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

SC/CHC/Appeal No. **34/2017**
HC/CIVIL/134/2012/MR

DFCC Bank PLC,
(Presently : DFCC Vardhana Bank PLC),
(Previously : DFCC Vardhana Bank Limited)
No ; 73, W.A.D. Ramanayaka Mawatha,
Colombo 2.

PLAINTIFF

vs

Mahasen Sampath Vithanage Happawana,
No.326, Pitakotte Road,
Pitakotte.

DEFENDANT

And now Between

Mahasen Sampath Vithanage Happawana,
No.326, Pitakotte Road,
Pitakotte.

DEFENDANT - APPELLANT

vs

DFCC Bank PLC,No. 03, “Chamini”,
(Presently : DFCC Vardhana Bank PLC),
(Previously : DFCC Vardhana Bank Limited)
No ; 73, W.A.D. Ramanayaka Mawatha,
Colombo 2.

PLAINTIFF - RESPONDENT

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BEFORE : Yasantha Kodagoda, P.C., J.
A. L. Shiran Gooneratne, J.
M. Sampath K. B. Wijeratne, J.

COUNSEL : Harith de Mel with Hasini Rupasinghe instructed By Chamithri Kaluhennadige for the Defendant-Appellant.

Kushan D' Alwis, P.C. with Kaushalya Nawaratne, P.C. and Sashendra Mudannayake instructed by Tejaka Perera for the Plaintiff – Respondent.

ARGUED ON : 09.10.2025

DECIDED ON : 26.05.2026

<u>**M. Sampath K. B. Wijeratne J.**</u>

Introduction

The Plaintiff -Respondent (hereinafter referred to as the 'Plaintiff') originally instituted the instant action in the High Court of the Western Province holden in Colombo (commonly referred to as the Commercial High Court) against the Defendant-Appellant (hereinafter referred to as the 'Defendant') for the recovery of a sum of Rs. 5,555,008/66 together with interest thereon at the rate of 21% per annum from July 01, 2011 on a sum of Rs. 4,004,547/17 till the date of decree and further interest on decreed sum at the rate of 21% until the payment is made in full. This appeal arises from the judgment of the Commercial High Court, where it was held that the Defendant is liable in his capacity as a guarantor/surety for the repayment of the credit facilities granted by the Plaintiff bank to ICM Micro Computer System (PVT) Ltd (the Principal Debtor).

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Analysis

It is the position of the Defendant that the aforesaid limited liability company has borrowed the amounts in question, and as it is the sole beneficiary of the credit facilities granted, the present action cannot be maintained solely against the Defendant, who is only a guarantor, without making the principal debtor a party to the action. It was submitted on behalf of the Plaintiff that the Defendant is being sued in the Commercial High Court based on the personal guarantee marked 'P6' and that the Defendant has assumed liability as the principal debtor in the event of default by the principal debtor, as per 'P 6'. Therefore, the Plaintiff bank contends that it does not have any obligation to proceed against the principal debtor in the first instance.

In light of the arguments presented, first, this Court has to determine whether the Plaintiff can maintain the instant action against the Defendant without making the company, which is the beneficiary of the credit facilities granted, a party to the action and without first proceeding against the said company to recover amounts due.

The law applicable in this connection is the Roman-Dutch Law, which is our residual law and not the English law that is applicable concerning issues with respect to the law of banks and banking, as repeatedly held in numerous previously decisions of this Court as well as the Court of Appeal, though the English law approach does not substantially differ from Roman-Dutch law. This was highlighted in the case of ***Gurusin Appu vs Carlina Hamine***[1] where the Court applied Roman-Dutch Law in determining the question of liability of a surety.

At the outset, let me discuss the approaches of English law and Roman-Dutch law to the law of guarantee. In **Paget's Law of Banking**" (12th edn at 701-702) provides "*A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed; the guarantor undertakes that the*

[1] 2 NLR 307.

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principal debtor will perform his (the principal debtor's) obligation to the creditor and that he the (guarantor) will be liable to the creditor if the principal debtor does not perform. Therefore, the guarantor's liability for the non-performance of the principal debtor's obligation is co-extensive with that obligation. If the principal debtor's obligation turns out not to exist, or is void, diminished or discharged so is the guarantors in respect of it"

Halsbury's Laws of England, Secondary liability of the guarantor, (Vol XX, 4th edn at 180): "*There are two different kinds of guarantee. One is a promise by the guarantor which becomes effective if the principal debtor fails to perform his obligations. The other is a promise that the principal debtor will perform his obligations. In both cases, the guarantor's liability is secondary. The guarantor is under no liability if the principal debtor's obligation is discharged, by performance or otherwise, on or before the date of performance. In the one case, the conditional promise never becomes effective; in the other, there is no breach by the guarantor. Consequently, a creditor may not, before any default has been committed, bring an action quia timet against a guarantor to force him to set apart money to provide for the possibility of a debt becoming due from the principal debtor and the principal debtor making default. Nor can the creditor obtain a Mareva injunction against the guarantor, because he has no accrued cause of action to support it. On the other hand, a guarantor is no more justified in placing the whole of his property out of the reach of liability to pay the guaranteed debt than if he were the principal debtor.*"

According to the afore-cited English law authorities it is clear that guarantors' liability would become effective only when the principal debtor fails to perform his obligations.

The position of Roman Dutch law with regard to a guarantor is stated in the following manner in **Wessels' Law of Contract in South Africa** [Volume II, 2nd edn] in the following manner. *"When the debtor is in default the creditor is entitled to demand payment from the surety. ... the mere default of the debtor does not as a rule entitle the creditor to proceed against the surety. The principal*

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debtor must not only first be sued, but he must also be excused, and only after this can the surety be called upon to pay the balance due. Hence, if a surety is sued before the principal debtor, he may advance as an exception or defence the beneficium ordinis seu excussionis – that the principal debtor be first excused before payment is demanded of the surety." [emphasis added]"

A similar view has been expressed in **Maasdorp, The Institutes of Cape Law** [Volume I, The Law of Obligation, at 357] : "*The benefit of excusion, as known to our law, is the right of exception to which a security is entitled, who is being sued before the principal debtor, to demand that the principal shall first be sued and excused; [Voet 46:1:14; Grotius 3:3:27] and, where there are more than one principal debtor, that all shall be excused. It further entitles the surety, where an obligation has been secured as well by the giving of sureties as by a mortgage on immovable property, to claim that the immovable property shall also be excused before he is himself proceeded against*."

In ***Gamini Seneviratne and Another vs Sampath Bank Limited***[2] Obeyesekere J. thus stated; *"[t]he resultant position then is that under the Roman Dutch law, the creditor's first recourse is to the principal debtor, and the surety becomes liable only once the principal debtor has been excused. Where that has not been done, and subject to certain limitations, the surety shall be entitled to take up the defence that the principal debtor be excused prior to proceeding against the surety. What is significant however is that this defence can be renounced by the surety."*

In such circumstances, the Plaintiff can only proceed against the Defendant if there is a valid and enforceable renunciation of the defence to the effect that the principal debtor need not be first sued, and that he must also be excused, before payment is demanded of the guarantor.

In the event, the surety/ guarantor expressly renounces his right by agreeing to a specific renunciation of this right, or impliedly renounces his right by accepting

[2] SC (CHC) Appeal No. 24/2008 SC Minutes of 08.07.2025.

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liability as a Principal Debtor and agreeing to be sued without the Debtor excusing the Principal Debtor, the Surety cannot later claim this right or insist that the Creditor must proceed against the Principal Debtor before proceeding against the Surety.

Today what we see mostly are contracts guarantor provides a primary or independent undertaking to fulfill the principal debtor's obligation. The rational for this could be found in in the Supreme Court case of ***Sri Lanka Insurance Corporation Ltd. vs People's Bank***[3] where by Eva Wanasundera PCJ, observed *"When any party grants an assurance to another party guaranteeing to pay on demand, it is accepted that if the principal does not pay that the guarantor shall pay. It is only on that assurance that the Bank grants the facility which the principal requests from the Bank. That is the norm and accepted practice in the business world. If any Bank takes it to mean that it has to first demand from the principal, then file action against the principal and then only the Bank can demand and file action against the guarantor, there will be no bank who would want to grant any facility to any principal on such a guarantee."*

Under contract law, party autonomy is a fundamental concept that emphasizes the freedom of parties to choose the substance of the contract that they are entering into. Accordingly, rights and liabilities that each party has undertaken can only be determined with reference to the agreement parties have entered into. There was no clause in the document marked 'P 6' (guarantee) which obligates the Plaintiff bank to first proceed against the principal debtor before demanding the payment from the guarantor/guarantors. Rather, when going through 'P 6', it is clear that the Defendant has assumed liability on behalf of the principal debtor in the event of a default. Clause 15 of the said agreement states as follows;

> *"I/we and each of us specially agree that the Bank shall be at liberty,* ***either in one action to sue the debtor and me/us and each or any of us jointly and severally, or to proceed in the first***

[3] SC (CHC) Appeal No. 18/09, SC Minutes of 17.03.2017.

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> ***instance against me/us and each or any of us only, and further that I/we and each of us hereby renounce the right to claim that the debtor should be excused or proceeded against by action in the first instance,*** *and (where this guarantee is given by more than one person) the right to claim that the Bank should divide its claim against us and bring actions against us, each for his portion pro rata, and the right to claim in any action brought against all of us that the Bank should only recover from each of us a pro rata share of the amount claimed in that action, and all other rights and benefits to which sureties are or may be by law entitled IT BEING AGREED that I/we and each of us am/are and is liable in all respects hereunder as principal debtor/principal debtors jointly and severally, to the extend aforementioned, including the liability to be sued before recourse is had against the debtor*."

When going through 'P6', Clause 15 clearly implies that bank has the discretion to proceed against Principal debtor and/or guarantors and/or any of the guarantor for they have already renounced their right to claim '*the debtor should be excused or proceeded against by action in the first instance*' and '*to claim that the Bank should divide its claim*' in the event where guarantee is given by more than one person. In such circumstances, the Plaintiff is entitled to maintain the instant action without making the principal debtor a party to the action.

In the instant case, the Defendant also claims that he is unaware of the contents of the documents he signed, as they were never explained to him, and that he placed his signature on blank documents. However, such a plea of *non-est factum* would not succeed unless it could be proven that the person signing the document is illiterate, blind, or lacks the mental capacity to understand what he is signing. Dealing with the burden of proof of a person who seeks to invoke this defense

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of *non-est factum,* Dissanayake J. in the Court of Appeal case of ***Mercantile Credit Ltd vs Thilakaratne***[4] observed as follows;

> *"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."*

I am also unable to accept the contentions of the Defendant that he did not understand what he was signing, considering his status and background. Even if we are to accept his contention that he signed blank documents, the consequences of such irresponsible conduct must be borne by the Defendant himself. Professor Weeramantry in '**The Law of Contracts'** (vol. 1) at page 300 thus observed,

> "*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 subscript or 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*

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[4] (2002) 3 Sri LR 206.

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

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 setup 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 3rd persons who have in good faith acted upon it as a genuine expression of intention."

The Defendant claims that he has not received any letter of demand sent by the bank. In the Court of Appeal case of ***Athukorala vs Special Commissioner, Municipal Council, Galle***[5] Grero J. held that the best proof of notice being sent served is to produce a copy of such notice along with the registered postal receipt. In the instant case, copies of the letter of demand sent and the registered post receipt attached to the Plaint clearly substantiate the fact that the letter of demand has been posted to the Defendant. Further, the Defendant has not produced any material to substantiate his claim that the contents of the bank statements and the amounts due to the bank are incorrect.

When the demand (P 11) was made by the Plaintiff to the Defendant, the Defendant has not sent any reply. In the ordinary course of business, if a person asserts in a letter to another that a certain state of facts exists, the person receiving such business letter or a letter of demand must reply, if he does not agree with

[5] [1994] 3 Sri LR 165.

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the assertions. The failure to do so would amount to an admission to a claim made therein, as I have already analysed in the previously decided case of ***Pasan Madanayake vs DFCC Bank PLC.***[6]

This position is very well articulated in ***Saravanamuttu vs de Mel***[7] in the following manner. "*In business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute the assertions. Otherwise, the silence of the latter amounts to an admission of the truth of the allegations contained in that letter.*"

For the reasons set out above, I see no reason to interfere with the judgment of the learned Commercial High Court Judge.

Conclusion

For the foregoing reasons I affirm the judgment of the Commercial High Court. The Plaintiff shall be entitled to costs of both this Court and the Commercial High Court.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT

[6] SC/CHC/Appeal No.38/2023, SC minutes of 26.03.2026.

[7] 149 NLR 529.

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