1929.

Present: Dalton and Maartensz JJ.

SENANAYAKE *v.* WIJEYESEKERE.

364—D. C., Colombo, 26,952.

Promissory note—Claim against bank—Agreement to abandon claim—Consideration.

Plaintiff, who was the customer of a bank which had suspended payment, gave a cheque for the amount lying to his credit to the defendant, who was the managing director and largest shareholder of the bank, in return for a promissory note given by the latter.

Held, that there was sufficient consideration for the note.

PLAINTIFF sued the defendant to recover a sum of Rs. 611.99 due on a promissory note. The defendant was managing director of the Bank of Colombo. He was also the largest shareholder and the largest debtor. Plaintiff was a shareholder and customer of the bank. The bank suspended payment in June, 1921, when there was a sum of Rs. 468.68 lying to the credit of

plaintiff's account. Plaintiff's case was that the defendant told him that if he abandoned his claim on the bank, the defendant would be personally liable for it. Thereupon in return for a cheque for the balance of plaintiff's account, the defendant gave the promissiory note sued upon. Defendant while admitting the making of the note, pleaded failure of consideration.

The learned District Judge gave judgment for the plaintiff.

N. E. Weerasooria, for defendant, appellant.

M. T. de S. Amarasekera (with *Amarasinghe*), for plaintiff, respondent.

July 25, 1929. DALTON J.—

Plaintiff is suing deftndant for the sum of Rs. 611.99 made up of principal and interest, and further interest alleged to be due on a promissory note. Defendant admits the signing of the note, but pleads there has been a total failure of consideration. The note is dated November 20, 1922, and the amount is payable on December 28, 1927, at the Imperial Bank of India, Colombo. The defendant was managing director of the Bank of Colombo, Ltd. He was also apparently under the name of Wijeyasekera & Co., the agent and secretary of the bank. He was also, according to his evidence, the largest debtor to the bank and the largest shareholder. Plaintiff was a shareholder and customer of the bank. The bank suspended payment in June, 1921, at which time there was the sum of Rs. 468.49 to the credit of plaintiff's account. Defendant says there were 425 creditors at that time, of whom 300 were creditors for sums over Rs. 100, the bank being indebted in the sum of two or three lakhs of rupees when it suspended payment.

In 1922 the Registrar of Joint Stock Companies published a notice in the *Gazette* of September 1, 1922, that three months from August 30 the name of the bank would be struck off the register and the company would be dissolved unless cause be shown to the contrary. The evidence shows that defendant was very anxious to prevent this being done as he wished to restart the bank. It was obvious however that he could not open its doors without first coming to some arrangement with the bank's creditors. He accordingly circularized them, including plaintiff, with the object of coming to some arrangement with them. His idea seems to have been to postpone the creditors' claims by arrangement with them. He met plaintiff on November 20, just ten days before the Registrar's notice expired. What happened at that meeting is not agreed on. Plaintiff says defendant asked him to take no action in respect of the bank's indebtedness to him and told him that if he abandoned

1929.

DALTON J.

Senanayake v. Wijeyesekere

his claim he (defendant) would be personally liable for it and give him a note for the sum payable with interest in five years. In return plaintiff was to give him a cheque for the balance to his (plaintiff's) account. This freed the bank from further liability to plaintiff, although he gave no other writing abandoning his claim. It may well be, as defendant says, that the creditors as a whole were not prepared to spend further money on enforcing their claims against the bank. It is clear however that defendant wished to take steps to prevent them doing anything of the kind. Plaintiff, on this version, clearly gave consideration for the note, forbearance to take action against the bank for the sum admitted to be due to him. So far as he was concerned therefore there was nothing to prevent defendant opening again the doors of the bank. Unfortunately, however, only ten of fifteen were agreeable to take notes for their claims and so the bank was not reopened, being dissolved as from November 30.

Defendant's version of what happened on November 20 differs in one important respect from plaintiff's version. He states it was agreed that he was only to be liable on the promissory note given to plaintiff by him, if he was able to cash plaintiff's cheque. That of course depended upon the bank being reopened and funds being forthcoming to meet the cheque, for the cheque was on plaintiff's account at the bank. As the bank was not reopened it was impossible to cash the cheque, and therefore the consideration on the note failed. The trial Judge prefers to accept plaintiff's version instead of defendant's as to the transactions on November 20, and in that conclusion, upon the evidence produced in the lower Court, I entirely agree with him. Another similar note (P 4) was produced at the trial, given to another creditor who has since died, and dated November 30. How it could be said that under the agreement come to with this creditor at any rate defendant was only to be liable upon that note if the bank was reopened I fail to see, since November 30 was the last day for showing cause against the dissolution of the company. It is admitted he has been paying off the sum due on P 4 by instalments, but he stopped payments so soon as he had notice of this present action. He says the payments were made out of charity and not because he was legally liable. This note was clearly given to prevent the creditor suing the bank. One concludes from the evidence that this creditor received the same circulars as plaintiff, and that defendant was actuated in respect of his dealing with all the creditors by the same motive, namely, the desire to reopen the bank. That could only be done, as I have stated, by making arrangements to prevent them enforcing their claims against the bank. The obtaining of a cheque from plaintiff was an insurance, as the trial Judge finds, that plaintiff's claim was abandoned. He received defendant's promise in the note to be personally liable in return for that forbearance.

I am unable to agree, upon the facts here, that anything adverse to plaintiff can be drawn from the fact that he endorsed the note over to a third party who presented the note for payment at the bank.

The decision of the trial Judge must therefore be affirmed and the appeal is dismissed with costs.

MAARTENSZ J.—

The defendant in this action appeals from a judgment entered against him for the recovery of a sum of Rs. 611.99 and further interest.

The sum sued for was alleged to be due on a promissory note for Rs. 468.49 made by the defendant in plaintiff's favour, dated November 20, 1922, and payable at the Imperial Bank of India, Ltd., on December 31, 1927.

The only question argued in appeal was whether there was a failure of consideration.

The note was made in the following circumstances. The plaintiff was a customer of the Bank of Colombo and had to his credit Rs. 468.49 when the bank suspended payment in June, 1921.

On August 30, 1922, the Registrar of Companies published a notice in the *Gazette* that there is reason to believe the Bank of Colombo, Ltd., is not carrying on business and that in terms of the provisions of the Ordinance No. 22 of 1866 and section 242 (3) of the Companies (Consolidation) Act, 1908, at the expiration of three months from the date of the notice the name of the Bank of Colombo, Limited, will, unless cause is shown to the contrary, be struck off the Register of Joint Stock Companies kept in the office of the Registrar and the company will be dissolved.

The defendant, who was the largest shareholder and the managing director of the bank, wrote two circular letters P 3 and D 3 to every customer, including the plaintiff, dated September 7, 1922, and November 4, 1922.

The letters are as follows:—

Colombo, September 7, 1922.

T. D. G. P. Senanayake, Esq.
Colombo.

DEAR SIR,

As I am aware that you have a claim against the Bank of Colombo, Ltd., I shall be glad if you or your representative will kindly see me by appointment on any week day convenient to you between 9 and 11 A.M. at my office, No. 3, Staples street, Slave Island.

1929.

MAARTENSZ J.

Senanayake v. Wijeyesekere

For your information I would like to add that I am the largest shareholder of the said bank and am anxious to see whether I could come to an arrangement with its creditors.

Yours faithfully,
(Sgd.) O. B. WIJEYESEKERA.

Colombo, November 4, 1922.

T. D. G. P. Senanayake, Esq.,
Colombo.

DEAR SIR,

IN continuation of my letter of September 7, 1922, you will see from the enclosed that the Registrar of Companies had gazetted that the name of the Bank of Colombo, Ltd., will be struck off the Register of Joint Stock Companies on the 30th instant. It might therefore be to your advantage if you will kindly see me as early as possible on any week day convenient to you between 9 and 11 A.M. at my office, No. 3, Staples street, Slave Island.

Yours faithfully,
(Sgd.) O. B. WIJEYESEKERA.

The plaintiff says he saw the defendant with reference to his first letter and the defendant said "if I gave him the cheque in his favour and abandoned the claim against him he would be responsible for the money and he would give me a note agreeing to pay the money within five years with interest."

The plaintiff did not consent as he wished to consult his lawyers. The defendant says plaintiff did not see him before the second letter was written. The learned District Judge has accepted the plaintiff's evidence and I see no reason to disagree with him. As the second letter was a circular letter I cannot infer from the terms of it that it was written because plaintiff had not seen the defendant in response to his first letter.

As regards the interview on November 20, when the note was made, the plaintiff's evidence is that the defendant gave him the note in exchange for his cheque for the amount standing to his credit at the Bank of Colombo, that the defendant told him he would get payment of the amount due on the note at the end of five years, and that he did not take any steps against the bank because the defendant had given him the note. He denied that defendant told him he would not get payment if the bank did not reopen.

The defendant's evidence is, that the note was given on the condition that he would be liable on the note only if the bank was reopened and he was able to cash the cheque given by the plaintiff.

The defence to the claim is that as the bank was not reopened and the defendant was unable to cash plaintiff's cheque there was a failure of consideration.

The trial Judge has accepted the plaintiff's evidence and I think that his view of the evidence is in accordance with the facts.

The defendant was not only the largest shareholder in the bank and the managing director, but he was also the largest debtor to the bank, and it is to be expected that he would not be anxious to have an inquiry regarding the circumstances which compelled the bank to suspend payment. It was possible to avoid an inquiry by taking from the customers cheques for the amounts standing to their credit in exchange for promissory notes on which the defendant was personally liable. It is highly improbable that the customers would part with their cheques merely on the chance of the bank being reopened.

The plaintiff was not the only customer to whom the defendant gave promissory notes. He gave a note to one Elisa Fernando dated November 30, payable at the Imperial Bank of India, Ltd., like the note sued on, in 1927. As the note was made on the last day on which cause could be shown against the bank being struck off the List of Companies and dissolved it could not have been made on condition that the bank was reopened. What is more, the defendant paid off a large part of the amount due on that note before 1927, and stopped payment only because this action was filed. This note clearly supports the plaintiff's evidence that the note sued on was not given on condition that the bank was reopened and his cheque cashed. Even on November 20 the defendant had hardly time to place himself in a position to show cause against the Registrar's notice.

I am of opinion that the note was given to the plaintiff in consideration of his abandoning his claim against the bank and that there was no condition that the defendant should not be liable if the bank did not reopen.

I accordingly dismiss the appeal with costs.

Appeal dismissed.