HATTON NATIONAL BANK LIMITED
v.
HELENLUC GARMENTS LTD. AND OTHERS

SUPREME COURT
DHEERARATNE, J.,
PERERA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. (CHC) 7/97
H.C. (CIVIL) NO. 19/96 (1)
MAY 11, 1999

Contract – Banking facilities – Overdrafts secured by mortgage of property and guarantee – Prescription of action by the Bank in respect of overdrafts and mortgage – Prescription Ordinance – Action against guarantors – Waiver of the right to plead prescription.

The appellant Bank (the plaintiff) by its plaint dated 27.5.96 instituted action against the 1st respondent (the 1st defendant) and the 2nd to 6th respondents (2 to 6 defendants) for recovery of monies advanced on overdraft facilities provided to the 1st defendant company. As security for monies advanced on overdrafts, the 1st defendant had by a mortgage bond dated 21.12.82 mortgaged and hypothecated certain movable properties to the Bank. The rights under these transactions which were initially with the Dubai Bank were later assigned to another Bank and finally to the plaintiff. By a guarantee dated 27.01.82 the 2nd to the 6th defendants agreed to pay all monies due from the 1st defendant to the Bank. The Commercial High Court dismissed the action on the ground that it was prescribed.

The action had been filed on the basis that the demand on the overdraft facilities was made on 21.05.96. The cause of action arose on such demand; hence prescription would begin to run from that date both as regards the monies due on overdrafts as well as the mortgage bond which was given as security for repayment of the sums payable by the 1st defendant.

Held:

1. Overdrafts are loans by the banker to the customer, and in general no demand is necessary, so that time runs against the banker in respect of each overdraft from the time when it is made. A bank cannot, therefore, recover against a customer on an overdraft which has lain dormant for

the prescriptive period which in Ceylon, in the absence of a written contract, would be three years. The overdraft facility in dispute was granted at or about the time the hypothecary bond was signed and hence the claim is prescribed.

As regards the mortgage bond, ten years had lapsed from the date of the mortgage or hypothecation. As such the action based on the bond is prescribed in terms of section 5 of the Prescription Ordinance.

2. The 2nd to the 6th defendants had in the guarantee made by them agreed to waive the plea of prescription. Such an agreement is valid and enforceable whether it is made before or after the period of limitation. Hence, the plaintiff is entitled to pursue the action against those defendants.

APPEAL against the judgment of the (Commercial) High Court, Colombo.

Romesh de Silva, PC with *Palitha Kumarasinghe* for plaintiff-appellant.

Defendants-respondents absent and unrepresented.

Cur. adv. vult.

September *09, 1999*

WIJETUNGA, J.

This is an appeal by the plaintiff-appellant from the judgment of the Commercial High Court, Colombo, dated 9.5.97 dismissing the plaintiff's action, after *ex parte* trial.

The plaintiff, by its plaint dated 27.5.96, sought to recover from the defendants-respondents, jointly and/or severally, a sum of Rs. 6,702,067/31, together with interest thereon at 24% from 1.1.96 until payment in full.

It was pleaded in the plaint *inter alia* that at the request of the 1st defendant, the Dubai Bank Ltd. provided loan/overdraft/banking facilities to the 1st defendant, and as security for repayment, the 1st defendant by Mortgage Bond No. 1232 dated 21.12.82 attested by D. M. Swaminathan, Notary Public, mortgaged and hypothecated certain moveable property to the said Bank.

The said Dubai Bank Ltd. by deed of Assignment No. 2548 dated 27.9.89 attested by V. Murugesu, Notary Public, assigned all rights under the said Mortgage Bond No. 1232 to the Union Bank of the Middle East Ltd.

The said Union Bank of the Middle East Ltd., subsequently known as the Emirates Bank International Ltd. by deed of Assignment No. 621 dated 17.9.92 attested by R. de S. Munasinghe, Notary Public, assigned all rights under the said Mortgage Bond to the plaintiff.

By guarantee dated 27.1.82, the 2nd to 6th defendants agreed to pay all moneys due from the 1st defendant to the Dubai Bank Ltd.

By the Deeds of Assignment aforementioned, all rights under the said guarantee too came to be assigned to the Union Bank of the Middle East Ltd. and thereafter to the plaintiff.

As the 1st and/or the 2nd to 6th defendants failed and neglected to pay the aforesaid sum of Rs. 6,702,067/31 together with interest, the plaintiff instituted action for the recovery of the same.

The learned High Court Judge dismissed the action on the ground that the plaintiff's action was prescribed in law.

It was submitted on behalf of the appellant that the overdraft facilities given to the 1st defendant became payable only upon demand and thus no cause of action arose on the principal transaction until a demand for payment was made by the plaintiff. As the Mortgage Bond was given as security for repayment of the sums payable by the 1st defendant, no cause of action arose on the bond too until such a demand was made. It was, therefore, contended that the cause of action arose from the date of demand and not from the date of the bond; and the demand having been made on 21.5.96, prescription would begin to run only from that date.

In regard to the contention that the overdrafts became payable only on demend, I would refer to Weeramantry: Law of Contracts, vol. II, section 873 at page 833 which states that "overdrafts are loans by

the banker to the customer, and in general no demand is necessary, so that time runs against the banker in respect of each overdraft from the time when it is made. A bank cannot therefore recover against a customer on an overdraft which has lain dormant for the prescriptive period which, in Ceylon in the absence of a written contract, would be three years".

This view finds support in Chitty on Contracts (27th ed. – 1994) vol. I section 28 – 025 at page 1338 where it states that "An overdraft is a loan by the banker to the customer. At common law, in the case of an overdraft repayable on demand, a demand was in general not a condition precedent to bringing an action and time ran against the banker in respect of each advance from the time when it was made".

In the absence of any material to show that the parties to this action had contracted otherwise, I am of the view that a demand was not a condition precedent to an action based on the principal transaction. No evidence has been led as to when this overdraft was granted. The learned trial Judge was right in thinking that it was granted at or about the time the hypothecary bond was signed and that the claim was prescribed.

As regards the Mortgage Bond, the relevant provision of the Prescription Ordinance applicable is section 5. Dr. Weeramantry (*ibid*) at section 866, page 821 has admirably paraphrased that section in one long sentence as follows:

"No action shall be maintainable –

(*a*) for the recovery of any sum due upon any hypothecation or mortgage of any property or

(*b*) upon any bond conditioned for –

i. the payment of money;
ii. the performance of any agreement or trust; or
iii. the payment of penalty

unless the same be commenced –

(*a*) In the case of an instrument payable at or providing for the performance of its condition within a definite time, within ten years *of the expiration of such time* and

(*b*) In all other cases –

i. within ten years from the date of such instrument or mortgage or hypothecation, or
ii. of last payment of interest thereon, or
iii. of the breach of the condition."

On the facts of this case it would appear that the date from which prescription would commence to run is the date of the instrument. The learned trial Judge was therefore right in holding that an action based on the hypothecary bond is prescribed.

I shall now consider the position of the 2nd to 6th defendants in regard to the question whether the cause of action against them is time-barred.

It is relevant to consider the effect of clause 16 of the guarantee (P7), where the 2nd to 6th defendants specifically agreed that "we and each of us hereby agree that so long as the monies herein mentioned or any part thereof is owing by the Customer to the Bank or has not already been paid to the Bank by the Customer or by us the liability of us and each of us to pay the same shall subsist and the monies herein mentioned shall be recoverable from and be the liability of us and each of us jointly and severally *notwithstanding anything to the contrary herein or in any rule of law or equity or the Prescription Ordinance or any statute contained and we hereby further agree that we or any of us shall not plead the Prescription Ordinance or any of its provisions or any rule of statute or other law as a bar to the Bank suing us or any of us for the recovery of the monies herein mentioned or any part thereof*" – (emphasis added).

Weeramantry (*ibid*) in section 844 at page 797 states under the heading: 'Agreements not to plead limitation' that "it is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law, except that such an agreement need not be supported by consideration".

Chitty (*ibid*) dealing with the English Law on 'Agreements not to plead the statute' also states at section 28 – 080 at page 1365 that "an express or implied agreement not to plead the statute, whether made before or after the limitation period has expired, is valid if supported by consideration, and will be given effect to by the Court".

The plaintiff can therefore claim the benefit of the aforementioned clause of the agreement not to plead limitation, insofar as the 2nd to 6th defendants are concerned, and I would accordingly hold that the provisions of the Prescription Ordinance would not operate as a bar to the plaintiff suing them for the recovery of the moneys due under the guarantee.

For the reasons stated above, I would set aside the judgment of the learned High Court Judge dated 9.5.97 and remit the case to the High Court. Since the 2nd to 6th defendants have defaulted in their appearance, I direct that appropriate steps be taken in terms of section 85 of the Civil Procedure Code as regards the plaintiff's case against those defendants.

There will be no costs.

DHEERARATNE, J. – I agree.

PERERA, J. – I agree.

Appeal in respect of
2nd to 6th defendants-respondents allowed.