SAPARAMADU AND ANOTHER
v.
PEOPLE'S BANK

COURT OF APPEAL
WIGNESWARAN, J., AND
TILAKAWARDANE, J.
CA NO. 661/94 (F)
DC COLOMBO NO. 11313/MR
JAN. 29, 1999
MARCH 09, 1999
MAY 10, 1999
MARCH 30, 2000

Trust Receipts Ordinance No. 12 of 1947 – S. 4 – Failure to register Trust Receipt – Consequences – Prescription Ordinance s. 4, s. 5 – Payment of interest – Interruption of running of prescription – Account stated – Continuing guarantee – Renouncing of common law privileges by guarantor.

The plaintiff-respondent had advanced facilities upon two Trust Receipts, the loans being payable within 90 days. As collateral the 1st defendant-respondent gave two Promissory Notes, a Guarantee Bond also secured the loan.

The 1st defendant company being in default after the said 90 days the plaintiff-respondent seized goods of the 1st defendant company and sold same by public auction to recover part of the sums due, thereafter the plaintiff-respondent filed action against the 1st defendant company and the 3rd and 4th defendant-appellants the guarantors to recover the said loan.

The District Court entered judgment in favour of the plaintiff-respondent.

On appeal it was contended that –

(1) failure to register the Trust Receipt makes it an invalid instrument and that consequentially no action or claim can be based on it.

(2) that the action is prescribed in law.

(3) that there was a duty on the plaintiff-respondent to first recover the sums owing from the 1st defendant-respondent, the principal debtor.

Held :

(1) Unlike Bills of Exchange there is no mandatory provision that necessitates the registration of a Trust Receipt in order to prefer any claim upon it. Furthermore, even prior to the institution of any action the 1st defendant admitted its liability and conceded that recovery could be effected in terms of s. 4, thereby waiving any rights of challenge to recovery in terms of the Trust Receipt Ordinance.

(2) There had been a recovery of a portion of the amount due by the auctioning of the goods and the sums so recovered had been credited to the aforesaid accounts. There had been no dispute that these sums had been duly credited. In an account stated, the silence of parties is regarded as an admission that the entries are correct.

(3) Even where the period of prescription has expired a part payment or an acceptance of the sum which was due would take the case out of the prescriptive period. Part payment into the account of the Bank on which the monies are transacted is a renunciation of the benefit of prescription.

(4) A payment 'on account' where there is necessarily an acknowledgment of the debt and implies a promise to pay the balance, prevents prescription from running against the debt.

(5) Where a plaintiff relies on a payment as having the effect of preventing application of a statutory bar, a part payment made on account of the debt sued must be reflected on the account stated. In this case, the plaintiff respondent was entitled to plead an exemption from the provisions of the Prescription Ordinance, on the basis that part payment was made when the goods were sold and the dues realised were credited to the account.

(6) Clause 1 (viii) of the Guarantee Bond, makes the Guarantee a continuing one, and prescription as for as the monies owing under the Guarantee Bond was concerned began when the ultimate balance was demanded from the guarantors.

(7) Clause 14 of the Guarantee Bond, relate to the renunciation by the surety of the *beneficum ordinis seu excussionis*' when a surety renounces this benefit the Bank is entitled to recover from him without proceeding against the principal debtor.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Re David Allester* – 1922 2 Ch. 211.
2. *Devaynes v. Noble* – 1816 1 Mer 529 at 535 (Clayton's case).
3. *Moorthiapillai v. Sivakaminathapillai* – 14 NLR 30.
4. *Sathappa Chetty v. Raman Chetty* – 5 SCC 62.
5. *Dharmawardane v. Abeywardena* – 41 NLR 182.
6. *Arunasalam v. Ramasamy* – 17 NLR 156.
7. *National Bank of Australia v. United Hand in Hand Bank of Hope Co.* – 1879 4 App. case 391 at 410 PC.

S. A. Parathalingam, PC with *N. N. Ranasinghe* for 3rd and 4th defendant-appellants.

Ms. M. B. Fernando, SSC for plaintiff-respondent.

Cur. adv. vult.

June 05, 2000

SHIRANEE TILAKAWARDANE, J.

The plaintiff-respondent Bank had advanced a sum of Rs. 98,218 to the1st defendant company upon a Trust Receipt dated 13. 08. 1983 (P1), and a further sum of Rs. 1,327,612 upon another Trust Receipt dated 20.10.1983 (P4). The loan was repayable within 90 days of the granting of same. As collateral for the monies borrowed on the aforesaid Trust Receipts the 1st defendant company gave two Promissory Notes (P5) and (P6). A Guarantee Bond also secured the loan (P7). This Guarantee Bond (P7) was between the plaintiff Bank and the 2nd to 4th defendants and liability thereon was limited to a sum which would not exceed Rs. 2 million.

The 1st defendant company being in default after the said 90 days, the plaintiff Bank seized goods of the 1st defendant company and sold same by public auction to recover part of the sums due on P1 and P4. Thereafter, the plaintiff Bank filed this action against the 1st defendant company and the guarantors to recover an aggregate sum of Rs. 2,640,000 plus interest and costs.

The action proceeded *ex parte* against the 2nd defendant. The plaintiff did not take out summons on the 1st defendant company. The 3rd and 4th defendants filed answer denying the claims of the plaintiff Bank stating *inter alia* that the plaintiff's action was prescribed in law.

After trial the Additional District Judge, Colombo, entered judgment on 25. 08. 1994 in favour of the plaintiff Bank. This is an appeal against the said judgment.

The 3rd & 4th defendant-respondents in their oral submissions urged that the judgment of the Additional District Judge was wrong in that he failed to consider the fact that ***failure to register*** the Trust Receipt (P4) makes it an invalid instrument and that consequentially no subsequent action or claim can be based upon it.

In this context the effect of the provisions of the Trusts Receipts Ordinance No. 12 of 1947 is relevant. This Ordinance prescribes that Trust Receipts for goods imported and exported must be in the prescribed form. Section 4 of the said Ordinance gives the legal effect of Trust Receipts to which the Ordinance applies.

According to this section registration of Trusts Receipts has the consequent legal effect of ***facilitating recovery*** of the dues in terms of the ***procedure*** prescribed therein.

In this case no objection was taken by the 1st defendant company regarding the failure to register the Trust Receipt. The validity of recovery under this procedure was not challenged at any stage. Even prior to the institution of any action the 1st defendant company admitted its liability and conceded that recovery could be effected in terms of section 4 aforesaid, by P9, thereby waiving any rights of challenge to recovery in terms of the Trust Receipts Ordinance, on the amounts due on both Trust Receipts. It is also relevant that unlike in Bills of Exchange there is no mandatory provision that necessitates

the Registration of a Trust Receipt, in order to prefer any claim upon it. [Re *David Allester*][1]. Therefore, Counsel's contention that the Trust Receipt (P4) is void due to non-registration is untenable.

The next matter which was strenuously urged by the Counsel for the 3rd and 4th defendant-appellants was that the plaintiff's action was prescribed in law. It is to be noted that the 1st defendant company had not claimed prescripion but acceded that the goods were entitled to be seized and sold in order to settle its loan (P9). Also admittedly, the 1st defendant was in default on the shortfall in the amount that was due upon Trust Receipts P1 and P4 on 11. 11. 1983 and 18. 01. 1984, respectively. Action was instituted on 27. 08. 1991 to recover the balance amounts due on the Trust Receipts. The amount so due was claimed by the plaintiff-respondent on the Guarantee Bond (P7).

According to paragraph 24 of the plaint, the Bank pleaded an exemption from the provisions of the Prescription Ordinance. This was in view of the account stated in P12 and P13, as there had been a recovery of a portion of the amount due by the auctioning of the goods and the sums so recovered had been credited to the aforesaid accounts on 07. 09. 1990 and 19. 10. 1990 since this was the 'last payment of interest thereon', according to section 5 of the Prescription Ordinance. There had also been no dispute that these sums had been duly credited on the aforesaid dates. In an account stated, the silence of parties is regarded as an admission that the entries are correct – *Devaynes v. Noble.*[2] (Also called *Clayton's* case). Prescription would, therefore, commence from 1990 and the action must therefore be deemed to have been instituted within the prescriptive period.

Even where the period of prescription has expired a part payment or an acceptance of the sum which was due would take the case out of the operation of the enactment which prescribes the time within which an action ought to be brought. Part payment into the account of the Bank on which the monies were transacted is a renunciation

of the benefit of prescription. (*Moorthiapillai v. Sivakaminathapillai*[3]). Our Courts have held that a part payment of the debt sued for prevents the statutoty bar from attaching (*Sathappa Chetty v. Ramen Chetty*[4]).

Similarly, a payment "on account" where there is necessarily an acknowledgment of the debt and implies a promise to pay the balance, especially in the absence of any special circumstances, prevents prescription from running against the debt. (*Dharmawardene v. Abeywardane*[5]; *Arunasalam v. Ramasamy*[6]).

Where a plaintiff relies on a payment as having the effect of preventing application of a statutory bar, a part payment made on account of the debt sued for, must be reflected on the account stated. The monies in this instances had been credited to the respective accounts in a sum of Rs. 23,394/76 and Rs. 316,480/64 in 1990 after the sales by auction of the goods that had been seized.

Clearly, these sums have been paid into the account. In this case, the plaintiff-respondent had proved that the monies were credited to 'an account stated' by producing P12, P13 and P9 which conclusively proved that the debt was owing and goods were sold and monies credited as part payment in pursuance of recoveries of the outstanding dues to the Bank. The 3rd and 4th defendant-appellants did not plead any special circumstances attending the aforesaid part payment in order to rebut the implication that a part payment vitiated the Prescription Ordinance. The 3rd and 4th defendant-appellants did not give evidence nor mark documents at the trial. No challenge was made to P9. The only position taken during the trial was that had the goods been sold earlier a higher price could have been fetched. Counter claim was not made in the pleadings nor was there a claim in reconvention. In these circumstances, the plaintiff-respondent Bank was entitled to plead an exemption from the provisions of the Prescription Ordinance on the basis that part payment was made when the goods were sold and the dues realized were credited to the accounts held by the Bank.

When considering the Prescription Ordinance it is also relevant to note that the 3rd and 4th defendant-appellants were sued on the Guarantee Bond P7. The Guarantee Bond given was a security given by the 2nd to 4th respondent-appellants for the debt of the 1st defendant company. Their liability was limited to a sum of Rs. 2,000,000 The purpose of the debt was clarified in clause 1 (ii) as follows: *". . . and take effect so as to give the Bank hereunder a guarantee, for the monies herein mentioned owing by such firm and every member thereof or by such limited liability Company . . .".* The term "monies herein mentioned" has been further defined in clause 1 (viii) to be *"... every sum or sums of money which shall, from time to time, become due or owing and remain unpaid to the Bank . . .".*

Clause 1 (viii) makes the guarantee a continuing one, and provides for its determination, as without determining a guarantee a guarantor is not entitled to call upon the principal debtor to release or indemnify him. (*National Bank of Australasia v. United Hand in Hand Band of Hope Co.*[7]). The determination of the ultimate balance was given by letters marked P14, P15 and P16 dated 31.01.1990. It is on this date that the Guarantee Bond was put in suit and was put in peril of recovery. Hence, prescription as far as the monies owing under the Guarantee Bond was concerned began only on this date and action was instituted within the prescriptive period set out in the Prescriptive Ordinance. This was all the more so, as the quantum for which the bond was to be put in suit was only determined after the sale of the goods and the monies had been credited to the respective accounts in a sum of Rs. 23,394/76 and Rs. 316,480/64 in 1990. Clearly, these sums have been paid into the account only after the sale of the seized goods by the auctions adverted to in P10 and P11.

Counsel in this case also argued that there was a duty on the Bank to first recover the sums owing from the 1st defendant-respondent. In this context clause 14 of the Guarantee Bond P7 bears much relevance. This clause renounces the common Law privileges and states that: *"I/we and each of us specially agree that the Bank shall*

be at liberty, either in one action to sue the debtor and me/us and each or any of us jointly, and severally, as to proceed in the first instance against me/us and each or any of us only, and further that I/We and each of us hereby renounce the right to claim that the debtor should be excused or proceeded against by action in the first instance., including the liability to be sued before recourse is had against the debtor". This important clause which is common to all guarantee forms of a Bank relates to the renunciation by the surety of the *beneficium ordinis seu execussionis.* When a surety renounces this benefit, the Bank is entitled to recover from him first without proceeding against the principal debtor. 150

We, accordingly, see no reason to interfere with the judgment dated 25. 08. 1994 of the Additional District Judge, Colombo. The Appeal is dismissed. We order taxed costs be paid by the 3rd and 4th defendant-appellants to the plaintiff-respondent.

WIGNESWARAN, J. – I agree.

Appeal dismissed.