

SELAN BANK PLC
VS
SAMANELIYA TEAS (PRIVATE) LIMITED AND 3 OTHERS

SUPREME COURT

SHIRANEE TILAKAWARDENE, J.

SALEEM MARSOOF, J AND

BALAPATABENDI, J

SC (C. H. C.) APPEAL NO. 43/2007

SC (HCLA) NO. 36/2007

HC (CIVIL) NO. 159/06/01

OCTOBER 22nd, 2008

Evidence Ordinance - Section 90(e) - Section 130(3) - Inspection of books by order of Court or Judge - Section 65 - Cases in which secondary evidence relating to documents may be given - Section 66 - Rules as to notice to produce documents - Civil Procedure Code - Section 104.

The Respondent had obtained banking facilities amounting to Rs. 29,700,000/= from the Appellant-Bank by entering into four mortgage bonds drawn in favour of the Appellant-Bank. Subsequently, the Respondent defaulted the repayment of the loan facilities. The Appellant-Bank demanded that a sum of Rs. 52,811,385/74 with interest at 22% per annum be paid immediately. The Board of Directors of the Bank also passed a resolution to recover the amount due to the Bank by auctioning the properties mortgaged to the Bank.

The Respondent challenged the correctness of the amount claimed by the Bank by filing action against the Bank in the Commercial High Court of Colombo, seeking *inter alia* an order from the Court directing the Bank to produce a Statement of Accounts in respect of the outstanding amount due to the Bank. In the alternative the Respondent also sought an order from Court to obtain a Statement of Accounts in respect of the loan facilities in terms of Section 90(e) of the Evidence Ordinance. The High Court Judge allowed this application. The Appellant-Bank appealed against this order.

The Supreme Court granted leave on the question of law, namely, whether the judgment of the High Court Judge was in error in permitting the application made under Section 90(e) of the Evidence Ordinance and consequently, requesting the Bank to produce a Statement of Accounts in respect of the banking facilities obtained by the Respondent.

Held:

- (1) The ambit and object of Section 90(e) is clearly, for the original entries in the ledgers to be examined and clearly specifies that the request should refer to an already existing original or primary entry of Banker's Books or business of a Bank.

Per Shiranee Tilakawardena, J. -

"It is important to note, however, that while Section 90(e), as guided by Section 63 of the Evidence Ordinance, affords a great deal of access to the internal documents of a bank, the breadth of this allowance is not without limit. What are noticeably missing from the list of discoverable material in Section 90(e) and from the definition of Secondary Evidence in Section 63 - are any derivative creations, that is, items which have to be created or brought into existence making use of entries in books of accounts which have been maintained by the Bank in the ordinary course of business".

- (2) "Statement of Accounts" sought by the Respondent does not fall under the definition of Primary Evidence, nor is it covered by the definition of Secondary Evidence and therefore the judicial discretion cannot be made under Section 90(e) of the Evidence Ordinance to compel the preparation and delivery of such statement.
- (3) Section 65 and 66 of the Evidence Ordinance, taken together, explicitly set out that the access to Secondary Evidence is only possible, *inter alia*, (1) where the Primary Evidence is not obtainable due to destruction or disappearance or (2) where the party possessing the Primary Evidence fails to produce it despite issuance of a notice of request to such party to do so.

APPEAL from an order of the Commercial High Court, with leave being granted.

Case referred to:

- (1) *Macdonnell vs. Evans* (1852)
- (2) *Williams vs. Summer Field*

Kuvera de Soysa with S. Haleemdeen, Sumedha Mahawanniarachchi and Asela Rekawa for Defendant-Petitioner

Gamini Marapana, P.C. with *Navin Marapana* for the Plaintiff-Respondents.

February 16, 2009

SHIRANEE TILAKAWARDENE, J.

This Court granted the Defendant-Petitioner Bank (hereinafter referred to as the "Petitioner Bank") leave to appeal on 16th October 2007 on a question of law set out in Paragraph 9 (b) of the Petition dated 02.10.2007, namely whether the Judgment of the High Court Judge dated 14.09.2007 was in error for permitting the application made under Section 90(e) of the Evidence Ordinance and consequently requiring the petitioner to produce a Statement of Accounts in respect of the facilities obtained by the plaintiff-Respondent (hereinafter referred to as the "Respondent").

The Respondent was a customer of the Ratnapura Branch of the Petitioner Bank, had maintained the Account bearing No. 0070000052296 since 1994, and had obtained several loan facilities by mortgaging his properties. The Respondent had obtained a total sum equal to Rupees Twenty-Nine Million Seven Hundred Thousand (Rs. 29,700,000/=) by entering into four mortgage bonds drawn in favour of the Petitioner Bank.

The Respondent eventually failed to service these loan facilities in accordance with the agreed-upon payment schedules required of them. In response the Petitioner Bank, by letter dated 5th May 2006 and addressed to the Respondent, demanded that a sum equal to Rupees Fifty - Two Million Eight Hundred Eleven Thousand Three Hundred Eighty Five and Seventy Four Cents (Rs. 52,811,385.74) (the "Debt Amount") with annual interest at the rate of Twenty-Two percent (22%) to accrue from 01.01.2006 be paid immediately to the Petitioner Bank. Consequently the Board of Directors of the Petitioner Bank had passed a resolution to recover the Debt Amount by auctioning the movable and immovable properties belonging to the Respondent.

The Respondent challenged the request on the Amount of the Debt and made representations to the Petitioner Bank, eventually filing an action in the Commercial High Court of Colombo against the Petitioner Bank and three (3) others seeking, *inter alia*, that the resolution dated 21.06.2006 of the Board of Directors of the Petitioner Bank be declared null and void.

In connection with the above action, the Respondent made application seeking an order from the High Court directing the Petitioner Bank to produce a Statement of Accounts in respect of the aforesaid outstanding amounts in terms of section 104 of the Civil Procedure Code. The application was refused.

The Respondent also sought, in the alternative, to obtain the Statement of Accounts in terms of Section 90(e) of the Evidence Ordinance. The High Court Judge by his Order dated 14.09.2007 allowed this application and ordered the Petitioner Bank to produce a Statement of Accounts with regard to the facilities obtained under the relevant mortgage bonds. The application for leave was preferred against this Order.

The substantive question posed to this Court is whether a direction can be made under Section 90 (e) of the Evidence Ordinance to entitle the Respondent to a statement of Accounts depicting the outstanding balance of the principle and interest as at 31.12.2005 on Bonds marked A3-A6. Essential to a determination of the answer, is (1) an analysis of the nature of the evidence being requested and (2) a determination of the Respondent's compliance, or lack thereof, with the statutory requirements for the granting of such requests.

Section 90(e) of the Evidence Ordinance allows a party to make application for, and a Court to so approve, access

to “the ledgers, day books, account books and all other books used in the ordinary business of a bank”, where such bank is party to that proceeding. Depending on the specific directive of the Court Order, access to these “banker’s books” can be (1) the inspection of the “Primary Evidence”, that is, the original books and ledgers themselves, or (2) limited to the inspection/receipt of “Secondary Evidence” - including “certified copies, counterparts, accurate mechanical reproductions, and first-hand oral accounts” - of such books. Section 90(e)’s mechanism of access to these items is both in conformance with, and guided by, the characterization and definition of Secondary Evidence made clear in Section 63 of the Evidence Ordinance.

It is important to note, however, that while Section 90(e), as guided by Section 63, affords a great deal of access to the internal documents of a bank, the breadth of this allowance is not without limit. What are noticeably missing from the list of discoverable material in Section 90(e) and from the definition of Secondary Evidence in Section 63 - are any derivative creations, that is, items which have to be created or brought into existence making use of entries in books of accounts which have been maintained by the Bank in the ordinary course of business. The Statement of Accounts requested by the Respondent, which, in their words, is necessary to explain “how (the Petitioner Bank) arrived” at the Debt Amount, constitute precisely this type of derivative creation or extraction of accounts and a creation of a new document. In order for the bank to provide such information, the Bank would need to calculate and prepare a statement of accounts showing the allocations of loan amounts that constitute the Debt Amount being sought.” For this reason, it is the Court’s considered opinion that the “Statement of Accounts” sought by the Respondent does not fall under the definition of Primary Evidence, nor is it covered by the

definition of Secondary Evidence, and therefore a judicial direction cannot be made under Section 90(e) to compel the preparation and delivery of such a statement.

Even if this Court were to assume that such documentation were to somehow constitute Secondary Evidence, the Respondent's efforts to obtain such evidence is buffeted by the fact that they have failed to comply with the prerequisites for obtaining such evidence. Section 65 and 66 of the Evidence Ordinance, taken together, explicitly set out that the access to Secondary Evidence is only possible, *inter alia*, (1) where the primary Evidence is not obtainable due to destruction or disappearance or (2) where the party possessing the Primary Evidence fails to produce it despite issuance of a notice of request to such party to do so. E. R. S. R. Coomaraswamy, in his book, The Law of Evidence (Volume II, Book 1), provides a succinct statement on the limited availability of Secondary Evidence:

“Primary” evidence is evidence which the law requires to be given first, secondary evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence.

This principle is further elaborated upon in the case of *Macdonnell vs. Evans*⁽¹⁾

The best evidence in the possession of the party producing the document must be given. This is generally the original document itself, and it is primary evidence of its contents. It must, therefore, be produced, unless its absence is accounted for, in which case secondary evidence would become the best evidence.

In none of the submissions provided before us is there any evidence that the Respondent had attempted to obtain

such material in a more traditional manner, that is by simply asking for the statements of the Petitioner Bank of the individual loan facilities. Had he done so, the Respondent would have easily been able to reconstruct the aggregate amount outstanding on the loans and offer such findings in its initial plaint. While it is admitted that the Respondent had requested - and the Petitioner Bank did not provide - Statement of Accounts in a letter dated before the initial action, this request for a prepared summary and analysis is fundamentally different in character from a mere request for information. The distinction this Court makes between (a) obtaining certified statements by request to the Petitioner bank and (b) a request to the Petitioner Bank to essentially have the bank summarize their internal records to show how they arrived at the Debt Amount being demanded, while seemingly insignificant, is in fact an important one for multiple reasons.

First, the request for a Statement of Accounts is an action by the Respondent that essentially shifts the burden to the Petitioner Bank, a move that belies the Respondent's diminished position as the party in default of the Loan Agreement. It is the Respondent who has defaulted and, accordingly, it is the Respondent who should be proactively determining the outstanding amount whether through a request for account balances or through a review of its own internal bookkeeping.

Second, the request for a Statement of Accounts by use of Section 90(e) is an attempt to make use of a statutory allowance which was never intended to serve as a customer service option. The special rules regarding Bankers Books are set out in chapter VI of the Evidence Ordinance and the said Chapter is structured on the English Banker's Books Evidence Act 1879. A historical analysis reveals that this Act had a twofold purpose, which was to protect the bankers from the inconvenience of having to produce their books

in court and to allow litigants to facilitate proof of the transactions recorded therein. This purpose can be extrapolated in our law to be seen as allowing bankers a limited immunity in accordance with the duty of the banker to preserve the secrecy of their customer's accounts. Such a duty is not absolute and is subject to reasonable exceptions, the foremost of which is to act under compulsion of the law. However, the power to order inspection of Bankers Book is a discretionary power and should be exercised with great caution, a fact made clear in *Williams vs. Summerfield*, (Widgery, L. C. J):

“... an order under section 7 can be a very serious interference with the liberty of the subject. It can be a gross invasion of privacy; it is an order which clearly must only be made after the most careful thought and on the clearest grounds.”

The significance of the application made by the Respondent is that he has sought to obtain information of “Statements of Accounts” made out of these original entries. Section 90(e) refers to particular entries in a banker's book and the Respondent has requested not for a specific entry but for statement of accounts to be produced. The ambit and scope of this section is clearly for the original entries in the ledgers to be examined and clearly specifies that the request should refer to an already existing original or primary entry of banker's books of business of a bank.

Where the Bank is a party as in the present case, normal procedural rules with regard to the Civil Procedure Code would apply. To rule otherwise would be to deprive the parties of the full benefit of the testing of the credibility of the evidence placed before the Court. It would indeed be disadvantageous to the Respondent who would then be saddled with the immunity of the Bank official who would

not have to attend court and could rely on producing certified copies of these statements, and not be able to scrutinize the original ledgers of the Bank. The underlying reason for these provisions is that the books of the Bank could remain in the Bank and not be removed for the reason of public convenience and maintenance of the confidentiality of the entries of other customers of the Bank and pertains to the duty of secrecy of the Banker to his customers. It also affords a limited immunity on the Bankers, limiting their responsibility, by section 130(3) of the Evidence Ordinance to produce the books of the Bank, where the Bank is not a party; only in terms of the provisions of section 90D. It is merely for proof by litigants of banking transactions recorded therein. Compulsion to produce the original books is confined to exercising of proper authority deriving from Statute or by an Order of Court.

Additionally, in seeking to produce the certified copies the Bank must prove that the book is in the custody of a Bank, at the time of making the entry as one of the ordinary books of the Bank, and that the entry was made in the ordinary or usual course of business. Here the entries in the bankers books can be proved in this manner, but this would preclude extraction from the entries and the formulation of a new set of documents as in the preparation of specific statement of accounts, at the dictates and demands of a litigant. The learned High Court judge has failed to note that there is a provision under the Civil Procedure Code where a party could obtain the same information by service of interrogatories on the litigant Bank. In this case the Respondent has in his affidavit failed to state the grounds of the application for the purpose of showing that it is not of a 'fishing character' and that the entries are relevant and the inspection of the copies necessary.

Accordingly, the order given by the learned High Court judge is not envisaged within the scope and ambit of Section 90(e) and the Court sets aside the said Commercial High Court order dated 14th September 2007.

The Appeal is allowed. The Respondent is to pay the Appellant a sum of Rs. 30,000/- as Costs.

MARSOOF, J. - I agree

BALAPATEBENDI, J. - I agree

Appeal allowed