HATTON NATIONAL BANK LIMITED

v.

HITHANARCHCHI AND ANOTHER

SUPREME COURT
DHEERARATNE, J.
WIJETUNGA, J. AND
BANDARANAYAKE, J.
SC APPEAL NO. 35/98
HCLA NO. 8/98
HC (CIVIL) NO. 143/97(1)
29TH NOVEMBER, 1999

Lease - Leasing agreement with a Bank - Lease of a bus - Mortgage of immovable property as security for payment of rentals - Termination of the lease for default of payments - Right of the Bank to sell mortgaged property for recovery of monies due under the lease - Recoveries of Loans by Banks (Special Provisions) Act, No. 4 of 1990.

The defendant Bank (the appellant) leased a bus to the plaintiffs (the respondents). The lease agreement provided inter alia, for the payment of monthly rentals and the recovery of the entire amount and the leased property on default of rentals. Clause 14 of the agreement required the appellant (the Bank) to insure the vehicle at the expense of the lessee (the plaintiffs) during the term of the lease agreement. As security for due payments under the lease, the 2nd plaintiff (the 2nd respondent) by a mortgage bond, mortgaged and hypothecated to the Bank an immovable property belonging to him.

The 1st plaintiff (the 1st respondent) defaulted in the payment of rentals whereupon the Bank terminated the lease in writing with effect from 1.2.94. The 1st plaintiff failed to deliver possession of the bus to the Bank, as he was obliged to do, and thereafter, while the bus was in the custody of the 1st plaintiff, it met with an accident on 27.04.94 and was destroyed. As on that date there was no valid insurance of the vehicle by reason of the fact that the payment of the cheque which had been sent to the Insurance Corporation had been stopped by the 1st plaintiff; and notwithstanding a written notice by the corporation on 22.12.83 that if payment was not made within two weeks therefrom, the policy would be cancelled, the 1st plaintiff failed to make payment. Hence no claim for the repair of the bus could be obtained from the Insurance Corporation.

The appellant Bank acting in terms of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 arranged to sell the property mortgaged to the Bank by auction sale. The Provincial High Court of the Western Province (Commercial) granted an *ex parte* enjoining order to the plaintiffs - respondents in an action instituted by them, preventing the sale on the basis that in terms of Clause 14(1) of the lease agreement it was the duty of the Bank to insure the vehicle. After inquiry, the High Court granted an interim injunction to the same effect.

Held :

The High Court Judge erred in granting an interim injunction in the particular circumstances of the case.

Per Wijetunga, J.

"..... the learned High Court Judge could not possibly have placed the blame on the appellant Bank for the non-renewal of the insurance policy, consequent to which the 1st respondent was unable to obtain compensation from the insurers to repair the bus".

APPEAL from judgment of the High Court of the Western Province (Commercial)

Romesh de Silva, P.C. with *Palitha Kumarasinghe* for defendant - appellant.

R.K.W. Goonasekera with *M. Sivananthan* for plaintiffs - respondents.

Cur. adv. vult.

February 24, 2000.

WIJETUNGA, J.

The defendant-appellant ('appellant') entered into a lease agreement bearing No. 2310/007/026 on 13.11.92 with the plaintiffs-respondents ('respondents') to lease a motor bus to the said respondents for a period of 48 months, subject to the terms and conditions of the said lease agreement.

By Mortgage Bond No. 285 dated 13.11.92 attested by N.M.C.P. Weerasingha, Notary Public, the respondents mortgaged and hypothecated an immovable property belonging to the 2nd

plaintiff-respondent ('2nd respondent') to the appellant as security for the due performance and payment of all rentals under the said lease agreement.

By the said lease agreement the respondents agreed *inter alia* :

(a) to pay monthly rentals to the appellant without default.

(b) if the respondents fail to pay any such rentals, the appellant is entitled to claim and/or receive immediate payment from the respondents of the entire amount of the total rentals payable under the agreement for the full term of the lease and to make a demand to the respondents for the return of the leased property and to take over possession of such property and to terminate the lease and to receive compensation from the respondents.

(c) upon termination of the said lease, the respondents should deliver and surrender the leased property to the appellant in the condition in which it was received by the respondents.

The appellant states that the 1st respondent failed, neglected, and defaulted in the payment of rentals and the appellant by writing dated 18.1.94 terminated the lease agreement with effect from 1.2.94.

The 1st respondent failed to deliver possession of the said bus the subject matter of the lease agreement, to the appellant after 1.2.94 and the 1st respondent was thus in wrongful and unlawful custody of the said bus.

The appellant further states that, as evidenced by the certified statement of accounts submitted to Court, a sum of Rs. 1,619,978/- was due and owing from the 1st respondent to the appellant as at 15.12.96.

The appellant also states that :

(a) while the said bus was in the wrongful and unlawful custody of the 1st respondent as aforesaid, it met with an accident on 27.4.94 due to negligent driving and was completely destroyed.

(b) the appellant and/or the 1st respondent were not paid any compensation by the Insurance Corporation as the 1st respondent had stopped payment of the cheque given by him for insurance premium and thus there was no valid insurance cover at the time of the accident.

(c) the Board of Directors of the appellant, acting under the provisions of the Recoveries of Loans by Banks (Special Provisions) Act, No. 4 of 1990, adopted a Resolution to sell the property mortgaged to the appellant as security for the repayment of the money due to the appellant.

Subsequently, the Auctioneer fixed a date for the auction sale of the said property, whereupon the respondents instituted proceeding bearing No. 4796/Spl. in the District Court of Colombo and obtained an enjoining order *ex parte* preventing the appellant from selling the mortgaged property. The appellant then filed a statement of objections against the application of the respondents. By order dated 3.10.97, the District Court of Colombo rejected the said plaint for want of jurisdiction.

Thereafter, the respondents instituted proceedings in the Provincial High Court of the Western Province (Commercial) bearing No. HC (Civil) 143/97 (1) and obtained *ex parte* an enjoining order preventing the appellant from selling the mortgaged property by auction and also obtained notice of injunction. After inquiry, by order dated 2.4.98, the learned High Court Judge allowed the application of the respondents and issued an interim injunction preventing the appellant bank from selling the property mortgaged to the bank, by auction.

The appellant submits that the learned High Court Judge made the said order on the basis that, in terms of Clause 14(1) of the lease agreement, it was the duty of the appellant to insure the said bus. However, it is submitted that the learned High Court Judge had failed to consider the fact that the said bus met with the accident while it was in the wrongful custody of the 1st respondent, as the lease agreement had been terminated by the appellant prior to the accident, due to the 1st respondent's failure to pay the rentals due.

It is further submitted that the learned High Court Judge was of the view that the 1st respondent had failed to pay the rentals due on the lease agreement as the bus met with the accident, whereas in fact the bus met with the accident after the termination of the lease agreement on account of the default of the 1st respondent.

The appellant had sought leave to appeal to this Court from the aforesaid order of the learned High Court Judge. By order dated 30.4.98, this Court had granted leave to appeal on the question "whether the learned Judge of the High Court erred in granting an interim injunction on the basis that, in terms of Clause 14(1) of the lease agreement, it was the duty of the (appellant) to insure the vehicle."

Arising for consideration therefrom is the question whether the appellant bank was obliged to insure the said vehicle after due termination of the lease agreement.

By its notice of termination dated 18.1.94, the appellant bank informed the respondents that the said contract was six months in arrears as at 31.12.93 and if the said arrears were not settled on or before 31.1.94, the lease under the agreement would be deemed to be terminated with effect from 1.2.94. As admittedly there had been no payment of arrears by the 1st respondent, the agreement had thus been terminated with effect from 1.2.94.

Article 14 of the lease agreement provides that the appellant bank should have the property insured in the name of the lessor but at the expense of the lessee during the term of the lease agreement. Article 17 dealing with default provides *inter alia* that, in the event of the lessee being in breach of the agreement (as by failure to make due payment of rentals), the lessor shall have the right to terminate the lease. The obligation of the lessor to have the property insured at the expense of the lessee being for the duration of the lease agreement, on its due termination by the lessor as provided for in Article 17, there is no further obligation on the appellant bank to have the vehicle insured after such termination.

The 1st respondent defaulted in the payment of rentals due under the lease agreement long before the accident occurred. In fact, in several letters addressed to the appellant bank, the 1st respondent admitted such default and promised to take remedial action. But he failed to do so. It must also be mentioned that the bus was destroyed in this accident after the termination of the lease agreement and while it was still in the custody of the 1st respondent, when it was being driven for or on behalf the 1st respondent. The 1st respondent having stopped payment on the cheque aforementioned for renewal of the insurance policy, he must be presumed to have knowledge of the fact that the vehicle was not insured at the relevant time. In any event, the Insurance Corporation itself had given notice to the 1st respondent by registered post on 22.12.93 that if payment was not made within two weeks therefrom, the policy would be cancelled. The 1st respondent therefore has only himself to blame for the destruction of this vehicle as aforesaid, with no possibility of obtaining compensation for such loss from the insurers.

There was before the learned High Court Judge the appellant's copy of the notice dated 22.12.93 sent under registered cover to the 1st respondent by the Manager, Motor Department of the Insurance Corporation of Sri Lanka stating *inter alia* that the cheque for Rs. 30,033.92 was returned by the bank stating that payment was stopped by the drawer and requesting payment by postal order, money order or cash within

the next fortnight from the date of that letter, failing which the Corporation would be compelled to cancel the relevant motor policy.

The notice of termination of the lease agreement dated 18.1.94, addressed to the 1st and 2nd respondents by the appellant bank, stating that unless the arrears were paid, the lease under the agreement would be deemed to be terminated with effect from 1.2.94 was also available to the High Court Judge.

Article 14(1) of the lease agreement limits the obligation of the lessor to "keep such insurance in full force and effect during the term of the lease agreement."

Against this background, the learned High Court Judge could not have possibly placed the blame on the appellant bank for the non-renewal of the insurance policy, consequent to which the 1st respondent was unable to obtain compensation from the insurers to repair the bus.

It is not necessary for me to consider the other submissions made by counsel which fall outside the parameters of the question on which leave to appeal has been granted.

For the reasons aforesaid, I hold that the learned High Court Judge was in error in granting an interim injunction in the particular circumstances of this case, on the basis that, in terms of Clause 14(1) of the lease agreement, it was the duty of the appellant to insure the vehicle. I therefore set aside the said order of the Provincial High Court of the Western Province dated 2.4.98 and dismiss the application of the plaintiffs-respondents for an interim injunction, with costs.

DHEERARATNE, J. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal allowed; application for interim injunction dismissed.