# SATHASIVAM
# v
# MERCANTILE CREDIT LTD. AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 192/95(F)
DC COLOMBO 4129/MHP
MARCH 28, 2007

*Hire Purchase – Consumer Credit Act No. 29 of 1982 – Finance Act – Management and administration of company vested in the Monetary Board – Company institutes action – legality? – Renouncing of benefits and privileges by guarantor – validity? Debtor's right to proceed against a guarantor?*

The defendant-appellant was a guarantor in the Hire Purchase action instituted by the respondent company against one A. The District Court held with the plaintiff-respondent. In appeal it was contended that, the respondent company has no *locus standi* to institute action, as under the provisions of the Finance Act, the Monetary Board has taken over all the functions. It was also contended that, all privileges and benefits of a guarantor has been retained in terms of the Consumer Credit Act and the clauses in the Guarantee Bond – renouncing benefits and privileges – is contrary to law. It was further contended that the agreement was not read over and explained to him.

**Held**:

(1) The plaintiff company does not cease to exist and only the management and administration of the company is vested in the Monetary Board, as such there is no legal bar for the company to defend or institute proceedings in a court of law.

(2) Section 29 of the Consumer Credit Act contemplates of making Hire Purchase agreements void in certain circumstances, but there is nothing in Section 29 which would prevent a guarantor renouncing his rights under the Common Law and entering into a contract of guarantee.

(3) The signature of the 2nd defendant-appellant in the agreement is admitted, if that be so the defendant-appellant cannot deny the contents of the said document.

*per* Anil Gooneratne, J.

"A creditor would have a right to proceed against a guarantor as long as the principal debtor's right to pay remains and the principal debtor fails to satisfy the creditor or is in default according to the terms of the contract".

**APPEAL** from the judgment of the District Court of Colombo.

**Cases referred to:**

1. *CA 209/93* DC Colombo 9118 CAM 3.6.93.
2. *GMOA* v *Senanayake* 2001 3Sri LR 377 at 389.

*S. Mandaleswaran* with *Ms. Aluthge Tharanga* for 2nd defendant-appellant.

*Padma Bandara* for respondent.

June 12, 2007

**ANIL GOONERATNE, J.**

This appeal arises from the judgment of the District Court of Colombo dated 29.3.95 on a hire purchase case. The appellant is the 2nd defendant in the District Court case who was a guarantor to the hire purchase agreement marked 'B' annexed to the plaint. In the District Court trial preliminary issues were raised by the 2nd defendant appellant and the learned District Judge rejected and ruled against those issues by his order of 19.11.1993. In this appeal matters raised by way of preliminary issues were also urged with emphasis on same namely that in view of the Gazette Notification marked 'A' annexed to the plaint, the Monetary Board has in terms of the Provisions of the Finance Act taken over the administration and management of Mercantile Credit Limited (plaintiff) and that the plaint and the action is not properly constituted since only the Monetary Board could file plaint or that this action should be preferred by the Monetary Board or that the plaint does not indicate that authority has been given by the Monetary Board to the plaintiff to proceed with the action.

The other important matter raised by the 2nd defendant appellant is that clauses 21, 22 and 23 of the above agreement marked 'b' is contrary to the provisions of the Consumer Credit Act, No. 29 of 1982 and the law relating to sureties.Issue Nos. 9 and 9A were not pursued.

At the hearing of this appeal the Counsel for 2nd defendant appellant also contended that the agreement marked 'B' was not read over and explained to the 2nd defendant-appellant.

I would like to comment on the above objections referred to above initially since it was the case submitted to this Court by the 2nd defendant-appellant though the written submissions of the appellant refer to other matters. It is apparent that plaintiff instituted action on or about 6.11.1992 and by that time Gazette Notification marked 'A' was in operation. The appellant contends that in terms of Section 20(2)(a) of Act No. 79 of 1988, all powers, duties and functions of the Board of Directors of the Company are vested with the Monetary Board and in view of Section 20(3) of the said Act every Director, Manager and Secretary of the Company will cease to function unless authorized by the Board and on account of this the Company itself cannot function.

Section 20 reads thus:

*20(1) If the Board after review of the facts and circumstances upon the receipt of a report by the Director under Section 18 is of opinion that a finance company may by made a solvent and viable by action as hereinafter provided, it may by a notice published in the Gazette take over the administration and management of a finance company for such period as may be specified in such notice. The Board may by a subsequent Notice published in the Gazette extend the period specified in the original notice. The Board shall cause copy of every such notice to be sent to the Registrar of Companies who shall make a minute thereof in the books relating to the company.*

*(2) Where the Board takes over the administration and management of a finance company the Board may –*

*(a) exercise, perform and discharge with respect to such finance company all the powers, duties and functions conferred or imposed on, or assigned to, the Board of Directors of such company by or under any written law or by the articles of association of such company.*

*(b) enter into any agreement with any person or body of persons for the management of the finance company*

*subject to such conditions as may be agreed upon between the Board and such person or body of persons having regard to the interests of the depositors and creditors of the company and in the public interest.*

*(c) make such arrangements as it considers necessary for the amalgamation of the finance company with another finance company or any other institution with the consent of such other finance company or institutions.*

*(d) re-organise such finance company by increasing its capital, arranging for new shareholders, and by reconstituting its Board of Directors.*

*(e) reconstruct the finance company in any such manner as it considers to be in the interest of depositors; or*

*(f) direct any shareholder of any finance company to divest or transfer the ownership of any shares owned by him to a person nominated by the Board on payment by such person of compensation determined as follows-*

*(i) where such shares are quoted, at the market value thereof; or*

*(ii) where such shares are not so quoted, at a price to be determined by a valuer nominated by the Board.*

*(3) During the period for which the administration and management of a finance company is taken over by the Board, every director, manager and secretary of such finance company shall, unless expressly authorized to do so by the Board, cease to exercise, perform and discharge any powers, duties and functions with respect to such company.*

*(4) Where the administration and management of a finance company is taken over by the Board under subsection (1), the Board may where it considers it in the public interest to do so –*

*(a) arrange for or grant, such financial accommodation as it may consider necessary to the finance company by way of loans or other accommodation, other than by way of grants; and*

*(b) meet all costs, charges and expenses incurred in the administration and management of the company;*

*Provided however that the Board may at any time after the take over of the administration and management of a finance company under subsection (1) suspend the business of the company temporarily, if it is of opinion, that it is in the interest of the public or of the depositors to do so, or direct the Director to apply to a competent court to wind up the company, if on a report made by the Director or any person authorized by the Board, it.appears to the Board that the company cannot be made viable and solvent within a reasonable period of time. In the event of the Board directing the Director to wind up the finance company, the provisions of section 18 relating to winding up shall apply.*

On a perusal of the above Section one cannot contend in the same way as the appellant does and it is apparent that the company does not cease to exist and only the management and administration of the company is vested with the Monetary Board. As such there is no legal bar for the company to defend or institute proceedings, in a court of law. (there being no winding up or liquidation proceedings or assignment of it's rights at that point of time) Similar views were expressed in *C.A. 209/93*[1] by Wijeratne, J. the proxy in this case has been forwarded by the Monetary Board. As such there is no reason to interfere with the District Court order of 19.11.93.

On the other matter referred to above, the appellant contends that all privileges and benefits of a guarantor has been retained in terms of the Consumer Credit Act No. 29 of 1982, and clause 21, 22 and 23 of document 'B' would take away or be contrary to the said law which would renounce the benefits and privileges available under the common law, Section 29 of the said Act does not prohibit renouncing of privileges under common law by a guarantor.

*Section 29 reads thus:*

*The following provisions in a hire-purchase agreement shall be void, that is to say, any provision –*

*(a) whereby an owner or a person acting on his behalf is authorized to enter upon the premises where the hirer*

*resides for the purpose of taking possession of goods which have been let under a hire-purchase agreement or is relieved from liability for any such entry; or*

*(b) whereby the right conferred on a hirer by this Act to determine the hire-purchase agreement is excluded or restricted, or any liability in addition to the liability imposed by this Act is imposed on a hirer by reason of the termination of the hire-purchase agreement by him under this Act; or*

*(c) where by a hirer, after the determination of the hire-purchase agreement in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been determined by him under this Act; or*

*(d) whereby any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase agreement is treated as, or deemed to be, the agent of the hirer or buyer; or*

*(e) whereby an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase agreement; or*

*(f) whereby the hirer or buyer is required to avail himself of the services, as insurer or a repairer or in other capacity whatsoever, of a person other than a person selected by mutual agreement between the owner and the hirer or buyer.*

The admission recorded in this case also needs to be considered in the light of the objection of the 2nd defendant-appellant. The signature of the 2nd defendant in agreement 'B' is admitted. If that be so can the 2nd defendant appellant deny the contents of the said document. In a way one could argue that it is not safe to draw inferences from that admission. But having regard to ordinary business of this nature and the usual human behaviour one cannot plead ignorance of the transaction. In any event provisions of the statute needs to be examined. Section 31

*(interpretation) reads thus: .....*

*"contract of guarantee", in relation to any hire-purchase agreement means a contract whereby a person (in this Act referred to as "guarantor") guarantees the performance of all or any of the hirer's obligations under the hire-purchase agreement;*

*"court" means the court having jurisdiction to entertain the suit or action;*

*"guarantor" means a person who has guaranteed the performance by the hirer of all or any of his obligations under a hire-purchase agreement;*

Accordingly the 2nd defendant has guaranteed and agreed to pay in case of default of the principal debtor or the hirer. The learned Trial Judge in his order refer to Section 29 of the Consumer Credit Act and observes that the said section contemplates of making the hire-purchase agreement void in certain circumstances but there is nothing in that section which would prevent a guarantor renouncing his rights under Common Law and entering into a contract of guarantee. The Trial Court Judge's views on same cannot be disputed.

Defendants who choose to renounce or waive as per the well-known principle expressed in the maxim "*quilibet potest renunciare juri pro Se introducto*" which means – anyone may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour – Brooms legal Maxims 10th Edition – pg.477.

This legal maxim is recognised by our courts as per Upali De Z Gunawardena, J. in *GMOA* v *Senanayake* (2) at 384.

The evidence led by the respondent Company of one Michel Vandott the Finance Manager was that the agreement in question was read over as explained and signed by the 2nd defendant in his presence and another employee of the company. One Duleeth Fernando had in the presence of the said witness read the agreement and explained same to the appellant and if a translation was necessary into the Tamil language there was also one Sulochana Jayasinghe an employee of the company also present.

This evidence has been submitted to the trial court by the said witness and there had been no successful attempt to demolish the

version of the said witness of the Company. The Trial Court Judge has accepted the evidence of the said witness and this court sees no reason to interfere with those findings. It was the position of the 2nd defendant appellant that he signed the agreement in question as a witness and not as a guarantor. The learned District Judge has rejected this position of the 2nd defendant. The Trial Court Judge clearly explains that on the evidence led before the District Court it was said that the 2nd defendant-respondent had submitted his bank statements, tax receipts, Auditors reports of his business etc. and there is no reason to submit these documents to the company if his position was that he was only a witness to the transaction. The Trial Court Judge's views on same is correct and rejection by the District Judge of the 2nd defendant-appellant's version of being a witness cannot be faulted.

A creditor would have a right to proceed against a guarantor as long as the principal debtor's right to pay remains and the principal debtor fails to satisfy the creditor or is in default according to the terms of the contract. The several objections raised in this appeal by the appellant does not have any merit which were also put in issue in the original court, unsuccessfully. The learned District Judge's judgment cannot be faulted as he has given cogent reasons for rejecting the appellant's version. In the circumstances, I dismiss this appeal with costs fixed at Rs. 15,000/- and affirm the judgment of the District Court.

**CHANDRA EKANAYAKE**, – I agree.

*Appeal dismissed.*