

L.B. FINANCE LTD

v.

MANCHANAYAKE

COURT OF APPEAL.
EDUSSURIYA, J.
JAYASINGHE, J.
CA 506/90(F).
19TH MARCH, 1990.

Liability of a Guarantor - Guarantee Bond - Demand necessary - Cause of action.

Held :

(1) Liability of the guarantors arise only if and when a demand is made (Guarantee Bond clause 12(2)) upon the termination of the contract.

(2) There ought to be an averment in the plaint that the demand was made (consequent to such termination) and that such demand was not honoured.

(3) Termination of the contract and the demand made on the hirer will not help the Plaintiff to invoke jurisdiction of Court against the guarantors..

APPEAL from the Judgment of the District Court of Colombo.

Harsha Amerasekera for Plaintiff - Appellant.

S.F.A. Cooray with *S. Liyanage* for Defendant - Respondent.

Cur. adv. vult.

September 01, 1999.

JAYASINGHE, J.

The Plaintiff instituted action against one Perumal Kandasamy the 1st Defendant, the hirer and the 2nd and 3rd Defendants as guarantors for the recovery of monies due on a hire purchase agreement marked P1. When the trial against the 3rd Defendant was taken up the said 3rd Defendant raised issues 7 to 12 and moved that issues 9 and 10 be tried as

preliminary issues in terms of Section 147 of the Civil Procedure Code. Issue No. 9 related to the failure to terminate the contract sought to be enforced by the Plaintiff and issue No. 10 was in respect of Plaintiff's failure to plead that the demand was made prior to institution of the action. The liability of the guarantors are stipulated in clause 12 of P1 which is pleaded as part and parcel of the plaint. Clause 12 provides that;

- (i) the guarantors jointly and severally guarantee to the owners the regular and punctual payment of all the monthly hire and the performance and observance by the hirer of the several stipulations contained in the guarantee bond and that the guarantors hold themselves jointly and severally liable for any default or breach of any of the terms of this agreement to the same extent as the hirer.
- (ii) The guarantors bind themselves jointly and severally to *pay on demand* to the owners at Colombo all monies which may become payable under this agreement.
- (iii) that the owner shall be at liberty to sue the hirer and the guarantors jointly and/or severally and the guarantors further agree that the owner shall be entitled to proceed against the guarantors or either of them only in the first instance should the owners desire so to do and the guarantors bind themselves jointly and severally to pay on demand at Colombo to the owners the amount of any judgment with costs that the owners may obtain against the hirer.
- (iv) the guarantors renounced the rights to claim that the hirer should be excused in the first instance and all other benefits to which the sureties are by law entitled and that the guarantors are and each of them be liable in all respects to the same extent and in the same manner as the hirer including the liability to be sued before recourse is had to the hirer.

An examination of the said provision clearly shows that under the said guarantee bond the guarantor's liability arises on demand as found in 12(2) and it also provides that the owner may choose to proceed against either the owners or the guarantors in the manner he chooses to exercise his rights and that the guarantors had renounced all their rights under this agreement. Even though Mr. Coorey did not press that the agreement ought to be terminated before the Plaintiff decides to proceed against the guarantors it seems that the Plaintiff if he chooses to proceed against either the hirer or the guarantors he must in the first instance terminate the agreement. I am inclined to the view that since the liability of the guarantors arise only if and when a demand is made upon the termination of the contract and as Mr. Coorey submitted there ought to be an averment in the plaint that the demand was made (consequent to such termination) and that such demand was not honoured, there is no cause of action disclosed against the 3rd Defendant. Termination of the contract and the demand made on the hirer will not help the Plaintiff to invoke jurisdiction of Court against the guarantors. For the reasons set out above the appeal is dismissed with costs fixed at Rs. 2100/-.

EDUSSURIYA, J. - I agree.

Appeal dismissed.