

SEYLAN BANK LTD
v
SAMDO MACKY SPORTSWEAR (PVT.) LTD. AND OTHERS

SUPREME COURT
S. N. SILVA, C. J.
TILAKAWARDANE, J.
SOMAWANSA, J.
SC 44/2007
SC 45/2007
SC (HC) LA 25/07
SC (HC) LA 26/07
HC (CIVIL) 239/04 (1), 207/02 (1)
NOVEMBER 19, 2007
MARCH 4, 2008

Stamp Duty Act, No. 43 of 1982 – section 51, section 69, section 71 – Regulations – Gazette 224/3 of 20.12.1982 and 948/15 of 6.11.1996 – Guarantee Bond – Is it liable for the payment of stamp duty – What is a bond? – Deed? – Document? – Is the guarantee bond a bond attracting stamp duty?

Held

- (1) Stamp Duty Act imposes a pecuniary burden on persons, and it has to be subject to strict consideration. There is no room for intention, construction or equity about duties or taxation.
- (2) A bond in the context of the Stamp Duty Act is an instrument where the primary or principal covenant is to create an obligation to pay money, defeasible on the happening of the specified event and binds his property, as security for the debt.

In case of the guarantee bond, the term providing for guarantor liability is not the principal covenant between the parties, but merely a condition subsequent to a primary obligation.

The obligation to pay is in the form of a penalty that comes into operation, if and only if the proposed obligation of the principal debtor is violated. The arrangement contemplated by the guarantee bond is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the principal debtor obligation.

- (3) Inherent in the monetary obligation of a "bond" contemplated by section 7 (a) is that such obligation is for an ascertained sum of money. Such a requirement is a necessity given that the value of the stamp duty to be paid depends upon the slab of the amount or value secured. Given the inherently indeterminate nature of the guarantors respective payment obligations under the guarantee bond, such an instrument cannot be construed as the type of bond referred to in section 7(a). As such the guarantee bond does not warrant stamp duty as a bond under the Stamp Duty Regulations.

Per Shirani Tilakawardane, J.

"The Ceylease case is distinguishable as the finance company in that case had entered into a bond with the security of the property – a vehicle – that was mortgaged and which could be considered movable property. No such arrangements exist in the current action that suggests their inclusion under section 7 of the regulations.

APPEAL from an order of the Commercial High Court, with leave being granted.

Cases referred to:

- (1) *Tissera v Tissera* – 2 NLR 238.
- (2) *Ceylease Financial Services Ltd. v Sriyalatha and another* – 2006 – 2 Sri LR 169 (distinguished)

Ramesh de Silva PC with *Maitri Wickremasinghe, Shanaka de Silva, Shanaka Cooray* for plaintiff-petitioner-appellant.

Chandima Liyanapatabendi with Rangika Pilapitiya for defendant-respondent-respondent.

Sanjay Rajaratnam DSG as amicus.

June 26, 2008

SHIRANI TILAKAWARDANE, J.

Leave to Appeal from the Order of the Commercial High Court of Colombo (defined herein) dated 26th July 2007 with respect to Case No. CHC (Civil) 239/04 (1) and Case No. CHC (Civil) 207/02 (1) (hereinafter referred to as the "Commercial High Court Order") was granted by the Supreme Court by its order dated 15th December 2007 and it was agreed by the parties that the only issue to be determined was whether stamp duty was payable on the Guarantee Bond dated 25th of August 1999.

In response to the default of two loans it had granted, the plaintiff-petitioner-appellant (hereinafter referred to as the "appellant") instituted two actions in the High Court of the Western Province exercising jurisdiction pursuant to the High Court of the Provinces (Special Provisions) Act, No.10 of 1996 (hereinafter referred to as the "Commercial High Court of Colombo"). The appellant's first action was dated 13th September 2002 and was for the recovery of a sum of Rs.662,500/= together with interest thereon at 30% per annum and Business Turnover Tax on Rs.2,500,000/= from 1st July 2002 till date of decree. Appellant's second action was dated 26th October 2004 and was for the recovery of a sum of \$781,842/= together with interest thereon at 9% till 26th October 2004 and at 21% per annum thereafter till payment in full. Such actions were initiated because neither the "Principal Debtors" nor their respective guarantors (also defendant-respondents-respondents to the respective actions and herein referred to collectively as the "guarantors"), paid the outstanding loan amounts when demand for repayment was made on them consequent to the Principle Debtors' defaults on the loans.

The matter to be determined in this case arises out of an appeal against the Commercial High Court Order, which held, in response to an attempt by the appellant to submit a Guarantee Bond into evidence in each action, that (i) the Guarantee Bond (marked 'P9' in the

appellant's affidavits for the actions, dated 18th January 2006 and 24th May 2006, respectively, and hereinafter referred to as "Document P9") was not sufficiently stamped and (ii) the petitioner would be afforded a final opportunity of stamping the said documents by 20th September 2007.

Being aggrieved by the said Commercial High Court Order, the appellant has this filed application for a determination whether Document P9 is liable to be stamped under section 7 of the regulations made by the Minister in terms of section 69 of the Stamp Duty Act, No.43 of 1982 (referred to herein as the "Stamp Duty Regulations"). These Stamp Duty Regulations were published in Gazette Extraordinary No.224/3 of 20th December 1982 as amended by the Order published by the Minister of Finance under the said section in Gazette No. 948/15 dated 6th November 1996.

It is common ground that the only matter to be decided is whether the Document P9 is liable for the payment of stamp duty under section 7 of the amended regulations which, by subsection 7(a), mandates the payment of stamp duty on "a Bond, pledge, Bill of Sale or Mortgage for any definite and certain sum of money affecting any property other than any aircraft registered under the Air Navigation Act, (Chapter 365) ..." As it is clearly not within the meaning of "pledge", "bill of sale" or "mortgage" the only matter to be admittedly determined is whether it is a "Bond".

The lengthy arguments and submissions of the learned President's Counsel for the appellant averring that (1) there is no comma between the word "Bond" and "pledge" in the regulations, and (2) therefore, that the reference to a "Bond pledge" is what was intended, is without basis as the Sinhalese edition of the Gazette clearly evidences a separation between the words through the use of a comma, though the written submission incorrectly states that a comma between the two operative words is missing from both the English and Sinhalese version of the Gazette.

Section 2 of the Stamp Duty Act No 43 of 1982 provides that stamp duty shall be charged on every instrument which is executed, drawn or presented in Sri Lanka, to be prescribed at a certain rate depending upon the class or category in which an instrument falls, unless such instrument is (i) exempted from stamp duty by virtue of its inclusion

within section 5 of the Stamp Duty Act, as amended, or (ii) not contemplated by the Stamp Act altogether.

The type of "document" for which stamps must be affixed is defined in section 71 of the aforementioned Act and includes a Bond, and the question arises as to whether a Guarantee Bond is also included as a "Bond" which has been referred to by the aforesaid regulations prescribed by the Minister of Finance and referred to in subsection 7(a).

Needless to say, as the Stamp Duty Act imposes a pecuniary burden on persons, it has to be subject to strict construction. There is no room for intention, construction or equity about duties or taxations. The explicit language of the Statute must be the yard stick which guides the imposition of the stamp duty, and assumption and presumptions must be strictly excluded. If the imposition of duty upon a particular instrument is not expressly contemplated by the simple reading of the language of the statute then the benefit of the exclusion must necessarily be afforded.

The simple meaning of subsection 7(a), finds clarity in both the English version referred to above, and more so in the Sinhalese edition of the Gazette which reads as follows:

(365 වන අධිකාරය වූ) ඉවත් ගම්නාතමිත සහන යටතේ ලියාපදිංචි කළ ඉවත් යානයක් කොටස යම් දේපළකට බලපාන යම් නිශ්චිත හෝ නියමිත මුදල් ප්‍රමාණයක් සඳහා වූ බැඳුම්කරයක්, මිටිපතයක්, විකුණුම් පත්‍රයක් හෝ උකස් කරයක්--

Clearly the "Bond" contemplated by the language above has to be one where the money obtained is secured by, and correlated to property. Document P9 did not, at the time of the creation of the principal covenant, seek to secure or refer to any property in other words it was not a bond that bound property for the payment of the money.

A bond conditioned for the payment of money such as referred to in section 6 of the Prescription Ordinance 22 of 1871, has also been defined in *Tissera v Tissera*⁽¹⁾ where the meaning of a Bond was defined as "a document executed in triplicate before a Notary and two witnesses, whereby the person executing it acknowledges to have borrowed and received from the person in whose favor it is

executed a certain sum of money and promises to pay the latter the same with interest on demand and binds all his property generally as security for the debt..."

"Bond" is defined in Stroud's Judicial Dictionary of Words and Phrases as "an obligation by deed." (3rd edition, Volume III, at p. 318)

In the case of a deed it is essential that a deed must be necessarily be under seal. A "deed" is defined in Wharton's Law Lexicon to mean "a formal document on paper or parchment duly signed, sealed and delivered" (14th Edition, at p. 308). A document which is not under seal cannot be a deed.

A bond in the context of the Stamp Duty Act is an instrument where the primary or principal covenant is to create an obligation to pay money, defeasible on the happening of the specified event and binds his property, as security for the debt. In the case of Document P9, the terms providing for guarantor liability are not the principal covenant between the parties, but merely a "condition subsequent" to a primary obligation. In other words, the obligation to pay is in the form of a penalty that comes into operation if, and only if, the principal obligation of the Principal Debtor is violated. Had the Principal Debtors complied with the principal covenant to pay, then the Guarantors' obligations to pay would never have arisen. The arrangement contemplated by Document P9 is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the Principal Debtor's obligation.

Inherent in the monetary obligation of a "bond" contemplated by subsection 7(a) is that such obligation is for an ascertained sum of money. Such a requirement is a necessity, given that the value of the stamp duty to be paid depends upon the slab of the amount or value secured. However, when Document P9 was executed, no fixed amount of money could be said to have been agreed as payable, as the Guarantors' respective obligations to pay in connection with the loans, in fact, only arose upon the breach of the respective principal covenants to pay, with the owed amounts necessarily determined only after the respective breaches actually occurred. Given the inherently indeterminate nature of the

Guarantors' respective payment obligations under Document P9, such instrument cannot be construed as the type of Bond referred to in subsection 7(a).

In construing the meaning of the word Bond in the context of subsection 7(a), the accrual of the obligation to pay money should precede the performance or non-performance of the specified act of payment. This is an essential distinction as even though the performance or non-performance of the specified act is incumbent upon the obligor, the obligation to pay does not precede the performance or non performance of the Act. Document P9 in this context is just an agreement to pay and cannot be considered as a bond as envisaged in terms of subsection 7(a) referred to above. Document P9 is merely an agreement to pay with consequences for default, with no attestation and no obligation by Deed. As such, Document P9 does not warrant stamp duty as a Bond under the Stamp Duty Regulations.

The Learned High Court Judge arrived at his determination, it appears, solely on the finding that he was bound by the decision in the case of *Ceylease Financial Services Limited v Sriyalatha and another*⁽²⁾ (hereinafter referred to as the "*Ceylease Case*"). In that case Justice Bandaranaike considered section 7 of the Stamp Duty Regulations in the context of a document entitled Guarantee and Indemnity and executed in connection with a lease agreement, and held the document to be one contemplated by section 7. The aforementioned case was used as legal authority by the Learned Judge of the Commercial High Court, in order to substantiate the fact that Document P9 would also come within section 7 of the regulations of the Stamp duty Act, as amended.

However, the decision in the *Ceylease Case* is inapplicable to, and therefore not determinative of, the present matter at hand as the facts of the *Ceylease Case* are clearly distinguishable in a very material and relevant manner from the facts of the present actions before this Court. The *Ceylease Case* is distinguishable as the finance company in that case had entered into a bond with the security of the property – more particularly, a vehicle – that was mortgaged and which could be considered movable property. No such arrangements exist in the current actions that suggest their

inclusion within section 7 of the Stamp Duty Regulations.

Accordingly this Court sets aside the said Commercial High Court Order dated 26th July 2007 appeal is allowed no costs.

S. N. SILVA, C.J. - I agree.

SOMAWANSA, J. - I agree.

Appeal allowed.