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

Pramuka Savings and Development Bank Limited,
30/63J, Longdon Place,
Colombo 07.

PLAINTIFF

S.C. (CHC) APPEAL NO. 22/2010
HC (COLOMBO) Case No.
HC (Civil) 132/2001(1)

Sri Lanka Savings Bank Limited,
110, D S Senanayake Mawatha,
Colombo 08

SUBSTITUTED PLAINTIFF

-VS-

Habib Bank AG Zurich incorporated
In Switzerland and having a registered
Place of business at Nos. 148-151
Main Street, Colombo 11.

DEFENDANT

Hatton National Bank Limited,
481 T B Jayah Mawatha,
Colombo 10.

SUBSTITUTED DEFENDANT

AND NOW BETWEEN

Pramuka Savings and Development
Bank Limited,
30/63J, Longdon Place,
Colombo 07.

PLAINTIFF- APPELLANT

Sri Lanka Savings Bank Limited,
110, D S Senanayake Mawatha,
Colombo 08

Presently of
No. 265, Ward Place,
Colombo 07

SUBSTITUTED PLAINTIFF-APPELLANT

-VS-

Habib Bank AG Zurich incorporated
In Switzerland and having a registered
Place of business at Nos. 148-151
Main Street, Colombo 11.

DEFENDANT- REPONDENT

Hatton National Bank Limited,
481 T B Jayah Mawatha,
Colombo 10.

SUBSTITUTED DEFENDANT-RESPONDENT

Before: Vijith K. Malalgoda, PC, J.
P. Padman Surasena, J.
E. A. G.R. Amarasekara, J.

Counsels: Geoffrey Alagaratnam, PC with Suren Fernando & T. Lader instructed by Sinnadurai Sundaralingam & Balendra for the Plaintiff-Appellant.

K. Kanag-Isvaran, PC with K.M.B. Ahamed, Gayani Adikari, Lakshman Jayakumar, A. Weerasekara &V. Anren instructed by Neelakandan & Neelakandan Associates for the Substituted Defendant-Respondent.

Argued on: 31.08.2020

Decided on: 08.08.2024

E. A. G. R. Amarasekara, J.

The Original Plaintiff- Appellant (hereinafter sometimes referred to as the Plaintiff or Plaintiff Bank) instituted an action in the Commercial High Court against the Original Defendant-Respondent, Habib Bank AG Zurich, (hereinafter sometimes referred to as the Defendant or Defendant Bank) *inter alia* stating that;

- It placed with the Defendant Bank deposits on interest from time to time aggregating to approximately Rs. 70 million,
- It reinvested deposits aggregating to 70 million from 06.03.2000 to 05.04.2000, then from 05.04.2000 to 05.05.2000 and then 05.05.2000 to 04.05 2001,
- The Defendant was obliged to repay to the Plaintiff, Rs.78,400,000 (including interest) on 5th May 2001,
- The Plaintiff, by its letter dated 02.05.2001 (X21), requested the Defendant to credit the maturity proceeds to the Plaintiff's account at Pan Asia Bank,
- The Defendant wrongfully refused to pay and had reinvested the deposits contrary to the instructions relying on the letter dated 05.05.2000 (X24)-vide X23.

- The Defendant bank was not entitled to any lien over the said deposits or any right to set off the said deposits against any monies lent by the Defendant to Vanik Incorporation Limited (hereinafter referred to as Vanik).

Thus, the Plaintiff *inter alia* prayed for;

- A declaration that the Defendant was not entitled to any equitable remedy of set off in respect of the amount due and payable to the Plaintiff on the Deposit of Rs. 70 million made by the Plaintiff as evidenced by Certificate No.1063.
- A declaration that the Defendant was not entitled to renew the said deposit beyond the period set out in the said certificate No. 1063.
- A judgment and decree for a sum of Rs. 78,400,000/- together with interest at 32% per annum from 5th of May 2001 till payment in full.

The Defendant filed its answer dated 05.10.2001 praying for a dismissal of the Plaint, *inter alia* pleaded the following grounds;

- That prior to 06.03.2001, the Plaintiff placed three deposits in its name amounting to 70 million with the Defendant bank on behalf of and/or for the benefit of Vanik Incorporation Limited (hereinafter referred to as Vanik), by way of security for Vanik's borrowings from the Defendant Bank,
- That Vanik by its letter dated 06.03.2000 (R3/ D1) sent to the Defendant Bank agreed to hold the said deposits made in the name of the Plaintiff under the Defendant's Bank lien till the adjustment of Vanik's entire liabilities to the Defendant Bank,
- That the said letter R3/D1 was sent by Vanik on the same day the letter X12/P12 was sent by the Plaintiff to the Defendant renewing the said deposits,
- That Vanik through R8/D2, letter dated 04.04.2000 informed the Defendant Bank that Vanik was taking steps to renew the said deposits which it had placed with the Defendant Bank in the name of the Plaintiff, accordingly the Plaintiff requested via letter dated 05.04.2000 (X13/P13), the extension of the said deposits till 05.05.2000 and thereafter further extension was requested until 04.05.2001 by letter dated 24.04.2000 (X14/P14).
- That the placement of said deposits as well as the said extensions from time to time was done by the Plaintiff at the instance of Vanik and/or for and on behalf

of Vanik and/or for the benefit of Vanik to enable the Defendant Bank to secure monies outstanding from Vanik and/or to lend monies to Vanik.

- That, since the said deposits were placed for the purpose of on-lending funds to Vanik and as security for Vanik's outstandings, the Defendant informed the Plaintiff by letter marked X23/P23, dated 04.05.2001 that the deposits would be repaid once the Vanik repay the funds lent to it.
- That the Defendant Bank lent monies and other facilities to Vanik and/or refrained from taking action against Vanik and it was only thereafter that the Plaintiff sent the letter dated 05.05.2000 (X24/P24) stating that the lending was at the risk of the Defendant Bank and that it did not create a lien or any other encumbrance,
- That Vanik failed to repay the balance outstanding to the Defendant Bank.
- That the Defendant Bank had an equitable right to set-off in respect of the aforesaid deposits and the interest accrued to it and the Defendant Bank exercised that right against the monies due and outstanding from Vanik to the Defendant Bank and informed Vanik and the Plaintiff Bank of it by letters dated 28.05.2001, marked R11 and R12,
- The Plaintiff is estopped by its conduct from making any claim whatsoever to the said deposits having caused the Defendant Bank to act on the Plaintiff's representation to the prejudice of the Defendant Bank.

Thus, the Defendant Bank denied that it was under any obligation to pay the Plaintiff and/or it was in breach of its duties as a banker. It is pertinent to note that the answer filed by the Defendant impliedly indicate that the money so deposited is the money of Vanik deposited in the name of the Plaintiff on behalf of or for the benefit of Vanik- vide paragraph 5 and 6 of the Answer.

However, when the matter was fixed for trial, it appears that the Plaintiff and Defendant have not challenged the various communications that occurred between them which were marked as X documents and R documents in their pleadings. However, no objection has been reiterated to any document marked during the trial at the close of the case of each party.

Moreover, it is clear from the answer that the Defendant Bank does not contest the fact that the deposits were made by the Plaintiff and it was not paid at the maturity with the accrued interest to the Plaintiff. The position of the answer seems to be that when the maturity occurred, the Defendant Bank withheld releasing it with interest in the manner exercising a lien over it stating that it will be repaid once Vanik repay the funds lent to them -vide paragraph 9 of the answer, and since Vanik failed to pay it exercised its right to set-off- vide paragraph 15 of the Answer.

The learned High Court Judge after the trial held against the Plaintiff stating that the Defendant Bank had the right to hold the deposits as of a lien for the borrowings of Vanik. Being aggrieved by the said Judgment, the Plaintiff has appealed to this Court and, as indicated above, success of the appeal depends on the fact whether there was a lien in favour of the Defendant Bank over the deposits made by the Plaintiff or whether the Defendant had the right to set off the money deposited by the Plaintiff against the money due from Vanik.

If the money so deposited belonged to the Plaintiff Bank and if there was no lien right or equitable right to set off or a contractual obligation that allowed the Defendant Bank to hold that money or set off it for the obligations of Vanik towards the Defendant, the relationship between the Plaintiff and the Defendant Bank generally would be a relationship of a Creditor (Plaintiff Bank being the Depositor) and a Debtor (Defendant Bank who undertakes to pay back)[1] and, thus, the Defendant Bank would be obliged to pay the money with interest at the maturity as per the direction of the Plaintiff Bank.
As said before, in the Answer, the Defendant has implied that the money so deposited were money belonged to Vanik, but the only witness for the Defendant categorically in his evidence including the evidence given during re-examination has stated that the money so deposited was the money that belonged to the Plaintiff confirming the Plaintiff's version that it was its money that was deposited with the Defendant Bank- vide evidence of Justin Meegoda, President and CEO Vanik, recorded at pages 580,581,583,584,585,592,594,595,596,597,604,610. Further, this witness of the Defendant Bank admits relevant deposits were time deposit which means on maturity

[1] Banking and Cheque Law in Sri Lanka Cases and Commentary) at page 113 – Wickrema Weerasooria- Published by The Institute of Bankers of Sri Lanka-2005. Also see **Foley V Hill (1848) 2H.L.C 28, 9 E. R. 1002, [1848-60] All E. R. Rep 16** and **Royal Bank of Scotland v Skinner 1931 SLT 382 at 384**

the Defendant Bank would pay back to the Plaintiff Bank with the accrued interest. The said witness's position seems to be that those money belonged to the Plaintiff Bank was subject to a lien and/or security in favour of the Defendant Bank against the obligation Vanik had towards the Defendant Bank. It is pertinent to note that no document containing any agreement between the Plaintiff and the Defendant Bank creating a security or guarantee or a right to hold the deposit or right to set-off securing Vanik's debts has been marked in evidence. If there was such an agreement, the Defendant would have naturally tendered it in evidence. Thus, whether the Defendant Bank had a lien right to hold the deposits against the Plaintiff's direction to pay the money back with the interest or the Defendant Bank had an equitable right to set-off the deposits against the money due to the Defendant Bank from Vanik has to be looked into in this appeal filed before this Court. Further, it is also necessary to see whether the Plaintiff is estopped by its conduct in denying such lien or right to set-off.

It is said that '*the oldest of the common law rights of bankers recognized by the courts is what is popularly called as banker's lien*'.[2] '*Every Banker has a lien on all securities deposited by his customer and can hold on to such securities until all monies due to the bank have been settled by the customer……..It is not necessary to lead evidence to prove its existence. It is binding upon the bank's customers whether they know of it or not. It is an incident of the banker-customer relationship. It arises automatically when a person becomes a customer of a bank. The customer need not and invariably does not expressly agree to be the subject to the lien*'.[3]

"*The banker's lien*" states Lord Chorley, "*is a general lien existing by mercantile custom and it is binding upon the customer whether he knows of it or not. Furthermore, although lien normally confers only a right to retain possession, a banker's lien is exceptional and carries with it the valuable right of sale and recoupment. It has indeed been neatly defined as an 'implied pledge'*."- vide Banks and Banking Laws in Sri Lanka by W. S. Weerasooria, updated revised edition 2006, published by the Institute of Bankers Sri Lanka at page 144.

[2] A text book of Commercial Law (business Law), Dr. Wickrema Weerasooria, published in 2000 by The Postgraduate Institute of Management, [25.5] (c) at page 513
[3] Ibid [32.33] at page 634

The same author, in the relevant footnote to the above quoted paragraph referring to Paget's Law of banking (7th ed.1966) pp.482-491 and **Halesowen Presswork and Assemblers Ltd. V Westminster Bank Ltd. (1970) 3 All. E.R 473** at p 477 states respectively as follows;

"*According to Paget, the banker's lien is dependent partly on the general usage of bankers and partly on agreement or course of dealing between the banker and the particular customer*."

'*In a recent case Lord Denning M.R. took the view that the banker's lien has no resemblance to any other kind of lien. "It is no true lien and it would be better to discount the word lien and speak simply of a banker's right to combine accounts or a right to set-off one account against the other".'*

"*The general lien of bankers is part of the law merchant as judicially recognized and attaches to all securities deposited with them as bankers by a customer or by a third person on a customer's account, and to money paid in by, or to the account of a customer*." – See chapter [6.7], page 126, of Banking and Cheque Law of Sri Lanka (Cases and Comments) by Wikrema Weerasooria, published by the Institute of bankers of Sri Lanka,2005, that refers to many case laws and Halsbury's Laws of England (3rd ed). Vol. 2, pp,210-211.

"*Only the banks can combine the bank accounts of their customers. On the other hand, the bank's customers are not entitled to this right. The right to combine accounts -also called right to set-off- is the right that a bank has to retain a credit balance in one account of a customer against a debt balance in another account of the same customer*."- vide chapter [25.5] (b) at page 513 of 'A text book of Commercial law (Business law)' by Dr. Wickrema Weerasooria published by The Postgraduate Institute of Management.

What has been quoted above indicates that lien and/or right to set-off is available for a bank against another account or security of the same customer. A bank cannot hold the money of a customer or set-off credit balance in an account of such customer for debts of another customer. If a third person deposits his money in the account of the customer who has debt balance in another account, the bank may have the lien or right to set off

that money as it is deposited in an account of the customer who has a debt balance in another account, but to hold the money deposited in an account of a third party or set off that money against debt balance of another person cannot be considered as allowed unless there is an agreement between the bank and the said 3rd person to such a set-off or holding of such money in security for that debt of another. Such an agreement entered between the Plaintiff and the Defendant has not been marked in evidence.

The Plaintiff Bank in its written submissions has brought this Court's attention to the law relating to the common law right of set off as summarized by Lloyd L.J. in the decision of **Uttamchandami v Central Bank of India [1989] 139 NL 222** referred to in the **Law and Practice of Banking- Vol I Banker and Customer by J. Milnes Holden 5 Ed.** as follows;

"*Now the banker's right of set off between accounts is well established part of our law of banking. But so far as I am aware,* ***set off has never been allowed save where the accounts are of the same customer, held in the same name, and in the same right****. Even then, the right of set off maybe excluded by agreement express or implied. What is unusual about the present case is that the bank is seeking to set off accounts held in different names, on the ground that in each case the accounts are so called 'nominee' accounts, and that in each case the customer is in reality Mr. Vaswani.*" (highlighted by me)

Further, the Plaintiff Bank in its written submissions states that a bank may not exercise an equitable right of set off unless there is clear and indisputable evidence that the accounts are held as nominee of a third party who owes money to the bank and has cited the case of **Bhogal v Punjab National Bank (1988) 2 AILER 296 CA** where the Defendant Bank claimed an equitable right of set off in respect of a credit balance in one account in the name of one customer (as in the case of the Plaintiff in the present case) with a debit balance on an account in the name of another customer (as in the case of Vanik in the present case). In that case, the bank alleged that the customers were nominees of a third party. The Court of Appeal dismissed the bank's appeal on the ground that equitable set off was not available. At page 301 of the said Judgment, it was stated that:

"*it would be wholly contrary to the rules of the banking law.....if a bank could without warning dishonour a customer's cheque when there were funds to cover it in the account, on a tenuous, if just arguable suspicion that the account was held by the customer as a nominee for a third party who was indebted to the bank, and if the bank could then freeze the customer's account until it had been ascertained after full inquiry after a lengthy trial a year or more later whether the customer was indeed such a nominee. I can see no equity in the bank in such a case."*

It is pertinent to note that in the matter at hand, Defendant Bank's own witness, as explained above, has admitted in evidence that the money deposited in the Plaintiff's account belongs to the Plaintiff bank indicating that the account was not held as a nominee of Vanik or on behalf of Vanik.

The Plaintiff Bank has quoted the following passages from **Saudi Arabian Monetary Agency v Dresdner Bank AG (2005) Lloyd's Law Reports 12**:

'*The question whether the banker, say A, is entitled to set-off a debit balance owed by B against the credit balance on an account in the name of C-on the grounds that C holds that account as nominee or trustee for B-* ***turns on the contract between A and C****. It is, I think, plain that that contract could provide that there were no circumstances in which A could set-off B's debt against the balance on C's account. Conversely, the contract could provide that A could set-off B's debt against the balance on C's account whenever A had reasonable grounds for a belief that B was beneficially interested in the monies in that account. But, if the contract is silent on that question, then- in the light of the decisions of this Court in* ***Bhogal and Uttamchandami****- the rule is that stated by Mr. Justice Scott in the* ***Basna case****; "a bank is not entitled to refuse payment of money deposited with it* ***on the basis merely of an arguable case*** *that some other debtor of the bank has an equitable interest in the money". If it is thought necessary to seek some jurisprudential basis for that rule, then it can be found either in the need to imply a term to that effect into the banking contract between A and C in order to give business efficacy to the relationship of banker and customer; or in the proposition that,* ***where the existence of the equitable interest is not clear and indisputable, equity will not override the clear rules of law on which bankers and customers habitually deal with each other.*** *There is support for both in those passages from the judgments in this*

Court which I have already set out.' (from Lord Chadwick's Judgment), (highlighted by me)

"*I agree with Chadwick L.J. that this appeal is governed by the principles set out in* ***Bhogal v Punjab National Bank [1988] 2 All ER 296****, it would be "lamentable"., to use the word of Scott J at first instance in that case****, if a bank which has received a customer's instructions to transfer what is on the face of the account the customer's money could assert against the customer an equitable set off on the basis that the money in the account was beneficially held for a person who uses himself indebted to the bank, without having "indisputable" evidence that the money in the account was so held.*** *The Judge was correct to hold that the evidence relied on by the bank in the present case was by no means indisputable and that summary judgment should, therefore, be given to the customer.*" (from Lord Justice Longmore's Judgment), (highlighted by me)

As mentioned before there is no contract in writing between the Plaintiff Bank and the Defendant Bank which allows the Defendant Bank to hold as of a lien or to set off the monies in the Plaintiff Bank's account for the debts owed to the Defendant Bank by Vanik. There is no clear evidence to show that Vanik had a beneficial interest over the money deposited and the interest accrued to it in the account held in the name of the Plaintiff Bank by the Defendant Bank. The Defendant Bank's position is that owing to the conduct of the Plaintiff Bank, the Defendant Bank had a right to hold that money and set-off it against the debts of Vanik and the Plaintiff is estopped from denying such right. Whether there was such right created by the conduct of the Plaintiff Bank and whether the Plaintiff is estopped from denying such right will be discussed later in this judgment. However, there is no offer and acceptance, in writing or otherwise, proved constituting a contract between the Plaintiff and the Defendant Bank allowing the Defendant Bank to hold the monies in the account of the Plaintiff or set-off them for the debts of Vanik. It must be noted that D1 dated 06.03.2006 is letter written by CEO of Vanik stating that they have deposited the money in the name of the Plaintiff Bank which will be held in lien till the adjustment of entire liabilities, but there is no such admission made by the Plaintiff Bank. On the other hand, as pointed out earlier, the same CEO giving evidence for the Defendant Bank has categorically admitted that the monies so deposited were Plaintiff's money. The said letter D1 also speaks of an

undertaking by Vanik to deposit outstanding deposit of 100Mn by way of similar deposits. D3 is a letter addressed to the Defendant Bank by the General Manager of the Plaintiff Bank. This only contains that, at the request of Vanik, the Plaintiff Bank was examining a bank guarantee line of 100 Mn, on a **secured basis** and that will be issued on completion of the following requirements:

- Approval by the Board of Directors of the Plaintiff Bank
- Approved by the regulatory authorities
- Completion of security.

The above letter does not contain any consent to create a right to set-off the deposit of 70 Mn or a right to hold the deposit of 70 Mn as of a lien. The Plaintiff was expressing its willingness to issue the guarantee on a secured basis only after completion of three conditions. As such it is difficult to imagine that the Plaintiff was willing to create a lien over its account or right to set-off its monies lying in that account for another's debt without any security and such conditions. It must be noted that this is not a lien or right to set-off that can be arisen without the consent over debtor's own accounts as the Defendant's witness admitted the money that was deposited belonged to the Plaintiff and not Vanik, the debtor. Further, the Plaintiff has marked several documents during the trial, but none of them show the Plaintiff Bank agreed or consented to create such rights in favour of the Defendant Bank on behalf of Vanik.
D4 is a letter that conveys that a letter of lien and a Bank Guarantee would be provided within few days. Thus, it does not indicate any existing lien or right to set off over the deposit of 70Mn.

It is pertinent to note the letter marked P24/X24 dated 03.05.2000, under the topic 'Letter of Comfort'. The letter states that it was written on the request of Vanik and confirm that the 70 Mn placed with the Defendant Bank firstly on 29th December 1999 and 4th January 2000 for varying periods and placed for a period of 12 months on that date, was promoted by Vanik. Further it reveals that Vanik informed the Plaintiff that the placement will enable the Defendant Bank to on-lend the funds for Vanik **at the Defendant Bank's risk and responsibility.** While stating that the Plaintiff did not envisage to withdraw the funds prior to maturity and its anticipation to continue the deposit for further period, the Plaintiff through that letter clearly indicated that issuance

of that letter of comfort did not any way constitute the creation of a lien or any other encumbrance over the said deposit. Thus, this letter clearly communicated that the issuance of it is not intended to create any lien or encumbrances. This is a business letter. If it did not represent the correct state of facts, the Defendant Bank could have replied to it without waiting until the Plaintiff requested to pay the money back with interest in May, 2001, when it held the deposit and then set-off it against the debts of Vanik and indicated, at such later stage, that the Defendant Bank could hold that money until Vanik pays its debt or its right to set-off.

Dias, J. in **Saravanamuttu V De Mel 49 N L R 529 at 542**, held that,

"*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 addressed must reply if he does not agree with or means to dispute the assertions. Of Course there are exceptions to this rule. For example, failure to reply mere begging letters when the circumstances show that there was no necessity for the recipient of the letter to reply can give rise to no adverse inference against the recipient*."

P24/X24 is not a letter that can be ignored if there was any agreement or arrangement between the Plaintiff and the Defendant Bank as it is repugnant to such agreement or arrangement. Since there was no immediate repudiation of the contents of P24/X24, it has to be considered in favour of the Plaintiff and in detriment to the Defendant Bank. Vanik's statement to the Plaintiff mentioned in that letter that such placement of money in deposits would enable the Defendant Bank's on-lending funds to Vanik, cannot be interpreted as indicating a lien or right to set-off for following reasons;

- There is a clear indication in that letter that the said letter was not meant to create a lien or any other encumbrance.
- It may mean only that the Defendant can borrow from the Plaintiff and re-lend it to Vanik; in other words that the deposits would enhance the financial strength of the Defendant to lend money to Vanik.

As explained above, there is no material to show that there was an agreement between the Plaintiff and the Defendant Bank or a consent given by the Plaintiff for the Defendant Bank to hold the deposit of 75Mn until Vanik pays its debts or to set it off

against the said debts. As shown above in P24/X24 there was a clear indication by the Plaintiff that it did not intend or agree to create any encumbrance over its deposits for the benefit of Vanik, which was the debtor.

Now I will endeavor to see whether the Plaintiff by its conduct is estopped from denying that the Defendant Bank had a right to hold Plaintiff's deposit and thereafter set off the said deposit and interest accrued against the debts of Vanik. In this regard, the Defendant Bank has referred to **Collettes Limited V Bank of Ceylon [1984] 2 S L R 253, Burkinshaw V Nicolls (1878) 3 App Cas 1004,1026, Cairncross and Others V Lorimer and Others [1843-1860] All E.R. Rep 174 and Grundt and Others V The Great Boulder Proprietary Gold Mines Limited 59 CLR 641 at 674.** However, to establish that the Plaintiff was so estopped, the Defendant Bank must show that the Plaintiff Bank by its declaration, act or omission intentionally caused or permitted the Defendant Bank to believe that deposits were made creating a lien or right to set-off against the debts of Vanik. In this regard it is worthwhile to see whether any representation or intimation were made by the Plaintiff creating such encumbrances or if there was no such representation or intimation by the Plaintiff, whether the Plaintiff made any omission in refuting such encumbrances if or when it was brought or came to the notice or knowledge of the Plaintiff that the Defendant Bank holds such deposits subject to such encumbrances.

D1 dated 06.03.2000 is a letter from the CEO of Vanik and not by the Plaintiff Bank. What it says is that they have deposited the amounts mentioned in the letter (Totaling up to 70Mn) in the Plaintiff Bank's name which will be held in Defendant Bank's lien until the adjustment of the entire liability (which appears to be 170 Mn). This is not a representation made by the Plaintiff Bank but by the CEO of Vanik. The same CEO while giving in evidence for the Defendant Bank, as explained before, has stated that it was Plaintiff's money, thus not Vanik's money deposited in Plaintiff's name. Thus, there was a misrepresentation by the CEO of Vanik in D1 but not by the Plaintiff. There is nothing to show that the Defendant Bank was vigilant enough to get the contents of this verified from the Plaintiff's Bank. What is important is that D1 does not contain a representation by the Plaintiff. The next letter is the letter marked D4 dated 10.03.2000 which was also written by the same CEO of Vanik to the Defendant Bank. It forwarded the letter written by the Plaintiff Bank addressed to the Defendant Bank, marked D3,

which was referred to before in this judgment. D4 only reveals that the Plaintiff Bank in principle agreed to provide Bank Guarantee for 100Mn as security for Vanik's Debts and Vanik agreed the necessary securities with the Plaintiff Bank. This indicates that the Plaintiff Bank expected security from Vanik to provide a Bank Guarantee. This letter further informs that Vanik would be able to provide the Defendant Bank a letter of lien and a Bank Guarantee to cover the outstanding 170Mn (including the 70Mn in question) within the next three to four days. Thus, the said letter indicates that a letter of lien and a guarantee were yet to be tendered. The monies in the deposit were Plaintiff's money and therefore, as explained before there cannot be a lien in favour of the Defendant Bank for the Debts of Vanik without the consent or approval of the Plaintiff. This letter itself shows that such lien is yet to be provided. This D4 does not contain any representation made by the Plaintiff to the Defendant Bank. The situation existed at the time of writing D4 is further explained by D3 which was attached to P4. As explained before, D3 only conveys that the Plaintiff Bank, on the request of Vanik examining a Bank Guarantee in the line of 100 Mn on a secured basis and it will be issued upon the completion of the 3 requirements mentioned therein which has been referred to earlier in this judgment. It further informs the Defendant Bank, if the Defendant Bank needs further clarifications to contact the Plaintiff Bank. There is no representation or intimation by the Plaintiff Bank that it has already provided a lien or right to set-off or any security over its money against the debts of Vanik or it will provide such rights. This only communicates that once the completion of the requirements mentioned therein guarantee would be issued. Letter marked D5, dated 27.03.2000, written on behalf of the Plaintiff only conveys that out of the said requirements, the approval of the Board was given but a discussion was still in progress with regard to a suitable security for the credit line, and once the security is cleared, the Plaintiff would seek the necessary approval from the regulatory authority. D3 does not contain any representation or intimation by the Plaintiff which may create any lien or right to set-off or any security against the Debts of Vanik over the 70Mn already deposited. D2 is a letter dated 04.04.2000 written by the CEO of Vanik to the Defendant Bank informing that it was arranging a guarantee from the Plaintiff for 100Mn and the Plaintiff has approved the guarantee subject to security documentation and approval of the regulatory authority. This also contain a statement that Vanik was taking steps to renew the Plaintiff's deposit with the Defendant Bank for a further period. However, these documents do not indicate that the Plaintiff made representation or any intimation

to hold its deposits that amounts to 70Mn to hold as a lien or the said amount can be set-off against Vanik's debts. D1 written by Vanik's CEO has not been copied to the Plaintiff. Thus, Vanik's intimation to the Defendant Bank that the monies in the deposits are made in the name of the Plaintiff and it can be held as a lien for Vanik's debts was not copied to the Plaintiff Bank and there is no proof that the Plaintiff knew that. CEO of Vanik has no authority to create a lien or right to set off over Plaintiffs money. Even though, an attempt was made to indicate that there was a tripartite agreement between parties, other than negotiations with regard to 100Mn Bank Guarantee where the Plaintiff had mentioned certain requirements must be fulfilled prior to giving such Guarantee, there is nothing proved to show at least there was an agreement between Vanik and the Plaintiff to create such lien. Vanik's CEO was the one who communicated to the Defendant Bank that it had deposited its money in Plaintiff's name and can hold in lien for Vanik's debts. His evidence that may indicate that there was telephone conversation in that regard cannot be trusted. On the other hand, such an agreement should be between Defendant Bank and the Plaintiff, and no one from the Defendant Bank has given evidence in that regard. On behalf of the Defendant Bank, it is brought to the notice of this Court that one Sunil Mendis who was a signatory to some of the communications marked was not called by the Plaintiff. When nothing was highlighted as evidence whether he was alive, available in the country or still an employee of the Plaintiff during the time the evidence was recorded, it cannot be considered as causing adverse effect on the Plaintiff's case. On the other hand, when there is proof of a time deposit, it has to be paid at its maturity. If there is a lien or any other right that stops the payment, it is the Defendant Bank which should prove the existence of such encumbrances.

Only other argument of the Defendant Bank is based on the fact that the Plaintiff extended or renew its deposit of 70Mn corresponding to the letters written by the Vanik to the Defendant Bank. In this regard the Defendant Bank bring this Court's attention to the letters marked P12 (X12) dated 06.03.2000, P13(X13) dated 05.04.2000, P14(X14) dated 24.04.2000 and P24(X24) dated 03.05.2000 of the Plaintiff which correspond to Vanik's letters marked D1(R3) dated 06.03.2000, D2 (R8) dated 04.04.2000, D4(R5) dated 10.03.2000, D5 (R7) dated 27.03.2000 etc. The Defendant also bring to the attention of Court that details of the Plaintiff's deposit referred to in letter marked P11 is as same as in Vanik's letter marked D1. This Court observes that

when the CEO of Vanik states that Vanik had deposited 3 deposits totaling up to 70 Mn in the Plaintiff's name in D1, on the same date the Plaintiff had confirmed the extension of the 70Mn until 5th April 2000 by P12. However, this Court also observes these were deposits not first made on that date but were originally made on 19.01.2000, 25.02.2000 and 02.03.2000 by the Plaintiff. However, in D4 dated 10.03.2000, while referring to the position of ongoing negotiations with the Plaintiff Bank, Vanik had expressed that it would be able to provide a letter of lien and a Bank Guarantee within few days indicating that still that there is no finality with regard to creating a lien over Plaintiff's deposits. This Court further observes that, when, by D2 dated 04.04.2000, CEO of Vanik had stated that Vanik would take action to renew the deposits of Plaintiff for a further period, the Plaintiff, by P13 dated 05.04.200, had confirmed the re-investment of the deposits up to 5th May 2000. D5 only indicates that the Board of the Plaintiff Bank approved a guarantee line of 100Mn (this was part of the 170Mn total liability of Vanik) for Vanik but it also reveals that discussions were in progress with regard to the security for the said credit line and if the security is cleared the Plaintiff would seek the necessary approval of the regulatory authorities. Thus, D5 clearly indicates that even the bank guarantee from the Plaintiff was also not finalized as it was seeking for a security for such credit line and the approval from the regulatory authority. What is important is that none of these communications indicates that Plaintiff was aware of an already existing lien over or right to set-off over its deposits and agreed or consented or approved such. Mere extension of the deposit on two occasions parallel to Vanik's communication with the Defendant Bank is insufficient to decide that the Plaintiff by its conduct agreed for a lien or to right to set-off over its deposits against the debts of Vanik. Such extensions of the period of the deposits would have been done for the purposes of the Plaintiff or as revealed in P24, on Vanik's request to enable the on-lending capacity of the Defendant Bank by strengthening its financial competence or due to the ongoing discussions with Vanik to provide a bank guarantee when other requirements were fulfilled such as security for providing such guarantee and approval of the regulatory authority. Hence, there was no sufficient material to say that by conduct of the Plaintiff, it created a lien or right to set-off over its deposits against the debts of Vanik and as such, the Plaintiff is not estopped from denying such claims of the Defendant Bank.

The Defendant Bank in its written submission has referred to **Federal Commerce & Navigation Co. Ltd. V Molena Alpha INC [1978] 1 QB 927** and **Hank V Green [1958] 2 QB 9** to show that equitable set-off is available where there is cross claims and equitable grounds to set-off. However, as indicated above, the monies deposited in the account of the Plaintiff was Plaintiff's money as admitted by the Defendant's witness, namely the C E O of Vanik. There was no agreement, consent expressed by the Plaintiff in writing or by conduct giving such right to the Defendant Bank to hold that money of the Plaintiff deposited with it or set it off against the debts of a third Party. Therefore, the learned High Court Judge of the Western Province sitting in the High Court known as Commercial High Court should have answered the issues in favour of the Plaintiff and granted reliefs (a), (b) and (c) and (h) in its plaint dated 06.06.2000. I do not see any sufficient evidence that have been led to prove damages as claimed by the Plaintiff to grant relief as prayed in prayer (d) of the plaint.

Hence, this Appeal is allowed and the Judgment dated 12.10.2010 of the learned High Court Judge is set aside and the learned High Court Judge is directed to enter Judgment in favour of the Plaintiff in accordance with this Judgment.
Appeal Allowed with Costs.

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Judge of the Supreme Court

Hon. Vijith K. Malalgoda, PC, J.
I agree.

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Judge of the Supreme Court

Hon. P. Padman Surasena, J.
I agree.

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Judge of the Supreme Court.