SEYLAN BANK LIMITED
VS
INTERTRADE GARMENTS (PRIVATE) LIMITED

SUPREME COURT
BANDARANAYAKE, J.
YAPA, J. AND JAYASINGHE , J
S. C. (CHC) NO. 32/98
COMMERCIAL HIGH COURT NO. 168/96(1)
D.C. COLOMBO NO. 16543/MB
29TH JANUARY,
17TH AND 20TH FEBRUARY, 2004

Prescription — Prescription of action - Recovery of money lent without written security - Prescription Ordinance, sections 6 and 7

The plaintiff Bank which had acquired the rights of BCCI Ltd. instituted action against the defendant company for recovery of loans advanced to the defendant by the BCCI Ltd. and secured by Bond No. 5584 dated 23.12.1986, attested by Abeysuriya, Notary Public.

The action was instituted on 06.10.1993

The action was inaccurately described as a Mortgage Bond action although the cause of action (in terms of section 5 of the Civil Procedure Code) was the failure of the defendant to pay on demand the moneys owed to the plaintiff. The plaintiff made his demand on 01.03.1993. In terms of the agreement ("The Bond") the defendant's obligation was to pay on demand.

The High Court held that the transaction sued upon was the so called Mortgage Bond and dismissed the action on the ground that the "Mortage Bond" had not been registered and was invalid.

The High Court characterized the document ("the Bond") as a written agreement and dismissed the action as it had not been instituted within 6 years in terms of section 6 of the Prescription Ordiance.

Held :

The High Court failed to appreciate that the true character of the cause of action was a claim of money payable " on demand" and that in terms of section 7 of the Prescription Ordinance the action had been filed within 3 years of the demand.

Cases referred to :

1. *Pless Pol* vs. *Lady de Soysa* (1906)9 NLR 316
2. *Amerasekera* and *Co. vs Duckworth* 5 ACR 21
3. *Croose* vs *Goonewardene Hamine* (1902)5 NLR 259 at 261
4. *Sivasubramaniam* vs *Alagamuthi* (1950) 53 NLR 150
5. *Merchant Bank of Sri Lanka Ltd.* v. *P.L. Buddhadasa and another* 2002 Bar Association Law Reports, 64

APPEAL from the judgement of the High Court.

Romesh de Silva, P.C., with *S. R. de Livera* and *Hiran de Alwis* for plaintiff-appellant.

Shamil J. Perera with L. B. J. Peiris and Arjuna Weerasinghe for defendant - respondent.

Cur.adv.vult.

May 28, 2004

SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgement of the High Court of Colombo (Commercial) dated 20.03.1998. By that judgment the High Court dismissed the action filed by the plaintiff-appellant (hereinafter referred to as the plaintiff) against the defendant-respondent (hereinafter referred as the defendant).

The plaintiff is a duly incorporated Bank which by virtue of the powers set out in Gazettes dated 28.12.1991(A) and 01.01.1992(B) have accrued all rights of the Bank of Credit and Commerce International (Overseas) Ltd. (hereinafter referred to as BCCI). The defendant was a duly incorporated Company and a Customer of BCCI. According to the plaintiff, at the request

of the defendant, BCCI granted to the defendant packing credit loans and banking facilities subject to the promise that the defendant would repay BCCI on demand all monies together with interest and charges outstanding. As security for the repayment of the said sum, the defendant entered into Bond No. 5584 dated 23.12.1986(D). The defendant failed and neglected to pay monies due to BCCI and the plaintiff instituted action to recover a sum of Rupees 15,967,962 together with further interest at 18% per annum from 01.01.1993.

Learned President's Counsel for the plaintiff took up the position that,

(a) the High Court erred in holding that the action of the plaintiff was based on the Mortgage Bond; and;

(b) the High Court erred in holding that the cause of action was prescribed in law.

Learned President's Counsel for the plaintiff submitted that there is no action known as a Mortgage Bond action and that a Mortgage Bond is a mortgage of property, whether it is movable or immovable given as security for the loan. Therefore he contended that the plaintiff's action was to recover a loan.

Learned Counsel for the defendant however submitted that although learned President's Counsel for the plaintiff sought to make out that the plaintiff's action was not based on the Mortgage Bond, even on a cursory examination of the plaint it would be obvious that the plaintiff's action is in fact based on the Mortgage Bond and not on any unwritten agreement as purported to be shown by the plaintiff. In support of this contention, learned Counsel for the defendant referred to the following instances:

(a) In the caption of the plaint, the nature of the action is described as a 'movable mortgage';
(b) The number given to the action at the time it was instituted (16543/MB) indicated that it was not a money recovery action, but a Mortgage Bond action;

(c) Paragraphs 7, 8 and 9 of the plaint are in relation to the execution of the Mortgage Bond;

(d) In paragraph 7, the Mortgage Bond is pleaded as part and parcel of the plaint;

(e) Paragraph 10 of the plaint stated that,
"the defendant wrongfully and in violation of the conditions in the said Mortgage Bond failed and neglected to pay the monies which became due thereon and accordingly the plaintiff is entitled to sue the defendant to recover the said money (emphasis added)"

(f) paragraph 14 of the plaint says that the cause of action has accrued to enforce the said Mortgage Bond to recover the money due from the defendant.

Learned Counsel for the defendant also drew our attention to the evidence of the plaintiff's witness, who was a Manager of the bank who stated that,

"මෙම මුදල විත්තිකරුට 'බී' වශයෙන් ලකුණු කර ඇති උකස්කරයෙන් දී තිබෙනවා"

Consequently, learned counsel for the defendant contended that the plaintiff came to court to recover the money which the defendant had failed and neglected to pay in terms of the conditions of the Mortgage Bond. Therefore it was submitted that it would be erroneous and misleading for the plaintiff to state that the action was not based on the Mortgage Bond.

It is not in dispute that the defendant entered into a Mortgage Bond No. 5584 dated 23.12.1986 as security for the repayment of the sum due to the plaintiff. Issue No. 6 refers to the said Bond and is in the following terms;

> "As security for the repayment of the said sum did the defendant enter into Bond No. 5584 dated 23.12.1986 attested by S. C. Abeysuriya, Notary Public?"

This issue was answered in the affirmative. However, it is common ground that the said Mortgage Bond was not registered as required within the stipulated time period.

Be that as it may, it is pertinent to note that it was common ground that the defendant obtained from the plaintiff a loan and that the defendant did not repay the loan to the plaintiff. It is also quite evident on a consideration of the plaint and the averments made thereof that the action against the defendant was filed to recover the loan which was granted to the defendant by the plaintiff. It appears that the High Court has solely based its decision on the fact that the transaction between the defendant and the plaintiff rested on the Mortgage Bond which lacked validity due to its non registration during the required time period. In fact after answering the issue No. 6 raised by the plaintiff in the affirmative which was to the effect that "Did the defendant promise and /or undertake to pay to BCCI on demand all monies outstanding on the said banking facilities together with interest and charges", the High Court has erred in failing to take into account the nature of the obligation of the defendant in respect of which the action has been filed. Consequently the High Court has not given any consideration and had totally ignored the course of action as pleaded in the plaint.

The Civil Procedure Code has defined the cause of action. According to Section 5 of the Code,

> "Cause of action is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation the neglect to perform a duty, and the infliction of an affirmative injury."

The plaintiff in the present appeal instituted action based on a 'wrong' relating to a refusal to fulfil an obligation. On a request of the defendant, the plaintiff had granted loan facilities, as pointed out earlier which was not paid by the defendant at the time the plaintiff made a demand for the repayment. Discussing the description of 'cause of action' in *Pless Pol V Lady de Soysa* [1] Lascells, A. C. J. said that,

> "An action is simply the right or power to enforce an obligation. It springs from the obligation which is simply the cause of action ..... The words 'the wrong or prevention or redress which an action may be brought' state generally what is connoted by term 'cause of action'

In *Amerasekera and Co.* v *Duckworth* [2] the Court, referring to the definition of the cause of action, stated that,

> "On the other hand, it implies not only the wrong for the prevention or redress of which action may be brought, but connotes the grounds upon which such wrong arises."

Discussing the specific issue or refusal to fulfil an obligation, Wendt, J. in *Croose* v *Goonawardene* Hamine [3] said that,

> ".....the word 'obligation' in this definition is to be understood not in the narrower sense in which a parol promise to pay a promissory note and a mortgage, although given for the same debt, may be described as three different 'obligations', but in the more generally understood sense of a liability to pay that sum of money.

The High Court has not considered the cause of action of the plantiff in the light of its definition given in Section 5 of the Civil Procedure Code and the interpretation given to that in the aforementioned decisions. Instead, it has erroneously taken into consideration the period of time when facilities were granted to the defendant and the date the plaintiff commenced proceedings against the defendant. The High Court had erroneously taken into consideration the time periods when loan facilities of different kinds were granted to the defendant and came to the conclusion that when proceedings commenced for the recovery of the money on 06.10.1993 it was 6 years after the last date of the facilities given on 05.01.1987 . The court had considered the question of prescription in terms of Section 6 of the Prescription Ordinance and held that the term of 3 years ended on 06.01.1990 and by the time the action was instituted by the plaintiff on 06.10.1993, it was well beyond the period of prescription.

However, it is to be noted that the undertaking given by the defendant at the time the facilties were obtained was that all the monies outstanding would be paid **on demand.** The plaintiff had stated that at the request of the defendant, the BCCI had granted the respondent packing credit loans

and/or banking facilities **subject to the promise of the defendant to repay to BCCI on demand** together with the interest and charges outstanding.

In fact the question whether the money was to be paid on demand was raised in issue No. 5 which was in the following terms:

> "Did the defendant promise or undertake to repay to the BCCI on demand all monies outstanding on the said banking facilities together with interest and charges."

The High Court had answered this issue in the affirmative.

It is not in dispute that the letter of demand by the plaintiff to the defendant was dated 01.03.1993. The High Court, after evaluation of evidence has also held that the defendant had undertaken to pay the plaintiff on demand. Therefore there cannot be any dispute that this was an action concerning a loan repayable on demand. In such circumstances there cannot be any doubt that the cause of action in the present case would arise only at the time when demand was made on 01.03.1993.

Section 7 of the Prescription Ordinance deals with the time frame in cases of action to recover money lent without written security. This section reads as follows:

> "No action shall be maintainable for the recovery of any movable property, rent or .... profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant , or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen."

Accordingly the question that should be inquired into is as to when did the cause of action arise in this instance.

Learned Counsel for the defendant contended that loans to the defendant were granted by the plaintiff on 03.05.1984, 24.08.1984, 05.09.1984, 12.09.1984 and on 05.01.1987. He took up the position that

since the amounts so granted were not covered by any agreement, as the Mortgage was invalid, the transction would be governed by law applicable for ordinary lending. He accordingly contended that it is a well established principle that in an action for money lent if it is not specified that it is repayable on demand, the term of prescription is taken into account from the date of such loan. Learned Counsel for the respondent drew our attention to *Halsbury's Laws of England* ([4th Edition] Vol. 28, pg,299) where it is stated that,

> "..... if no time is specified, the statute runs from the date of the loan....."

He further contended that, the Prescription Ordinance of Ceylon (as it was then), is based upon the Statute of Limitations in England at that time. His position is that the appellant cannot be heard to say that Laws of England have no application in this case.

I am however not inclined to agree with the submissions made by learned Counsel for the respondent for two main reasons. Firstly, it is to be noted that, as pointed out earlier the transaction between the appellant and the respondent had been on the basis for the repayment to be made on demand.

Secondly, it would not be correct to say that the applicable law in this country for repayment, where it has been agreed that the money should be paid on demand runs from the date of the loan. This question was discussed in detail in *Sivasubramaniam* v *Alagamuthi* [4] where Nagalingam , J. stated that,

> "Even in the case of a simple loan, where no time has been fixed for repayment, it is not immediately claimable, but after the lapse of a reasonable time; so that it would be seen that under our common law a demand is essential before it could be said that a cause of action accrues to a creditor to sue the debtor."

The necessity for a demand to be made for the purpose of stating that a cause of action has accrued to the creditor was reiterated by Chitty. (*Chitty on Contracts* , 28th Edition Vol. I, pg. 1412) According to Chitty,

> "At common law, where no time for repayment was specified in a contract of loan, or where the loan was expressed simply to be repayable 'on demand', the lender's cause of action

in general accrued when the loan was made and time began to run from that moment. As a result, once the loan was outstanding for more then six years..... the lender's right to recover the money lent became barred notwithstanding that no demand for repayment had been made. But by Section 6 of the Limitation Act, 1980, if (a) a contract of loan does not provide for repayment of the debt on or before a fixed or determinable date, and (b) does not effectively make the obligation to repay the debt conditional on demand for repayment made by or on behalf of the creditor or any other matter, then the right of action on the contract of loan is not barred after six years from the date of the loan. **Instead, the six year period does not start to run unless and until a demand in writing for repayment of the debt is made by or on behalf of the creditor** (emphasis added)."

In fact, as correctly referred to by the learned President's Counsel for the plaintiff this position has been accepted by our Courts. For instance in *Merchant Bank of Sri Lanka Ltd.* v *P. L. Buddhadasa and another*[5] an action was instituted based on an agreement to make payment on the Bill of Exchange by discounting them, dated 29.01.1990 against the principal debtor and the guarantor. The High Court dismissed the action on the basis that the cause of action was prescribed in terms of Section 6 of the Prescription Ordinance , The Supreme Court held that the cause of action arose when the 1st defendant failed to honour the Bill of Exchange and the demand made thereafter.

According to Section 7 of the Prescription Ordinance,as referred to earlier, action for the recovery of money lent without written security, must be commenced within three years from the time after the cause of action had arisen.

It is not disputed that the plaintiff by letter dated 01.03.1993 demanded that the defendant takes steps to repay the monies borrowed from the plaintiff Bank.

It is also not in dispute that the plaintiff instituted action to recover the loans on 06.10.1993. The cause of action thus arose on 01.03.1993 and the plaintiff has taken action for the recovery of the monies lent, within a period of 7 months of such demand being made.

For the aforementioned reasons the appeal is allowed with costs and the judgement of the High Court dated 20.03.1998 is set aside. We enter judgement in favour of the plaintiff as prayed for and the High Court is directed to enter decree and take steps according to law.

YAPA, J. — I agree.

JAYASINGHE, J. — I agree

Appeal allowed.