of cases.

When a document is requested to be entered in evidence and the opposing Counsel moves to have it marked "subject to proof," the District Judge, rather than passively accepting the Counsel's assertion, should require the objecting Counsel to specify the precise aspect of the document being challenged. Thereafter, the Judge must make an independent determination on the objection raised.

This simple query would either result in the objection being withdrawn or, at the absolute least, clarify the real issue at hand. For instance, if a party claims that a deed is void *ab initio* due to forgery, execution under duress, or the executant's lack of capacity at the time of execution, such claims must be specifically pleaded and framed as issues, rather than being raised casually by requiring that the document be marked "subject to proof."

When confronted with such an application, the District Judge should be cautious to first ascertain the precise matter or matters that are said to require proof and then determine whether those matters have in fact been raised as issues. The Judge should then decide whether the document should be marked "subject to proof" under section 136 of the Evidence Ordinance, or if no additional proof is required.

Despite the fact that it is irrelevant to the current case, I shall comment on the existing pre-trial conferencing procedure for more clarity. Chapter XVIIIA of the Civil Procedure Code, which contains pre-trial conference procedures, was initially introduced by Amendment Act No. 08 of 2017 and then further amended by Amendment Act No. 29 of 2023. Consequently, as the law stands today, District Judges play a crucial role in refining the required documents presented in evidence at the pre- trial stage in order to make the trial streamlined. According to Section 142A (1) (f), one of the core intentions of the pre- trial conference is to prevent presenting extraneous evidence at the trial. Section 142A (3) states that the court has the authority to decide legal questions during the pre- trial stage. Section 142B (a) requires the District Judge to identify and obtain admissions of facts or documents. According to Subsection (c) of the same provision, at the pre-trial conference, the judge must determine the relevancy, admissibility, and authenticity of documents to be produced at the trial, and in appropriate cases, dispense with proof of such evidence depending on the circumstances of each case.

Accordingly, District Judges should give effect to these provisions at the pre-trial stage so as to minimize potential objections regarding the proof of documents at the trial.

Next, I refer to Section 154(1) of the Civil Procedure Code, which stipulates that every document intended to be used in evidence by a party against his opponent must be formally tendered at the time when its contents or purport are first spoken to by a witness. When a document is tendered in evidence, the Court may, as the circumstances warrant, either admit it, reject it, or mark it "subject to proof."

The marking of a document "subject to proof," therefore, is not a mere formality but a conditional acceptance of the document, pending proof of its genuineness or due execution during the course of the trial.

In order for a document to be admitted in evidence by the Court, it must first satisfy the requirement that it is not one which is forbidden by law to be received in evidence. If the

document falls within a category prohibited by law, the Court must forthwith reject it from being accepted as evidence.

Next, it is important to consider the criteria to be applied by a trial judge when a document is sought to be tendered in evidence. Broadly, there are three factors that must be taken into account: **relevancy, authenticity,** and **admissibility**. This Court, on several occasions, has emphasized the significance of these three factors in its judgments.

In *Multiform Chemicals Limited v. Adrian Machado*[6] (S.C. Minutes of 18.07.2024), Janak De Silva J. provided an in-depth analysis of this matter, elucidating the principles governing the admission of documentary evidence.

"Relevancy is a question of fact. In terms of Section 5 of the Evidence Ordinance, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and relevant facts and of no others.

(...)

Facts in issue and relevant facts in a civil trial must be understood in the context of the issues raised by the parties as the trial proceeds on the issues and not on the pleadings. As Prasanna Jayawardena, P.C., J. held in ***Seylan Bank Limited v. Clement Charles Epasinghe and Another [S. C. Appeal 39/2006, S. C. M. 01.08.2017 at page 8],*** *"[...] the scope and ambit of the trial had been defined by the admissions and issues which were framed at the commencement of the trial, in terms of section 146 of the Civil Procedure Code."*

Accordingly, the first matter that a trial judge must address when a document is sought to be marked in evidence is whether it provides evidence of the existence or nonexistence of any fact in Issue or a relevant fact. Where the answer is in the negative, the document

6 S. C. /Appeal No. 183/2011.

cannot be allowed to be marked in evidence, even subject to proof, and the questions of authenticity or admissibility does not arise for consideration"

If the document sought to be marked aduces evidence as to the existence or non-existence of any fact in issue or a relevant fact, the Court should permit the document to be marked in evidence. In the absence of **relevancy**, the Court is not required to consider the remaining two factors.

If the document is found to be relevant, the trial judge must then examine its authenticity and admissibility, as required under Section 154 of the Civil Procedure Code.

Ordinarily, the term "authenticity" in evidence ordinance means *proof that the document was written or executed by the person who purports to have done so.*[7]

Justice Janak De Silva, J., explained the term **"**authenticity**"** as follows:

"Another instance is where a document purporting to have been sent to the other party is sought to be marked and that party asserts that it was never received. There the document may be allowed to be marked subject to proof of having been sent and received by the other party. Here the issue is mode of proof and not authenticity.

There are some instances when a document cannot be allowed to be marked even subject to proof without first proving certain facts. For example, as explained in illustration (b) to Section 136 of the Evidence Ordinance, where it is proposed to prove by a copy the contents of a document said to be lost, the fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced. Here again, the question is mode of proof of secondary evidence.

(...)

7 E. R. S. R. Coomaraswamy, The Law of Evidence, Vol. II, Book I (Stamford Lake Publication, 2022), page 70.

Where a document is relevant and admissible and its authenticity is admitted by the other party the document can be marked without subject to proof. However, where the authenticity of such document is challenged by the opposing party, the document can be allowed to be marked subject to its authenticity being proved by the party seeking to tender it in evidence. However, the trial judge must inquire from the party that is moving that the document be marked subject to proof, as to whether it is the authenticity or mode of proof that is in issue and record it."

The next factor to be considered is **"admissibility,"** which, unlike the previous factor, is a question of law. Although the concept of admissibility plays a significant role in the proof of facts in evidence, the Evidence Ordinance does not provide a specific legal definition of this term. I will therefore reproduce the definition articulated by Janak De Silva J. in the same judgment, as it clearly encapsulates the essence of the term.

"According to Coomaraswamy [E. R. S. R. Coomaraswamy, The Law of Evidence, Vol. I (Stamford Lake Publication, 2022), page 64] admissibility is a negative concept and is exclusively legal. It implies that the law has laid down rules of exclusion according to which evidence cannot be received even though it is both material and relevant. Evidence is inadmissible if it is rejected for some reason other than immateriality or irrelevance. It is admissible if there is no rule for its rejection other than a rule dealing with materiality or relevance. "Admissibility" here means the concept of the absence of an applicable rule for exclusion.

However, in applying this criterion to the process of marking a document, the trial judge must recognize that the issue of admissibility constitutes a question of law, rather than a question of fact.

"Where a party seeks to produce a document which is objected to by the other party on the basis of admissibility, as a general rule the trial judge must decide upon the objection then and there as the question of admissibility is not one of fact but one of law. Having done so, it is possible for the document that satisfies the test of admissibility to be admitted in evidence, subject to proof of its authenticity provided it provides evidence of the existence or non-existence of any fact in issue or a relevant fact. "

In ***Niyakulage Dilruk Sanjeewa Fernando vs Diyagama Vidanelage Somawathie Perera*** **S.C. Appeal NO. 1 /2025 (S.C Minutes dated 10.02.2025)** it was observed that, *"(...) documents marked "subject to proof" but not technically proved should not be automatically rejected. For instance, when a document is marked by the author himself, and the opposite party moves to have it marked subject to proof, the document need not be rejected on the basis that it was not proved by calling witnesses. The determination of whether a document has been proved, its admissibility in evidence, and the extent of its admissibility should be made at the conclusion of the trial, based on the unique facts and circumstances of each case."*

Accordingly, the final determination as to the admissibility of evidence rests with the trial judge at the stage of delivering judgment.

Now, I turn my attention to the evidence given by the Accountant on behalf of the Plaintiff-Respondent. According to his testimony, the invoices contained details relating to the cheques handed over by the Defendant-Appellant. Most importantly, the said cheques had been signed by the Defendant-Appellant, and his signatures on those cheques were identified by the Accountant. Nevertheless, the same witness was unable to identify the signatures appearing on the invoices[8].

However, upon examining the contents of the invoices marked "A1" to "A7", it is evident that each invoice was issued under the name of the Defendant-Appellant, thereby implying that the invoices were issued in respect of the delivery of fuel to him. Furthermore, the Defendant-Appellant, in his answer as well as during the cross-examination of the Plaintiff-Respondent's witness, did not deny the receipt of such fuel supplies.

In addition, according to the regulations of the Plaintiff-Respondent Corporation, each dealer is required to maintain an account with the Corporation. The account number assigned to the Defendant-Appellant was No. 1141, and this number appears consistently in

8 *Vide* proceedings dated February 03, 1998.

all seven invoices marked “A1” to “A7”, thereby establishing that the supplies were made to the Defendant-Appellant.

The learned Judges of the Court of Appeal have held that the evidence pertaining to the signature of the Defendant-Appellant on the cheques had gone into the record unchallenged. However, this finding is not correct, since questions regarding the witness’s knowledge and ability to identify the handwriting of the Defendant-Appellant were, in fact, put to the witness and answered in the negative. Nevertheless, the witness stated that the signatures appearing on the cheques were the same as those of their customer, the Defendant-Appellant. No specific questions were put to the witness by the Defendant-Appellant denying the signatures appearing on those cheques.

Furthermore, the witness identified the invoices as those under which the goods were delivered to the Defendant-Appellant. Both the dishonoured cheques and the invoices were produced in evidence through the person who had lawful custody of those documents.

Hence, I am satisfied that the said invoices and cheques have been sufficiently proved.

When applying the analysis of Janak De Silva J. to the instant case, it is evident that the cheques and invoices in question are not documents forbidden by law. Moreover, these documents are relevant to the present case, as it is upon them that the Plaintiff-Respondent instituted action against the Defendant-Appellant. They also satisfy the requirement of authenticity, since they were signed and issued by the Defendant-Appellant, who was a duly appointed dealer of the Plaintiff-Respondent Corporation. Furthermore, these documents constitute admissible evidence in the absence of any rule of exclusion applicable to them.

Accordingly, the cheques and invoices fulfill all three criteria that a trial judge must consider when determining whether a document should be tendered in evidence, namely, relevancy**,** authenticity, and admissibility.

However, as Janak De Silva J. correctly observed in his judgment in *Multiform Chemicals Ltd. vs Adrian Machado* (supra), an issue arises as to whether the practice of marking a document "subject to proof" has been applied in a productive and meaningful manner. This concern stems from the fact that, in certain instances, Counsel fail to specifically identify the particular content or aspect of the document which they seek to establish by way of proof.

"What is objectionable is the practice of moving that a document be marked subject to proof without specifying the matters on which proof is required. Judges have become passive observers of such practice. This is not a healthy practice and more often than not, leads to additional issues as in this case. Moreover, it signifies a poor grasp of the relevant evidentiary principles. A trial judge must not condone such practices. There is a duty on a trial judge to inquire from the party moving that a document be marked subject to proof, what is required to be proved in the document."

The same point was emphasized in ***Sirinivasam Prasanth and Another vs Nadaraja Devarajan and Another***[9] (S.C. Minutes of 22.03.2021), where Samayawardhena J. underscored the necessity for parties to clearly specify the particular aspect of a document that requires proof when such document is marked "subject to proof."

"There is a practice among some lawyers to get up and say "subject to proof' whenever a document is marked in evidence by the other party. This they do as a matter of course or as a matter of routine and not with any particular objective in mind, except perhaps to prolong the trial. It is regrettable that most of the time the party who produces the document obliges to this without a murmur. If we are serious about law's delays, we must put an end to this bad practice. When a counsel routinely says "subject to proof', the Judge must ask what he wants the other party to prove in the document. If this simple question is asked, I am certain the objection would be withdrawn or at least the issue to be addressed would be narrowed down. On the other hand, if the document is, take for instance, a Deed pleaded in the plaint but no issue has been raised disputing the Deed, the Defendant cannot make a routine application to mark it subject to proof when it is

9 S. C. Appeal No.163/2019.

marked in evidence. Against this backdrop, I must emphasise that the Judge shall not mechanically refuse documents marked subject to proof but not technically proved by calling witnesses. The Judge shall decide the question of proof at the end of the trial on the facts and circumstances of each individual case."

The Plaintiff-Respondent's case came to an end following the refusal of the learned District Judge to permit a witness to be called for the purpose of proving the documents marked "subject to proof." However, the learned Counsel for the Plaintiff-Respondent did not formally close his case by reading into evidence the documents tendered on behalf of the Plaintiff-Respondent. It may be contended that this omission does not absolve the Defendant-Appellant from the responsibility of placing on record the fact that the documents marked "subject to proof" were not duly proved.

Be that as it may, I am unable to find any statutory provision in the Civil Procedure Code that mandates the reading of marked documents at the time of closing a party's case.

Nevertheless, it is a long-standing practice that, at the close of each party's case, the documents marked in evidence are read into the record. This practice has been recognized as the *cursus curiae* of our Courts through several judicial precedents of the superior Courts. In ***Sri Lanka Ports Authority and Another vs Jugolinija Boal East*** (S.C.) (supra), Samarakoon C.J. observed as follows:

" If no objection is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the ***cursus curiae*** *of the original Civil Courts."*

In ***Jamaldeen Abdul Latheef and Abdul Majeed Mohamed Mansoor and Another***[10] (S.C.), Saleem Marsoof J. held that:

" (....) which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial? ***There is no provision in the Civil***

10 S. C. Appeal No.104/ 2005.

Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts. *For instance, in Sri Lanka Ports Authority and Another v. Jugolinija-Boal East (supra) Samarakoon, CJ., commented on this practice, and ventured to observe at 23 to 24 of his judgment that if no objection to any particular marked documents is taken when at the close of a case documents are read in evidence, "they are evidence for all purposes of the law." It has been held that this is the cursus curiae of the original courts. See, Silva v. Kingersle; Adaicappa Chettiar v. Thomas Cook and Son, Perera v. Seyed Mohomedi; Balapitiya Gunananda Thero v. Talalle Methananda Thero; Cinemas Limited v. Sounderarajan; Stassen Exports Ltd., v. Brooke Bond Group Ltd., and Two Other."* [emphasis added]

Subsequently, this principle received statutory recognition through the enactment of the Civil Procedure Code (Amendment) Act, No. 17 of 2022, which introduced Section 154A. However, this amendment has no application to the case at hand.

According to the dicta of Samarakoon C.J. in ***Sri Lanka Ports Authority vs Jugolinija–Boal East*** (supra), the obligation of the Defendant-Appellant to record that the documents marked "subject to proof" were not proved arises only when such documents are read into evidence at the closure of the case. In the present instance, the documents were not read into evidence, regardless of the reasons for this omission. Therefore, no obligation can be imposed on the opposite party to record that the said documents were not proved. In my view, before a party can be expected to raise such an objection, it must first be made aware of the specific documents upon which the opposing party intends to rely in proving its case at the close of the evidence.

Nevertheless, as discussed above, the Defendant-Appellant failed to challenge the cheques and invoices in his initial answer. Even thereafter, although he sought to have both the cheques and invoices marked "subject to proof," he did not specify the particular aspect or proof that was required. Consequently, I find that the objection raised by the Defendant-Appellant is **vague, misconceived, and devoid of merit.**

Conclusion

In light of the reasons set out above, the questions of law raised are answered as follows:

i. No.
iv. No. The documents were not contested at the appropriate stages of the proceedings.
vi. No.

Accordingly, the appeal of the Defendant-Appellant against the judgment of the Court of Appeal is hereby dismissed, and the judgment of the Court of Appeal is affirmed**.** The Plaintiff-Respondent is entitled to costs in all three Courts**.**

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C., J.
I Agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J.
I Agree.

JUDGE OF THE SUPREME COURT