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

S.C. CHC (Appeal) No. 21/2006
S.C. (H.C.) L.A. No. 27/2006
H.C. Civil No. 75/99 (1)

People's Bank
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

PLAINTIFF-PETITIONER-APPELLANT

Vs.

Yashodha Holdings (Pvt.) Ltd.,
No. 455, Galle Road,
Colombo 03.

Presently at No. 142A, 2nd Floor,
S. de S. Jayasinghe Mawatha,
Nugegoda.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE	:	Shirani A. Bandaranayake, J., N. G. Amaratunga, J., & Saleem Marsoof, J.
COUNSEL	:	S. A. Parathalingam, P. C. with Kushan de Alwis, Hiran Jayasuriya and Nishkan Parathalingam for Plaintiff-Petitioner-Appellant Manohara de Silva, P.C., with Jasa Jayasekera and Nimal Hippola for Defendant-Respondent-Respondent
ARGUED ON	:	25.09.2008
WRITTEN SUBMISSIONS TENDERED ON	:	Plaintiff-Petitioner-Appellant : 10.12.2008 Defendant-Respondent-Respondent : 31.03.2009
DECIDED ON	:	25.06.2009

MARSOOF, J.

I have had the advantage of perusing the judgment prepared by my sister Bandaranayake, J., in draft, and I agree that for the reasons to be set out hereinafter, the appeal should be allowed, the order of the Commercial High Court dated 16th February 2006 set aside, and the said High Court directed to make order for the execution of the decree pending appeal.

One of the questions that was argued with great vigor before the Commercial High Court as well as before this Court was whether at the relevant time, Section 35(1) of the English Companies Act of 1989 applied in Sri Lanka. This appeal arises from an action instituted by the Plaintiff-Petitioner-Appellant (hereinafter referred to as the "Appellant") in the Commercial High Court in July 1999 to recover from the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") money advanced as a short term loan with interest due thereon to finance the import of 14,907 metric tons of cement worth US $ 1,007,392.70 presumably for trading. It appears from the Memorandum of Association of the Respondent (X2) that the main object of the Company was to carry on the business of a holding company. The Memorandum disclosed only three primary objects, none of which included the business of trading in cement, and there were no "other" objects as contemplated by Section 4(3) of the Companies Act No. 17 of 1982, which admittedly applies to the transaction that constitutes the subject matter of this appeal. It is therefore clear that the loan had been granted for an object which was *ultra vires* the Respondent.

It was in order to overcome the defense of *ultra vires* raised by the Respondent that the learned Counsel for the Appellant has relied on Section 3 of the Civil Law Ordinance to invoke the benefit of Section 35 (1) of the English Companies Act of 1989 which provides that-

> "(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The above-quoted provision was intended to mitigate the harshness of the doctrine of *ultra vires*, which had originated from the English law but had found its way to almost all jurisdictions in the world. The doctrine was originally conceived of as an important principle of stakeholder protection, but it caused so much unhappiness to those who imprudently transacted business with companies acting beyond their objects that it later had few advocates, and in most countries legislation has been enacted to bring about its demise. However, as Prof. Kent Greenfield observes in his enlightening article entitled 'Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality' published in (2001) 87 Virginia Law Review 1279 at page 1284, "notwithstanding the many strong reasons for the downfall of the *ultra vires* doctrine, the doctrine did not erode to nothingness." It is noteworthy that Section 35(2) of the English Act enables a member of a company to bring proceedings to restrain any act of the company which would, but for subsection 35 (1) of the Act, be *ultra vires*, but the effect of Section 35 (1) is that this would not affect the rights of any person who has transacted business with a company.

There are similar provisions in the current Sri Lanka Companies Act No. 7 of 2007 which has taken away the requirement that a company should have a memorandum of association, but permits an objects clause to be included in the articles of association of a company. Section 17 of the Sri Lankan Act provides that-

"(1) Where the articles of a company sets-out the objects of the company, there shall be deemed to be a restriction placed by the articles in carrying on any business or activity that is not within those objects, unless the articles expressly provide otherwise.

(2) Where the articles of a company provide for any restriction on the business or activities in which the company may engage—

(a) the capacity and powers of the company shall not be affected by such restriction; and

(b) no act of the company, no contract or other obligation entered into by the company and no transfer of property by or to the company, shall be invalid by reason only of the fact that it was done in contravention of such restriction."

The effect of Section 35 (1) of the English Act of 1989 and Section 17 (2) of the Sri Lankan Act of 2007 is to confine the doctrine of *ultra vires* to internal management but saving the actions and contracts of companies from invalidity. Learned Counsel for the Respondent has strenuously contended that while Section 17(2) of the Companies Act of 2007 has no application to this case as the law that has to be applied is the law that was in force at the time of the institution of the action in July 1999, the provisions of the English Companies Act of 1989 were never part of our law.

Learned President's Counsel for the Appellant has argued, with great force, that even if the salutary provisions of Section 17(2) of the Sri Lankan Companies Act of 2007 could not have applied in favor of his client, the People's Bank, Section 35(1) of the English Companies Act of 1989 has become part of the law of Sri Lanka by virtue of Section 3 of the Civil Law Ordinance No. 5 of 1852 (Cap. 79, Legislative Enactments of Ceylon, 1956). This section provides that-

"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, *unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted*."(*emphasis added*)

He has submitted that the said provision could have entered into our law through two gateways, namely, "corporations" and "banks and banking" both found in the above quoted section. For this proposition, he has relied very heavily on the decision of the Court of Appeal in *Wright and Three Others v People's Bank* [1985] 2 Sri LR 292 and three decisions of the Supreme Court, namely *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, *Duhilanomal and Others v Mahakande Housing Co. Ltd.*, [1982] 2 Sri LR 504, and *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22. In all but the last of these cases, principles of English law including statutory law were held to be applicable in Sri Lanka having being incorporated by reference as provided in the Civil Law Ordinance, and in *Amarasekere v Mitsui and Company Ltd. and Others* too, as we shall see later, there is a reference to the Civil Law Ordinance.

The last of these cases, *Wright and Three Others v People's Bank,* had nothing to do with company law, and the question that arose was whether certain brokers had the authority to pledge the "Ceylon produce" which belonged to their clients for the purpose of obtaining the loan, the proceeds of which were sought to be recovered by the Bank. In answering the question in the affirmative, the learned District Judge had relied on the provisions of Section 2(1) of the English Factors Act of 1889, which provided that a mercantile agent had authority to pledge goods of the clients who were the owners of the goods. The Court of Appeal had no difficulty in affirming the decision of the learned District Judge since in terms of Section 3 of the Civil Law Ordinance the law applicable in Sri Lanka with respect to any questions or issues which may arise with respect to the law of principals and agents would be "the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England." It is noteworthy that G.P.S de Silva, J (as he then was) noted at page 300 of his judgment that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." It is also instructive to note that responding to a submission that the only authority the brokers had was the authority conferred on them by the licence issued under the Auctioneers and Brokers Ordinance (Cap. 109, Legislative Enactments of Ceylon, 1956), G.P.S de Silva J observed at page 303 that-

> "…..on a reading of that Ordinance it would appear that it does not seek to regulate the rights and duties of a broker. It is rather a statute which makes provision to license the practice of the trade or business of a broker. There is nothing in the Ordinance which prohibits the pledging of goods if such power exists under another statute. The Ordinance is certainly not exhaustive of the rights of a broker and appears to be more in the nature of a revenue statute…"

Learned President's Counsel for the Appellant also relied on *Duhilanomal and Others v Mahakande Housing Co. Ltd.*, [1982] 2 Sri LR 504, for the proposition that Section 3 of the Civil Law Ordinance had the effect of making Section 35(1) of the English Companies Act of 1989 applicable to the determination of the appeal at hand. In this case, it was held by the Supreme Court that despite the existence of the Partnership Ordinance No. 21 of 1866, the provisions of the English Partnership Act of 1890 regulate the rights and liabilities of partners in this country by virtue of Section 3 of the Civil Law Ordinance. I cannot see how this decision can assist the Appellant as the Partnership Ordinance consists of only seven sections and is by no means an exhaustive legislation regulating the rights and duties of partners which could have the effect of precluding the application of Section 3 of the Civil Law Ordinance. By contrast, the Companies Act No. 17 of 1982, which was the applicable company legislation at the time the action from which this appeal arises was instituted, is described in its preamble as "an act to amend and consolidate the law relating to companies" and contains elaborate provisions for the registration and administration of companies in Sri Lanka and also deals specifically with the rights of shareholders.

The right of a shareholder to file a derivative action was considered by this Court in *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22, in the context of an appeal against the order of the Court of Appeal (reported in [1992] 1 Sri LR 29) granting leave to appeal against the interim-injunction issued by the District Court of Colombo at the instance of a shareholder who did not have the requisite voting strength to initiate proceedings in terms of 210 to 211 of the Companies Act of 1982. All that the Supreme Court had to decide was whether the Court of Appeal was right in thinking that the shareholder had a *prima facie* case and reasonable prospect of success to obtain the interim-injunction, and at page 29 of the judgment Amerasinghe J. referred to

Section 3 of the Civil Law Ordinance only because the Court of Appeal had invoked it to bring in the English law which had been developed in *Wallersteiner v Moir (No.2)* so as to permit a derivative action. The Supreme Court, however, was careful not to call in aid Section 3 of the Civil Law Ordinance, and treating the question as one of standing, reasoned that if in the context of the allegation that company funds were being siphoned off and sent abroad a shareholder is unable to convince the company to take effective action to protect its own interests, the shareholder has every right as a representative of the company to obtain an injunction. At page 36 of the Supreme Court judgment, Amarasinghe J explained the dilemma the original court was faced with in the following words:

> "I do appreciate the dilemma that emerges when a court is confronted with an application for an injunction by a plaintiff who brings the application in a derivative capacity. On the one hand, if the plaintiff can require the court to assume as a fact every allegation in the plaint as proved, the purpose of the rule in *Foss v Harbottle* would be easily outmanoeuvred by the mere allegation of fraud and control. If, on the other hand, the interim injunction is to be refused until the issue of fraud or control is decided, the injunction would serve very little or no purpose. The interests of justice, I think, are served in the circumstances by requiring the plaintiff to establish a *prima facie* case that (1) the company is entitled to the relief claimed, and (2) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle.*"

It is universally acknowledged that the decision in *Wallersteiner v Moir (No.2)* was an exception to the rule in *Foss v Harbottle* [1843] 2 Hare 461. The essence of the rule is that, where the company suffers harm, the company itself is the true and proper claimant, to the exclusion of shareholders. The rule and the exceptions have been developed in the context of English and local statutory provisions which are substantially similar, and if, notwithstanding the comprehensive nature of the Companies Act of 1982, English decisions have been considered by our courts as did Amarasinghe J in the Colombo Hilton Case, it is clearly because of the persuasive value of those decisions, and not by reason of anything contained in Section 3 of the Civil Law Ordinance. However, in seeking enlightenment from foreign decisions, it is necessary as was stressed by Amarasinghe J in *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri LR 314 at 351, to "proceed with caution" as the constitutional or statutory provisions on which such decisions were made may be substantially different from our own. It is also remarkable that a twentieth century parallel to the nineteenth century rule of standing enunciated in *Foss v Harbottle* is the decision in *Durayappah v Fernando and Others* 69 NLR 265, in which the Privy Council held that when a Municipal Council is dissolved, the Mayor of the Council had no right to complain independently of the Council. Rules of standing such as this have been relaxed by the courts from time to time, and in almost all jurisdictions, and in doing so, the courts have not lost sight of the particular statute in the context of which the question of standing has arisen.

There is no doubt that in terms of Section 3 of the Civil Law Ordinance, Acts of the Parliament of England as well of principles of English common law could have been legitimately applied in Sri Lanka had there been no elaborate legislative provision such as was found in the Companies Act of 1982 dealing with all aspects of company law. However, it is noteworthy that towards the end of the nineteenth century, in the absence of any comprehensive company legislation in this county, several ordinances fashioned on the then prevailing English legislation on joint stock companies, such as the Joint Stock Companies Ordinance No. 4 of 1861, No. 6 of 1888, No. 3 of 1883 and No. 2 of 1897 were enacted, but they did not deal with all aspects of company law. It was in this scenario that De Sampayo J observed in *The Ceylonese Union Co. v Vyramuttan* 19 NLR 250 at 252, that "….until some comprehensive law relating to companies is passed locally, we must, when any question is not covered by any provision in our Ordinance, decide the same as far as possible by reference to the English law." This was how basic principles of English company law, including the rule in *Foss v Harbottle* [1843] 2 Hare 461 and the doctrine of *ultra vires* enunciated in the decision of the House of Lords in *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* [1875] LR 7 HL 653, initially came to be introduced into our legal fabric.

The first comprehensive peace of legislation enacted in Sri Lanka with respect of companies was the Companies Ordinance No. 51 of 1938 (Cap. 145, Legislative Enactments of Ceylon, 1956). It is important to note that despite the absence in the aforesaid Joint Stock Companies Ordinances and the Companies Ordinance of 1938 of any provision expressly incorporating the doctrine of *ultra vires,* our courts have considered the concept as part of our law. In *Jupiter Cigarette & Tobacco Co. Ltd. v. Soysa* 72 NLR 12 (SC) 74 NLR 241 (PC), the Privy Council not only recognized the doctrine within the framework of the Companies Ordinance of 1938, but also applied the exception to it that was evolved in *Royal British Bank v Turquand* [1856] 6 E&B 327 (the well known 'Turquand rule'). The question for decision in the *Jupiter Cigarette* case was whether a mortgage bond purported to have been executed by a company was binding on the company notwithstanding that the number of directors who signed the bond happens to be less than the number required by the articles of the company. In answering the question in the affirmative, Lord Wilberforce, at page 245 of the judgement observed that-

> "In considering questions such as this, which are of common occurrence, particularly in relation to private companies, the Courts have evolved principles, basically of common sense, which, while respecting the separate corporate entity of the company concerned, enables it to, bind itself, as against third parties, in the absence of technicality or the formalities of internal procedure."

Even after the enactment of the Companies Act of 1982, our courts have in innumerable decisions applied the doctrine of *ultra vires*, which has been recognized as a fundamental principle of not only our company law but also of our administrative law. Thus, in *Patrick Lowe & Sons and Others v Commercial Bank of Ceylon* Ltd [2001] 1 Sri LR 280, at page 284, S.N. Silva CJ observed that-

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* and *Attorney General v The Great Eastern Railway*)**.**"

The fact that our courts have shown great reverence to decisions of English courts in the realm of company law does not necessarily mean that the entire body of English company law has been imported into our country. It is true that by Section 3 of the Civil Law Ordinance the entire body of English law relating to "corporations" was introduced into our legal system, but that was subject to the qualification contained in the said section that the law of England will not have application in any case if other provision is made by any local enactment. Thus, the comprehensive nature of the provisions of the Companies Act of 1982, and the absence therein of a '*casus omissus'* provision which enables the reception of principles of English law to deal with matters, if any, not specifically provided for in the Act, effectively prevented the application of English law except as persuasive authority for the purpose of interpreting provisions which were identical or substantively similar to the provisions in force in England.

Another important factor that would militate against the application of any provision of English law seeking to modify the doctrine of *ultra vires* into our law in the absence of amending legislation, is that our Companies Act of 1982 is an exhaustive enactment which contains a provision that may be regarded as expressly embodying the doctrine of *ultra vires.* Section 4 of the Companies Act of 1982, distinguishes between primary and "other" objects, and provides in Section 4(1) that "the memorandum of every company shall, in stating the objects of the company, set out specifically, the primary objects of the company, that is to say, the objects which the subscribers or promoters intend that the company should carry out during the period of five years from the date of the commencement of business by the company." Section 4(2) provides for the incorporation in the memorandum of association, of "ancillary powers", and Section 4(3) enacts that-

> "(3) Nothing in the provisions of subsection (1) or subsection (2) shall be deemed or construed to preclude the memorandum from containing a separate statement of objects, not being primary objects, or of powers (whether general or special), in addition to those specifically set out under the provisions of subsections (1) and (2):
>
> Provided, however, that *no such object or power may be carried out or exercised by the company except with the prior sanction of a special resolution of the company*."(*emphasis added*)

It is clear from the above-quoted provision that a company is prohibited from entering into any transaction outside its primary objects and ancillary powers, even if it be for an "other" object within the meaning of Section 4(3) of the Act, unless it is sanctioned by a special resolution of company. It therefore goes without saying that any transaction which falls neither within the primary objects nor the "other" objects of a company, cannot be validly entered into by a company unless it is one that has been sanctioned as contemplated by Section 4(3) of the Act. Such a transaction is therefore *ultra vires* and not binding on the company. In view of these clear provisions of the local enactment, I am firmly of the opinion that Section 35 of the English Companies Act of 1989 could never have entered into the Sri Lankan legal fabric through the "corporations" gateway.

There remains the question whether the English law provision could have entered through the "banks and banking" gateway also found in Section 3 of the Civil Law Ordinance. For this argument, learned President's Counsel for the Appellant has relied heavily on the decision of the Supreme Court in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457. He has contended that in the said case, "a five judge bench of the Supreme Court consisting of Their Lordships H.N.G. Fernando CJ, Sirimanne J, Alles J, Weeramantry J and Wijayatilake J, unanimously held that *inter alia* that the English Law of Conversion under the common law of England applies to Sri Lanka through the operation of the Civil Law Ordinance."(*Vide* - paragraph 13.1 of the Written Submissions of the Appellant dated 17th November 2008). Without going into details, I am constrained to observe that while a closer examination of the separate judgments delivered in this case by the five judges reveals considerable differences of opinion in regard to the basis of applying principles of English law to the facts of that case, the decision is not very helpful to the determination of the present appeal for two reasons. Firstly, it is noteworthy that the Bills of Exchange Ordinance, unlike the Companies Act of 1982, contains a *casus omissus* provision in Section 98(2), which seeks to make the rules of the common law of England applicable in Sri Lanka "save insofar as they are inconsistent with the express provisions of this Ordinance, or any other enactment". Secondly, even though one of the parties to this case is a Bank, the question that looms large in this case is one of *ultra vires*, and not any issue relating to banks and banking.

While for the above reasons, I am of the opinion that the learned Judge of the Commercial High Court cannot be faulted for entertaining serious doubts about the relevance of Section 35(2) of the English Companies Act of 1989 for deciding this case, this does not dispose of this appeal. This Court cannot show a Nelsonian eye to the fact that the Respondent will be unjustly enriched if the Appellant cannot recover the money advanced by it to the Respondent on a straightforward short term loan. If the transaction on the basis of which money was advanced to the Respondent is a nullity, then at least the money so advanced should be capable of being recovered. It is true that in *Sinclair v Brougham* [1914] AC 398, due to insistence of an imputed or fictional contract, the English House of Lords missed an opportunity of developing a general restitutionary remedy to redress unjust enrichment, but we cannot forget the ancient authority of *Moses v Macferlan* [1760] 2 Burr. 1055 in which Lord Mansfield observed at page 1012 that ‘‘ if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit)* founded in the equity of the plaintiff's case, as it were, upon a contract (" *quasi ex contractu"*) as the Roman law expresses it)." This reasoning has been followed in England (*Re Coltman; Coltman v. Coltman* [1881], 19 Ch.D. 64), Australia (*In re K.L. Tractors Ltd.*, ([1961], 106 C.L.R. 318) and Canada (*Breckenridge Speedway Ltd. et al. v. R.*, [1970] S.C.R. 175) to found an action for money had and received, and perhaps prompted Vicount Haldane to observe in *Dodwell & Co v John* 20 NLR 206 at page 211, that "under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund." Weeramantry J, in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, after making an exhaustive examination of all relevant authorities, set out his conclusions at page 544 of the judgment as follows:-

> "For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment. I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts."

There is however, one limitation that arises in the application of the general principle of unjust enrichment to the facts of this case, namely that what the Appellant has claimed from the Respondent in the action filed by it is the full amount due on the loan transaction, rather than a mere refund of the amount advanced. The restitutionary remedy cannot be availed of to obtain such broad relief.

In the circumstances, it is necessary to look at the other question on which leave to appeal has been granted by this Court, namely, whether the Respondent is estopped from asserting that "the borrowing and / or receiving the said loan facility from the Appellant is *ultra vires* of its Memorandum and Articles of Association". It is in evidence that the Respondent applied for the loan in question from the Appellant Bank by a loan application dated 9th November 1995 (X18) which contained several stipulations including a promise to repay the amount of the loan with interest thereon within ninety days. In the context of the issue of estoppel that arises in this case, it is necessary to note paragraphs 5, 6 and 7 of the loan application which provided as follows:-

> "5. All representations and statements made to you us, our Agents, employees or Officers whether in writing or otherwise on our behalf or purporting to be on our behalf are hereby warranted true and correct and intended to be acted upon and shall form the basis of the contract or obligation intended to result from or arise upon your acting upon the request hereby made for an advance.
>
> 6. As Borrowers we shall jointly and severally be liable to repay the advance and interest due to you.
>
> 7. We hereby irrevocably authorize People's Bank without any notice to us to debit our current account maintained with People's Bank to settle People's Bank with all monies due from us by way of Capital interest and other charges in respect of this transaction, and authorize to set off any sum or sums of money due to us from People's Bank for the recovery of the sum or sums of money advance/to be advanced."

It is evident from the testimony of W.D. Dayananda, Senior Manager of the Appellant Bank that the said bank had previously granted several loan facilities to one Yasasiri Kasturiarachchi, and that the Respondent company was later floated by him and that the Bank had acted in good faith in granting the said loan to the newly formed company to enable it to clear a quantity of cement which had been imported from China. It is also evident from the said loan application and the receipt dated 9th November 1995 (X19) issued acknowledging the acceptance of the money advanced, both signed by the said Yasasiri Kasturiarachchi and one other Director of the Respondent company, that the loan facility was granted on the very day the application was made, and that in doing so, the Appellant had acted on the basis of the representation made by the Respondent that it was competent to enter into the loan transaction in question and as borrower it was liable to repay the loan and interest due thereon.

Spencer Bower, in *The Law relating to Estoppel by Representation*, (4th Edition), paragraph I.2.2, explains the concept of estoppel by representation of fact in the following terms:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment*, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (*emphasis added*)

It is clear from the evidence in this case that the Respondent has represented to the Appellant that it was competent to enter into the loan transaction in question and it is bound in law to honor its promise to repay the amount of the loan with interest, and that the Appellant had been lead to believe that the said representation was true and had acted thereon to its prejudice. The courts in England have shown some restraint in using the concept of estoppel to hold companies liable on *ultra vires* transactions, and in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Limited* [1964] 1 All E.R. 630, the English Court of Appeal specifically held that "no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself." However, the concept of estoppel has successfully been deployed in the United States from the nineteenth century to overcome the plea of *ultra vires*, as it appears from decisions such as *Whitney Arms Co. v Barlow* 63 New York 62 [1875]. In that case, a New York Court noted at page 70 that "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract." The principle enunciated in this decision was approved by the United States Supreme Court in *Eastern Building & Loan Association of Syracuse v Williamson* 189 US 122 [1903]. As Seymour D. Thompson observed in 'The Doctrine of Ultra Vires in Relation to Private Corporations', 28 American Law Rev. 376, 387 (1894) -

> "The judicial and professional conscience . . . could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it and repudiate it because it had been made with an artificial person having no power to make it."

I see no reason why the concept of estoppel cannot be employed in Sri Lanka to defeat such a plea in appropriate circumstances. I am therefore of the opinion that the Respondent is estopped from taking up the defence of *ultra vires* in the circumstances of this case.

Accordingly, for the reasons stated above, I agree with the conclusion reached by Bandaranayake, J., in her judgment that the appeal should be allowed, the order of the High Court of Colombo (Commercial) dated 16th February 2006 should be set aside and the said High Court should be directed to make order for the execution of the decree pending appeal. I make no order for costs, in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

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

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S.C. (H.C.) L.A. No. 28/2006
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MARSOOF, J.

I have had the advantage of perusing the judgment prepared by my sister Bandaranayake J in draft, and I agree that for the reasons to be set out hereinafter, the appeal should be allowed, the order of the Commercial High Court dated 16th February 2006 set aside, and the said High Court directed to make order for the execution of the decree pending appeal.

One of the questions that was argued with great vigor before the Commercial High Court as well as before this Court was whether at the relevant time, Section 35(1) of the English Companies Act of 1989 applied in Sri Lanka. This appeal arises from an action instituted by the Plaintiff-Petitioner-Appellant (hereinafter referred to as the "Appellant") in the Commercial High Court in July 1999 to recover from the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") money advanced as a short term loan with interest due thereon to finance the import of 10,186.10 metric tons of sugar worth US $ 4,104,489 presumably for trading. It appears from the Memorandum of Association of the Respondent (X2) that the main object of the Company was to carry on the business of a holding company. The Memorandum disclosed only three primary objects, none of which included the business of trading in sugar, and there were no "other" objects as contemplated by Section 4(3) of the Companies Act No. 17 of 1982, which admittedly applies to the transaction that constitutes the subject matter of this appeal. It is therefore clear that the loan had been granted for an object which was *ultra vires* the Respondent.

It was in order to overcome the defense of *ultra vires* raised by the Respondent that the learned Counsel for the Appellant has relied on Section 3 of the Civil Law Ordinance to invoke the benefit of Section 35 (1) of the English Companies Act of 1989 which provides that-

> "(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The above-quoted provision was intended to mitigate the harshness of the doctrine of *ultra vires*, which had originated from the English law but had found its way to almost all jurisdictions in the world. The doctrine was originally conceived of as an important principle of stakeholder protection, but it caused so much unhappiness to those who imprudently transacted business with companies acting beyond their objects that it later had few advocates, and in most countries legislation has been enacted to bring about its demise. However, as Prof. Kent Greenfield observes in his enlightening article entitled 'Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality' published in (2001) 87 Virginia Law Review 1279 at page 1284, "notwithstanding the many strong reasons for the downfall of the *ultra vires* doctrine, the doctrine did not erode to nothingness." It is noteworthy that Section 35(2) of the English Act enables a member of a company to bring proceedings to restrain any act of the company which would, but for subsection 35 (1) of the Act, be *ultra vires*, but the effect of Section 35 (1) is that this would not affect the rights of any person who has transacted business with a company.

There are similar provisions in the current Sri Lanka Companies Act No. 7 of 2007 which has taken away the requirement that a company should have a memorandum of association, but permits an objects clause to be included in the articles of association of a company. Section 17 of the Sri Lankan Act provides that-

“ (1) Where the articles of a company sets-out the objects of the company, there shall be deemed to be a restriction placed by the articles in carrying on any business or activity that is not within those objects, unless the articles expressly provide otherwise.

(2) Where the articles of a company provide for any restriction on the business or activities in which the company may engage—

(a) the capacity and powers of the company shall not be affected by such restriction; and

(b) no act of the company, no contract or other obligation entered into by the company and no transfer of property by or to the company, shall be invalid by reason only of the fact that it was done in contravention of such restriction.”

The effect of Section 35 (1) of the English Act of 1989 and Section 17 (2) of the Sri Lankan Act of 2007 is to confine the doctrine of *ultra vires* to internal management but saving the actions and contracts of companies from invalidity. Learned Counsel for the Respondent has strenuously contended that while Section 17(2) of the Companies Act of 2007 has no application to this case as the law that has to be applied is the law that was in force at the time of the institution of the action in July 1999, the provisions of the English Companies Act of 1989 were never part of our law.

Learned President’s Counsel for the Appellant has argued, with great force, that even if the salutary provisions of Section 17(2) of the Sri Lankan Companies Act of 2007 could not have applied in favor of his client, the People’s Bank, Section 35(1) of the English Companies Act of 1989 has become part of the law of Sri Lanka by virtue of Section 3 of the Civil Law Ordinance No. 5 of 1852 (Cap. 79, Legislative Enactments of Ceylon, 1956). This section provides that-

“In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, *unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted*.”(*emphasis added*)

He has submitted that the said provision could have entered into our law through two gateways, namely, “corporations” and “banks and banking” both found in the above quoted section. For this proposition, he has relied very heavily on the decision of the Court of Appeal in *Wright and Three Others v People’s Bank* [1985] 2 Sri LR 292 and three decisions of the Supreme Court, namely *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, *Duhilanomal and Others v Mahakande Housing Co. Ltd.*, [1982] 2 Sri LR 504, and *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22. In all but the last of these cases, principles of English law including statutory law were held to be applicable in Sri Lanka having being incorporated by reference as provided in the Civil Law Ordinance, and in *Amarasekere v Mitsui and Company Ltd. and Others* too, as we shall see later, there is a reference to the Civil Law Ordinance.

The last of these cases, *Wright and Three Others v People's Bank,* had nothing to do with company law, and the question that arose was whether certain brokers had the authority to pledge the "Ceylon produce" which belonged to their clients for the purpose of obtaining the loan, the proceeds of which were sought to be recovered by the Bank. In answering the question in the affirmative, the learned District Judge had relied on the provisions of Section 2(1) of the English Factors Act of 1889, which provided that a mercantile agent had authority to pledge goods of the clients who were the owners of the goods. The Court of Appeal had no difficulty in affirming the decision of the learned District Judge since in terms of Section 3 of the Civil Law Ordinance the law applicable in Sri Lanka with respect to any questions or issues which may arise with respect to the law of principals and agents would be "the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England." It is noteworthy that G.P.S de Silva J (as he then was) noted at page 300 of his judgment that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." It is also instructive to note that responding to a submission that the only authority the brokers had was the authority conferred on them by the licence issued under the Auctioneers and Brokers Ordinance (Cap. 109, Legislative Enactments of Ceylon, 1956), G.P.S de Silva J observed at page 303 that-

> "…..on a reading of that Ordinance it would appear that it does not seek to regulate the rights and duties of a broker. It is rather a statute which makes provision to license the practice of the trade or business of a broker. There is nothing in the Ordinance which prohibits the pledging of goods if such power exists under another statute. The Ordinance is certainly not exhaustive of the rights of a broker and appears to be more in the nature of a revenue statute…"

Learned President's Counsel for the Appellant also relied on *Duhilanomal and Others v Mahakande Housing Co. Ltd.,* [1982] 2 Sri LR 504, for the proposition that Section 3 of the Civil Law Ordinance had the effect of making Section 35(1) of the English Companies Act of 1989 applicable to the determination of the appeal at hand. In this case, it was held by the Supreme Court that despite the existence of the Partnership Ordinance No. 21 of 1866, the provisions of the English Partnership Act of 1890 regulate the rights and liabilities of partners in this country by virtue of Section 3 of the Civil Law Ordinance. I cannot see how this decision can assist the Appellant as the Partnership Ordinance consists of only seven sections and is by no means an exhaustive legislation regulating the rights and duties of partners which could have the effect of precluding the application of Section 3 of the Civil Law Ordinance. By contrast, the Companies Act No. 17 of 1982, which was the applicable company legislation at the time the action from which this appeal arises was instituted, is described in its preamble as "an act to amend and consolidate the law relating to companies" and contains elaborate provisions for the registration and administration of companies in Sri Lanka and also deals specifically with the rights of shareholders.

The right of a shareholder to file a derivative action was considered by this Court in *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22, in the context of an appeal against the order of the Court of Appeal (reported in [1992] 1 Sri LR 29) granting leave to appeal against the interim-injunction issued by the District Court of Colombo at the instance of a shareholder who did not have the requisite voting strength to initiate proceedings in terms of 210 to 211 of the Companies Act of 1982. All that the Supreme Court had to decide was whether the Court of Appeal was right in thinking that the shareholder had a *prima facie* case and reasonable prospect of success to obtain the interim-injunction, and at page 29 of the judgment Amerasinghe J. referred to

Section 3 of the Civil Law Ordinance only because the Court of Appeal had invoked it to bring in the English law which had been developed in *Wallersteiner v Moir (No.2)* so as to permit a derivative action. The Supreme Court, however, was careful not to call in aid Section 3 of the Civil Law Ordinance, and treating the question as one of standing, reasoned that if in the context of the allegation that company funds were being siphoned off and sent abroad a shareholder is unable to convince the company to take effective action to protect its own interests, the shareholder has every right as a representative of the company to obtain an injunction. At page 36 of the Supreme Court judgment, Amarasinghe J explained the dilemma the original court was faced with in the following words:

> "I do appreciate the dilemma that emerges when a court is confronted with an application for an injunction by a plaintiff who brings the application in a derivative capacity. On the one hand, if the plaintiff can require the court to assume as a fact every allegation in the plaint as proved, the purpose of the rule in *Foss v Harbottle* would be easily outmanoeuvred by the mere allegation of fraud and control. If, on the other hand, the interim injunction is to be refused until the issue of fraud or control is decided, the injunction would serve very little or no purpose. The interests of justice, I think, are served in the circumstances by requiring the plaintiff to establish a *prima facie* case that (1) the company is entitled to the relief claimed, and (2) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle.*"

It is universally acknowledged that the decision in *Wallersteiner v Moir (No.2)* was an exception to the rule in *Foss v Harbottle* [1843] 2 Hare 461. The essence of the rule is that, where the company suffers harm, the company itself is the true and proper claimant, to the exclusion of shareholders. The rule and the exceptions have been developed in the context of English and local statutory provisions which are substantially similar, and if, notwithstanding the comprehensive nature of the Companies Act of 1982, English decisions have been considered by our courts as did Amarasinghe J in the Colombo Hilton Case, it is clearly because of the persuasive value of those decisions, and not by reason of anything contained in Section 3 of the Civil Law Ordinance. However, in seeking enlightenment from foreign decisions, it is necessary as was stressed by Amarasinghe J in *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri LR 314 at 351, to "proceed with caution" as the constitutional or statutory provisions on which such decisions were made may be substantially different from our own. It is also remarkable that a twentieth century parallel to the nineteenth century rule of standing enunciated in *Foss v Harbottle* is the decision in *Durayappah v Fernando and Others* 69 NLR 265, in which the Privy Council held that when a Municipal Council is dissolved, the Mayor of the Council had no right to complain independently of the Council. Rules of standing such as this have been relaxed by the courts from time to time, and in almost all jurisdictions, and in doing so, the courts have not lost sight of the particular statute in the context of which the question of standing has arisen.

There is no doubt that in terms of Section 3 of the Civil Law Ordinance, Acts of the Parliament of England as well of principles of English common law could have been legitimately applied in Sri Lanka had there been no elaborate legislative provision such as was found in the Companies Act of 1982 dealing with all aspects of company law. However, it is noteworthy that towards the end of the nineteenth century, in the absence of any comprehensive company legislation in this county, several ordinances fashioned on the then prevailing English legislation on joint stock companies, such as the Joint Stock Companies Ordinance No. 4 of 1861, No. 6 of 1888, No. 3 of 1883 and No. 2 of 1897 were enacted, but they did not deal with all aspects of company law. It was in this scenario that De Sampayo J observed in *The Ceylonese Union Co. v Vyramuttan* 19 NLR 250 at 252, that "….until some comprehensive law relating to companies is passed locally, we must, when any question is not covered by any provision in our Ordinance, decide the same as far as possible by reference to the English law." This was how basic principles of English company law, including the rule in *Foss v Harbottle* [1843] 2 Hare 461 and the doctrine of *ultra vires* enunciated in the decision of the House of Lords in *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* [1875] LR 7 HL 653, initially came to be introduced into our legal fabric.

The first comprehensive peace of legislation enacted in Sri Lanka with respect of companies was the Companies Ordinance No. 51 of 1938 (Cap. 145, Legislative Enactments of Ceylon, 1956). It is important to note that despite the absence in the aforesaid Joint Stock Companies Ordinances and the Companies Ordinance of 1938 of any provision expressly incorporating the doctrine of *ultra vires,* our courts have considered the concept as part of our law. In *Jupiter Cigarette & Tobacco Co. Ltd. v. Soysa* 72 NLR 12 (SC) 74 NLR 241 (PC), the Privy Council not only recognized the doctrine within the framework of the Companies Ordinance of 1938, but also applied the exception to it that was evolved in *Royal British Bank v Turquand* [1856] 6 E&B 327 (the well known 'Turquand rule'). The question for decision in the *Jupiter Cigarette* case was whether a mortgage bond purported to have been executed by a company was binding on the company notwithstanding that the number of directors who signed the bond happens to be less than the number required by the articles of the company. In answering the question in the affirmative, Lord Wilberforce, at page 245 of the judgement observed that-

> "In considering questions such as this, which are of common occurrence, particularly in relation to private companies, the Courts have evolved principles, basically of common sense, which, while respecting the separate corporate entity of the company concerned, enables it to, bind itself, as against third parties, in the absence of technicality or the formalities of internal procedure."

Even after the enactment of the Companies Act of 1982, our courts have in innumerable decisions applied the doctrine of *ultra vires*, which has been recognized as a fundamental principle of not only our company law but also of our administrative law. Thus, in *Patrick Lowe & Sons and Others v Commercial Bank of Ceylon* Ltd [2001] 1 Sri LR 280, at page 284, S.N. Silva CJ observed that-

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* and *Attorney General v The Great Eastern Railway*)**.**"

The fact that our courts have shown great reverence to decisions of English courts in the realm of company law does not necessarily mean that the entire body of English company law has been imported into our country. It is true that by Section 3 of the Civil Law Ordinance the entire body of English law relating to "corporations" was introduced into our legal system, but that was subject to the qualification contained in the said section that the law of England will not have application in any case if other provision is made by any local enactment. Thus, the comprehensive nature of the provisions of the Companies Act of 1982, and the absence therein of a '*casus omissus'* provision which enables the reception of principles of English law to deal with matters, if any, not specifically provided for in the Act, effectively prevented the application of English law except as persuasive authority for the purpose of interpreting provisions which were identical or substantively similar to the provisions in force in England.

Another important factor that would militate against the application of any provision of English law seeking to modify the doctrine of *ultra vires* into our law in the absence of amending legislation, is that our Companies Act of 1982 is an exhaustive enactment which contains a provision that may be regarded as expressly embodying the doctrine of *ultra vires.* Section 4 of the Companies Act of 1982, distinguishes between primary and "other" objects, and provides in Section 4(1) that "the memorandum of every company shall, in stating the objects of the company, set out specifically, the primary objects of the company, that is to say, the objects which the subscribers or promoters intend that the company should carry out during the period of five years from the date of the commencement of business by the company." Section 4(2) provides for the incorporation in the memorandum of association, of "ancillary powers", and Section 4(3) enacts that-

> "(3) Nothing in the provisions of subsection (1) or subsection (2) shall be deemed or construed to preclude the memorandum from containing a separate statement of objects, not being primary objects, or of powers (whether general or special), in addition to those specifically set out under the provisions of subsections (1) and (2):
>
> Provided, however, that *no such object or power may be carried out or exercised by the company except with the prior sanction of a special resolution of the company*."(*emphasis added*)

It is clear from the above-quoted provision that a company is prohibited from entering into any transaction outside its primary objects and ancillary powers, even if it be for an "other" object within the meaning of Section 4(3) of the Act, unless it is sanctioned by a special resolution of company. It therefore goes without saying that any transaction which falls neither within the primary objects nor the "other" objects of a company, cannot be validly entered into by a company unless it is one that has been sanctioned as contemplated by Section 4(3) of the Act. Such a transaction is therefore *ultra vires* and not binding on the company. In view of these clear provisions of the local enactment, I am firmly of the opinion that Section 35 of the English Companies Act of 1989 could never have entered into the Sri Lankan legal fabric through the "corporations" gateway.

There remains the question whether the English law provision could have entered through the "banks and banking" gateway also found in Section 3 of the Civil Law Ordinance. For this argument, learned President's Counsel for the Appellant has relied heavily on the decision of the Supreme Court in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457. He has contended that in the said case, "a five judge bench of the Supreme Court consisting of Their Lordships H.N.G. Fernando CJ, Sirimanne J, Alles J, Weeramantry J and Wijayatilake J, unanimously held that *inter alia* that the English Law of Conversion under the common law of England applies to Sri Lanka through the operation of the Civil Law Ordinance."(*Vide* - paragraph 13.1 of the Written Submissions of the Appellant dated 17th November 2008). Without going into details, I am constrained to observe that while a closer examination of the separate judgments delivered in this case by the five judges reveals considerable differences of opinion in regard to the basis of applying principles of English law to the facts of that case, the decision is not very helpful to the determination of the present appeal for two reasons. Firstly, it is noteworthy that the Bills of Exchange Ordinance, unlike the Companies Act of 1982, contains a *casus omissus* provision in Section 98(2), which seeks to make the rules of the common law of England applicable in Sri Lanka "save insofar as they are inconsistent with the express provisions of this Ordinance, or any other enactment". Secondly, even though one of the parties to this case is a Bank, the question that looms large in this case is one of *ultra vires*, and not any issue relating to banks and banking.

While for the above reasons, I am of the opinion that the learned Judge of the Commercial High Court cannot be faulted for entertaining serious doubts about the relevance of Section 35(2) of the English Companies Act of 1989 for deciding this case, this does not dispose of this appeal. This Court cannot show a Nelsonian eye to the fact that the Respondent will be unjustly enriched if the Appellant cannot recover the money advanced by it to the Respondent on a straightforward short term loan. If the transaction on the basis of which money was advanced to the Respondent is a nullity, then at least the money so advanced should be capable of being recovered. It is true that in *Sinclair v Brougham* [1914] AC 398, due to insistence of an imputed or fictional contract, the English House of Lords missed an opportunity of developing a general restitutionary remedy to redress unjust enrichment, but we cannot forget the ancient authority of *Moses v Macferlan* [1760] 2 Burr. 1055 in which Lord Mansfield observed at page 1012 that ‘‘ if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit)* founded in the equity of the plaintiff's case, as it were, upon a contract (" *quasi ex contractu"*) as the Roman law expresses it)." This reasoning has been followed in England (*Re Coltman; Coltman v. Coltman* [1881], 19 Ch.D. 64), Australia (*In re K.L. Tractors Ltd.*, ([1961], 106 C.L.R. 318) and Canada (*Breckenridge Speedway Ltd. et al. v. R.*, [1970] S.C.R. 175) to found an action for money had and received, and perhaps prompted Vicount Haldane to observe in *Dodwell & Co v John* 20 NLR 206 at page 211, that "under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund." Weeramantry, J., in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, after making an exhaustive examination of all relevant authorities, set out his conclusions at page 544 of the judgment as follows:-

> "For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment. I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts."

There is however, one limitation that arises in the application of the general principle of unjust enrichment to the facts of this case, namely that what the Appellant has claimed from the Respondent in the action filed by it is the full amount due on the loan transaction, rather than a mere refund of the amount advanced. The restitutionary remedy cannot be availed of to obtain such broad relief.

In the circumstances, it is necessary to look at the other question on which leave to appeal has been granted by this Court, namely, whether the Respondent is estopped from asserting that "the borrowing and / or receiving the said loan facility from the Appellant is *ultra vires* of its Memorandum and Articles of Association". It is in evidence that the Respondent applied for the loan in question from the Appellant Bank by a loan application dated 9th November 1995 (X16) which contained several stipulations including a promise to repay the amount of the loan with interest thereon within ninety days. In the context of the issue of estoppel that arises in this case, it is necessary to note paragraphs 5, 6 and 7 of the loan application which provided as follows:-

> "5. All representations and statements made to you us, our Agents, employees or Officers whether in writing or otherwise on our behalf or purporting to be on our behalf are hereby warranted true and correct and intended to be acted upon and shall form the basis of the contract or obligation intended to result from or arise upon your acting upon the request hereby made for an advance.
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> 6. As Borrowers we shall jointly and severally be liable to repay the advance and interest due to you.
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> 7. We hereby irrevocably authorize People's Bank without any notice to us to debit our current account maintained with People's Bank to settle People's Bank with all monies due from us by way of Capital interest and other charges in respect of this transaction, and authorize to set off any sum or sums of money due to us from People's Bank for the recovery of the sum or sums of money advance/to be advanced."

It is evident from the testimony of W.D. Dayananda, Senior Manager of the Appellant Bank that the said bank had previously granted several loan facilities to one Yasasiri Kasturiarachchi, and that the Respondent company was later floated by him and that the Bank had acted in good faith in granting the said loan to the newly formed company to enable it to clear a quantity of sugar which had been imported from Brazil. It is also evident from the said loan application and the receipt dated 9th November 1995 (X17) issued acknowledging the acceptance of the money advanced, both signed by the said Yasasiri Kasturiarachchi and one other Director of the Respondent company, that the loan facility was granted on the very day the application was made, and that in doing so, the Appellant had acted on the basis of the representation made by the Respondent that it was competent to enter into the loan transaction in question and as borrower it was liable to repay the loan and interest due thereon.

Spencer Bower, in *The Law relating to Estoppel by Representation*, (4th Edition), paragraph I.2.2, explains the concept of estoppel by representation of fact in the following terms:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment*, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (*emphasis added*)

It is clear from the evidence in this case that the Respondent has represented to the Appellant that it was competent to enter into the loan transaction in question and it is bound in law to honor its promise to repay the amount of the loan with interest, and that the Appellant had been lead to believe that the said representation was true and had acted thereon to its prejudice. The courts in England have shown some restraint in using the concept of estoppel to hold companies liable on *ultra vires* transactions, and in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Limited* [1964] 1 All E.R. 630, the English Court of Appeal specifically held that "no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself." However, the concept of estoppel has successfully been deployed in the United States from the nineteenth century to overcome the plea of *ultra vires*, as it appears from decisions such as *Whitney Arms Co. v Barlow* 63 New York 62 [1875]. In that case, a New York Court noted at page 70 that "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract." The principle enunciated in this decision was approved by the United States Supreme Court in *Eastern Building & Loan Association of Syracuse v Williamson* 189 US 122 [1903]. As Seymour D. Thompson observed in 'The Doctrine of Ultra Vires in Relation to Private Corporations', 28 American Law Rev. 376, 387 [1894] -

> "The judicial and professional conscience . . . could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it and repudiate it because it had been made with an artificial person having no power to make it."

I see no reason why the concept of estoppel cannot be employed in Sri Lanka to defeat such a plea in appropriate circumstances. I am therefore of the opinion that the Respondent is estopped from taking up the defence of *ultra vires* in the circumstances of this case.

Accordingly, for the reasons stated above, I agree with the conclusion reached by Bandaranayake J in her judgment that the appeal should be allowed, the order of the High Court of Colombo (Commercial) dated 16th February 2006 should be set aside and the said High Court should be directed to make order for the execution of the decree pending appeal. I make no order for costs, in all the circumstances of this case.

JUDGE OF THE SUPREME COURT