GUNAWARDANE AND OTHERS

v.

INDIAN OVERSEAS BANK

COURT OF APPEAL
WIGNESWARAN, J.
TILAKEWARDANE, J.
C.A. 702/94(F)
D.C. COLOMBO 4210/M
AUGUST 30, 1999
OCTOBER 5, 1999
NOVEMBER 30, 1999

Overdraft facility - No Written request - Trust Receipt - Prescription - Acknowledgement of the debt.

The Plaintiff - Respondent sought to recover moneys advanced on overdraft facilities on the Defendant's Current Account - A . M. K. Agency and loans advanced on Trust Receipt facilities. Judgment was entered against 1 - 4th Defendant - Appellants. The Appellants took up the position that the debt was prescribed, the 1st - 3rd Defendants denied signing the Trust Receipt, and that only the 4th Defendant - Appellant signed the Trust Receipt.

Held :

(i) Even though circumstances beyond their control (Ethnic riots 1983) prevented the Plaintiff Respondent Bank from furnishing written documents requesting overdraft facilities, the fact of the existing contract based on an overdraft facility had been established.

(ii) Question of prescription does not arise as there had been acknowledgement of the debts due.

(iii) There was a tacit admission on behalf of the Defendant Firm of the existence of the Trust Receipt, and that the Trust Receipt had been signed only by the 4th Defendant Partner. The action was to recover money lent and advanced, it was not a summary action based on any document.

(iv) There was no evidence led that the so called third party did not act on behalf of the Defendant Firm.

(v) The right to sue on an overdraft facility arises as soon as the customer overdraws his account.

(vi) In the absence of special arrangements overdraft dues are repayable on demand and limitation will begin to run from the promised date of repayment of the fixed term loan or from the date of demand in any other case.

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to :

1. *Kepitigalla Rubber Estates Ltd., v. National Bank of India* - 1909 2 KB 1010
2. *Tai Hing Cotton Mills Ltd., v. Lie Chong Hing Bank Ltd.,* - 1986 AC 80, 1985 All ER 947
3. *Canadian Pacific Hotels Ltd., v. Bank of Montreal* - 1987 40 NLR(4th) 385
4. *Dabare v. Marthelis Appu* - 5 NLR 210
5. *Sri Lanka Ports Authority and another v. Jugo linija Boat East* - 1981 1 SLLR 18
6. *Williams and Glyn's Bank Ltd. v. Barnes* - 1981 Com.LR 20.

Shammil Perera with Ms. Vijula Arulanadan for 1st, 2nd and 3rd Defendant - Appellants.

Harsha Amarasekara with Kanchana Peiris for plantiff - Respondent.

Cur. adv. vult.

February 25, 2000.
WIGNESWARAN, J.

The first to third Defendant-Appellants and fourth and fifth Defendant-Respondents were constituents and customers of the Plaintiff-Respondent Bank as partners of a business called "A. M. K. Agency" and they maintained an account with the said Bank. (Vide paragraph 4 of the Plaint and paragraph 2 of the Answer).

This action was filed by the Plaintiff to recover moneys advanced on overdraft facilities on the Defendants' current account and loans advanced on Trust Receipt facilities.

Summons was never served on the fifth Defendant and an exparte order was made against the fourth Defendant. The first

to third Defendants took up the defence of prescription with regard to the overdraft facility and denied the signing of a Trust Receipt. The first to third Defendants did not lead any evidence. An officer of the Plaintiff Bank gave evidence.

Judgment was entered on 11.03.1994 by the Additional District Judge of Colombo against first to fourth Defendants, as prayed for in the plaint less Rs. 100,000/- received by the Plaintiff Bank on an insurance claim.

The learned Counsel for the first to third Defendant-Appellants submitted as follows :-

1. No written request from the Defendants for an overdraft facility was furnished by the Plaintiff-Respondent.

2. The ledger from which P1 (an extract) was prepared was not produced.

3. Last date of payment by Defendants regarding overdraft facility was 24.09.1984. Action was filed on 24.06.1988. The right to sue on an overdraft facility arises as soon as the customer overdraws his account. *(Weeramanthry in "The Law of Contracts" Vol. II Sec. 873 page 833 referred to).* The claim therefore was prescribed under Sec. 7 of the Prescription Ordinance.

4. Defendants' failure to challenge the accuracy of Bank statements, P4 and P5, could not have led to the inference that the statements were in fact correct. Decisions in *Kepitigalla Rubber Estates Ltd. Vs. National Bank of India*[1] *Tai Hing Cotton Mills Ltd. Vs. Lie Chong Hing Bank Ltd.*[2] *and Canadian Pacific Hotels Ltd. Vs. Bank of Montreal*[3] referred to.

5. Neither the original nor any copy of the Trust Receipt was marked in evidence. Secondary evidence of the contents of the Trust Receipt could not have been led.

6. Alleged acknowledgment letter P2 pertaining to receipt of loan on Trust Receipt unsatisfactory.

7. P8 was neither written by any of the Defendants nor signed by any of them. Therefore acknowledgment by a third party cannot interrupt the prescriptive period.

8. "Vigilantibus non dormientibus jura subvenient" Laws assist those who are vigilant and not those who sleep over their rights. Dictum of *Bonser C. J. in Dabare Vs. Marthelis Appu*[4] referred to.

9. In any event a sum of Rs. 98657.49 paid, was not deducted.

10. Failure to bring to the notice of Court the insurance claim obtained initially, highlights dishonesty on the part of the Bank.

All these submissions will now be examined.

Firstly the claim regarding the Trust Receipt would be gone into.

At page 110 of the Brief, the Bank Officer Shanmugarajah Rajasekeram has stated that the original Trust Receipt signed by the partners of "A. M. K. Agency" for a sum of Rs. 250,000/= was in the custody of the Bank but that during the 1983 Ethnic Riots when the Bank was set on fire, the original Trust Receipt got burnt. In cross examination the Counsel for the first to third Defendants at page 116 of the Brief had asked whether it was only the fourth Defendant partner who had signed the Trust Receipt. The case of the first to third Defendants therefore appeared to be that the fourth Defendant partner had compromised the partnership by signing the Trust Receipt. It was not said that none of the partners signed the Trust Receipt or that the claim on the Trust Receipt was a figment of the imagination of the Plaintiff-Respondent. Therefore when the first to third Defendant-Appellants denied signing the Trust Receipt

it did not mean that the Plaintiff Bank had falsely implicated the "A. M. K. Agency" to a transaction that never took place but that the first to third Defendant partners were trying to wriggle out of a transaction in which according to them the fourth Defendant partner had compromised the partnership. Advisedly the fourth Defendant partner seems to have kept away after filing an answer!

Whether signed by a single partner or all the partners the question that needs to be answered is whether on a Trust Receipt, a loan was made available to the Defendant Firm. The following matters are to be considered in this regard :-

(i) On an "A. M. K. Agency" letter head dated 10.08.1983 (P3) two partners of the firm had written to the Plaintiff-Respondent Bank few weeks after the Ethnic Riots of July 1983, that they have an overdraft facility of Rs. 100,000/= and a Trust Receipt facility of Rs. 250,000/= asking for one year's time to start repayment.

(ii) On an "A. M. K. Agency" letter head dated 04.07.1985 a partner of the Firm had written to the Chief Manager of the Plaintiff-Respondent Bank under the heading "T. R. Account-Rs. 250,000/=" to transfer their dues to a loan account so that the amount will be paid by 36 monthly instalments. Whether the numerals "250,000" were written in Blue Ink or Black Ink, the fact remains that the letter referred to Trust Receipt Account.

The comments at the bottom of the letter were internal endorsements by the Bank. P2 is not suspect in any manner as claimed by the Counsel for the first to third Defendant-Appellants. P2 was an acknowledgment of the existing Trust Account transaction between the parties.

(iii) The letter of demand sent by the Attorney-at-Law for the Plaintiff-Respondent dated 14.01.1988 (P6)

referred to an outstanding amount of Rs. 230,000/= on the Trust Receipt. This letter was replied to by "A. M. K. Agency" (P7). There was no denial of a Trust Receipt transaction in the reply P7 only referred to a further communication that would follow. No such communication followed. If in fact there was no Trust Receipt transaction it is reasonable to infer that the person signing for the Managing partner of the partnership would have immediately denied such a transaction or queried what it meant. P7 therefore was a tacit acceptance of the existence of a Trust Receipt transaction. No denial was sent even after the month stipulated in P7 was over.

(iv) There was no need for one A. M. C. Attanayake to send P8 dated 25.06.1992 to the Plaintiff-Respondent Bank and to refer to "his firm" and speak of a settlement with regard to the existing debts including the Trust Receipt loan unless he had acted for and on behalf of the "A. M. K. Agency". There had been no evidence given by the Defendant-Appellants or the other partners refuting the fact that "A. M. C. Attanayake" acted for and on behalf of the Firm. In any event P8 was not marked subject to proof. It was produced during cross examination and not during the examination-in-chief or re-examination. It referred to many intimate details of the transaction known only to the parties to the transaction, such as Bank's letter dated 04.05.1992, the balance outstanding after crediting cheques (Rs. 78442.29) and Trust Receipt loan balance standing at Rs. 132,000/=. The sum of Rs. 72474.80 mentioned in P8 was reflected in D1 at page 90 of the Brief.

The contention of the Plaintiff's witness therefore must be accepted. Moreover credit had been given for the sum of Rs. 98657.49 mentioned by the Counsel for the first to third

Defendant-Appellants in her written submissions and that was how the balance of Rs. 72474.80 was arrived at as per D1.

The question of the overdraft facility too needs to be looked into from the stand point of the effect the Ethnic Riots of 1983 had on the Plaintiff-Respondent Bank. Merely because a written request from the Defendants applying for an overdraft facility was not furnished, the Defendant Firm cannot resile from its obligations and responsibilities. So too the non-furnishing of the ledger from which P1, an extract, was prepared. It is to be noted that when the learned Counsel for the Defendants allowed P1 to be marked subject to proof, the Counsel for the Plaintiff immediately pointed out that there was no need to prove P1 any further. This was not challenged by the Counsel for the Defendants. [vide page 110 (reverse) of the Brief]. Therefore P1 must be presumed to have been allowed to be admitted without further proof. When at the end of the trial documents were tendered nothing was mentioned about P1. *(Vide Sri Lanka Ports Authority & another Vs. Jugolinija - Boal East*[5]

Finally we come over to the question of prescription.

An overdraft facility is afforded by a Bank by permitting a customer to overdraw his current account upto certain limits. The current account being operative and in force the facility too will continue to be operative until cancelled and/or unless the money due to the Bank is demanded by it. If the customer does not take steps to pay off the overdrawn amount, interest will accrue on such overdrawn amount and shall continue to be a debt due to the Bank until there is repayment of the debt or cancellation of the debt. The overdraft facility itself will come to an end, as stated above, on the cancellation of the facility or when the Bank demands repayment. This would be generally so unless there are special arrangements to the contrary. It was held in *Williams and Glyn's Bank Ltd. Vs. Barnes*[6] that in the absence of special arrangements overdraft dues are repayable on demand and limitation (prescription) will begin to run from

the promised date of repayment of a fixed term loan or from the date of demand in any other case. (Vide also *T. G. Reeday - The Law Relating to Banking 5th Edition page 48).*

In the present case demand was made on 05.05.1988 and action was filed on 24.06.1988. In any event as between 25.07.1983 and 24.06.1988 statements of monthly account had been sent and there was no denial of the receipt of the monthly statements. Overdraft interest and B. T. T. were added every month to the arrears of dues and reflected in the monthly statements. Added to this, several acknowledgments by the Defendants that they would pay the amounts due, was recorded in evidence.

The question of prescription would arise only if there were no acknowledgments or undertakings by the Defendants to pay the outstanding dues to the Plaintiff-Respondent.

It is significant to note that letter of demand P6 dated 14.01.1988 referred to the amounts due to the Plaintiff Bank from the Defendant Firm and P7 dated 22.01.1998 signed by someone acting for the Managing Partner of the Firm did not deny liability nor was a further communication sent at the end of the month, as undertaken in P7, denying liability.

It was elsewhere pointed out in this judgment that P8 was not marked subject to proof and that it was marked during cross examination and that its contents were personal to the parties to the dispute. The authenticity of P8 was therefore not in question. Even if the question at the end of page 117 and beginning of 118 of the Brief, happened to be raised on the basis that the Defendants had only admitted a sum of Rs. 72474/= as arrears due and nothing more, the fact remained that there was an acknowledgment of the debt. Only with regard to the amount due was there any differences of opinion according to the question posed by the learned Counsel for the 3rd Defendant in cross examination. There was no outright denial of any debt due.

Thus coupled with the fact that there had been acknowledgments of the debt and that the Defendants never led any evidence to controvert the case of the Plaintiff-Respondent that there had been demands made and further taken together with the fact that the Defendants never denied that P8 was written on their behalf, it must be concluded that prescription could not have run in this case.

Thus the answers to the submissions of the learned Counsel for the first to third Defendant-Appellants could be summarised as follows :-

1. Even though circumstances beyond their control (viz. the Ethnic Riots of 1983) prevented the Plaintiff Bank from furnishing written documents requesting overdraft facilities, the fact of an existing contract based on overdraft facility admitted and abided by the Defendant Firm had been established.

2. P1 was not objected to in evidence after the Counsel for the Plaintiff argued that no further proof of it was necessary.

3. The question of prescription does not arise if there had been acknowledgments of the debts due.

4. Whether the Bank statements were correct or not the Defendant Firm did not dispute the existence of a lawful contract between the Firm and the Bank. The Firm also did not dispute that the monies were not payable on demand nor state that monies became due only when advances were taken nor that prescription had set in after the last advance was taken.

5. There was a tacit admission on behalf of the Defendant Firm of the existence of a Trust Receipt, when it was put in cross examination by the Counsel for the

Defendants that the Trust Receipt had been signed only by the fourth Defendant Partner. There were other instances of admissions by the Defendants of the debt due on the Trust Receipt, which were pointed out. This was an action to recover money lent and advanced. It was not a summary action based on any document.

6. P2 was dealt with earlier in this judgment. It was written on the Defendant Firm's letter head. It referred to a T. R. Account. (Trust Receipt Account). Whether the T. R. Account referred to Rs. 250,000/= or not was immaterial. The writing at the bottom of P2 referred to internal endorsements. There was nothing suspicious about P2. In any event the Defendants gave no evidence denying the sending of P2 to the Chief Manager of the Plaintiff Bank.

7. P8 refers to intimate details of the transaction. There was no evidence led that the so-called third party did not act on behalf of the Defendant Firm. More details in this regard were referred to above.

8. The fact that the Plaintiff Bank had undergone immense hardship on account of the Ethnic Riots of 1983 was recognised and admitted by the Defendant Firm by their letter dated 10.08.1983 (P3). The maxim referred to by Bonser C. J. would not apply in its entirety to extraordinary circumstances as the aftermath of the Ethnic Riots of 1983 in this instance.

9. Rs. 98657.49 had been referred to in P1 and accounted for.

10. The insurance claim was not made by the Bank. The payment was made on a claim made by the Defendant Firm. If the Defendant Firm did not resort to dilatory tactics and deny their obligations unreasonably all aspects of the claims and deductions due would have

been gone into in an atmosphere of cordiality and co-operation. The Defendants having acted unreasonably cannot point an accusing finger at the Plaintiff Bank who had lost a number of connected documents to fire in July 1983.

The entire case of the Defence, including the fourth Defendant filing his answer and keeping away and the first to third Defendants not coming forward to give evidence having known the hardships faced by the Plaintiff Bank in the aftermath of the Ethnic Riots of July 1983, savours of a desire on the part of the Defendants to brush aside their obligations and responsibilities and delay payments lawfully due to the Bank as long as possible.

We see no reason to interfere with the judgment dated 11.03.1994 delivered by the Additional District Judge, Colombo. We dismiss the appeal of the first to third Defendant-Appellants with incurred costs payable by them to the Plaintiff-Respondent Bank.

TILAKAWARDANE, J. - I agree.

Appeal dismissed.