MERCANTILE CREDIT LTD.
v.
THILAKARATNE

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
DISSANAYAKE, J.
CA NO. 518/93
DC COLOMBO NO. 40958/MHP
JULY 09, AND
AUGUST 02, 2001

Hire Purchase Agreement – Failure to pay instalments – Term beneficium sui divisionis excussionis not explained to guarantor?

Evidence Ordinance, sections 101 and 102 – Burden of proof – On whom lies the burden – Special fact – Plea of non est factum.

The plaintiff-appellant filed action against the 1st (principal debtor), 2nd and 3rd defendant-respondents (guarantors) jointly and severally to recover a certain sum of money, and the return of the vehicle (on hire purchase) and damages. The 2nd defendant-respondent (guarantor) whilst admitting signing the Guarantee Bond stated that he was not aware of the conditions of the agreement, he had not renounced all the rights and privileges to which the sureties are entitled to by law and that the clause relating to the renunciation of the benefit were not explained to the guarantors. The District Court held with the defendant-respondent.

Held:

(1) The burden of proving that the clauses relating to the renouncing of all benefits and privileges to which sureties are entitled to by law were not understood by him is a special fact within the knowledge of the person alleging it and by virtue of section 101, the burden of proving that fact is with the person who asserts that fact.

(2) If as asserted to by the 2nd defendant-respondent that he was not aware of the conditions of the agreement at the time he signed it, it was open for him to have opted for his common law remedy of repudiating his suretyship when he came to know by receipt of certain letters. Furthermore, he states in evidence that he did not care to read it and that he signed because a friend told him to do so.

(3) Negligence on the part of the 2nd defendant-respondent is not an excuse to deny liability.

"Where a person who is neither illiterate nor blind signs a deed without examining the contents he would not as a general rule be permitted under the Roman Dutch Law to set up the plea that the document is not his."

APPEAL from the judgment of the District Court of Colombo.

A. J. I. Tilakawardane with *Upul Fernando* for plaintiff-appellant.

H. D. E. Gunatilake for 2nd defendant-respondent.

Cur. adv. vult.

January 31, 2002

DISSANAYAKE, J.

The plaintiff-appellant by his plaint dated 18. 06. 1992 filed action against the 1st, 2nd and 3rd defendant-respondents jointly and severally to recover a sum of Rs. 30,897.44 due as arrears of instalment and interest, return of the vehicle bearing No. 38 Sri 9081 or to pay its value Rs. 154,071.91 and damages Rs. 57,060 with continuing damages at Rs. 3,170 a month until the return of the said vehicle, this claim arising out of the hire purchase agreement dated 29. 05. 1990 (P2) signed by the 1st defendant-respondent as the hirer and the 2nd and 3rd defendant-respondents as guarantors.

The 1st and the 3rd defendant-respondents failed to appear in court on summons being served on them and *ex parte* trial was ordered to be held against the 1st and the 3rd defendant-respondents.

The 2nd defendant-respondent by his answer dated 16. 02. 1993 whilst denying the averments in the plaint prayed for dismissal of the plaintiff's action.

The trial against the 2nd defendant-respondent proceeded on 11 issues, and at the conclusion of the evidence the learned District Judge by his judgment dated 03. 09. 1993, dismissed the plaintiff-appellant's action.

It is from the aforesaid judgment that plaintiff-appellant filed this appeal.

The contention of the plaintiff-appellant in the petition of appeal was that the learned District Judge has misdirected himself in refusing to accept the evidence of Danforth with regard to witness Rajasundera explaining the clauses of the hire purchase agreement to the signatories in a language that they can understand.

It was also the contention of the plaintiff-appellant that the learned District Judge had also erred in concluding that the clause relating to the renunciation of the benefits to which guarantors are entitled to by law, which is known by the term *"beneficium sui divisionis excussionis"*, has not been explained to the guarantors.

At the commencement of the trial the 2nd defendant-respondent admitted the signing of the agreement marked B and filed with the plaint (P2). It should be noted that when the guarantors signed the agreement which includes clauses 21 (*a*) to 21 (*f*) and clause 22 their liability becomes inherent in the agreement. Thus, they become jointly and severally liable with the hirer.

Therefore, the 2 guarantors had bound themselves jointly and severally to pay on demand the amounts of any judgment or decree that the owners may obtain against the hirer. The 2nd defendant-respondent had also agreed to renounce his right to request that the hirer be sued in the first instance and had renounced the benefit of division of liability.

These rights of the sureties had been explained in clause 23. The hirer and the two guarantors have placed their initials on the margin of clause 21 which is an indication that clauses 21, 22 and 23 have been brought to the attention of the parties to the agreement, before it was signed.

In view of the fact of admission of signing of agreement (P2) by the 2nd defendant-respondent and the testimony of Danforth to the effect that he was present when the conditions and clauses of the agreement were explained to the signatories in the language that could be understood by them, calling Rajasundera to establish those facts is not necessary.

Therefore, it would appear that the plaintiff-appellant has discharged the burden of proving that the 2 guarantors including the 2nd defendant-respondent had renounced all the rights and privileges to which the sureties are entitled to by law including the right to ask that the hirer be sued in the 1st instance and also to ask for division of the liability.

The burden of proving that the clauses relating to the renouncing of all benefits and privileges to which sureties are entitled to by law were not understood by him is a special fact within the knowledge of the person alleging it and by virtue of section 101 of the Evidence Ordinance the burden of proving that fact is with the person who asserts that fact. In this case since it was the position of the 2nd defendant-respondent that the conditions of the agreement relating to renunciation of the rights and benefits of the guarantors were not understood by him, the burden of proof of that fact lies with the 2nd defendant-respondent who alleges it.

It is well to be borne in mind that under section 102 of the Evidence Ordinance, the burden of proof lies on that person who would fail if no evidence at all were given on either side. Illustration B given in section 102 is relevant in this regard, namely where A sues B for money due on a bond execution of the bond is admitted, but B states

that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.

Thus, it is clear that the burden of proving that he signed the agreement without understanding that he was renouncing the benefit of requesting that the hirer be sued in the 1st instance, and the benefit of requesting the division of the claim, lies on the 2nd defendant-respondent.

Wille in his book *"Principles of South African Law"* 5th edition at page 462 stated that the benefit of excussion and the benefit of division fail if the surety has renounced the said benefits either expressly or impliedly, ie for eg. where the surety signs the suretyship agreement as principal debtor or as surety and co-principal debtor, he has renounced the said benefits.

The 2nd defendant-respondent did not deny the receipt of the following letters :

(*a*) notice of termination of the hire purchase agreement (P8).

(*b*) the letter terminating the hire purchase agreement (P9), and

(*c*) the letter of demand by the attorney-at-law of the plaintiff-appellant company (P11) claiming the amount due from the hirer as well as the 2 guarantors as being jointly liable.

If as asserted to by the 2nd defendant-respondent he was not aware of the conditions of the agreement (P2) at the time he signed it was open for him to have opted for his common law remedy of repudiating his suretyship, when he came to know by receipt of the aforesaid letters, that he had bound himself jointly as the hirer. Even after receipt of letters P8, P9 and P11 he did not opt to repudiate his suretyship.

Wille in his book *"Principles of South African Law"* 5th edition at page 465 under the heading "Notice of Termination" states thus: "Notice given by the surety to terminate the suretyship releases him in the case of continuing guarantee which provides that it is subject to termination after the expiration of due notice given by the surety."

It is interesting to note that the 2nd defendant-respondent in his testimony with regard to signing of the proposal form F1 stated in his examination in chief that P1 was in English and since he was asked to sign, he signed it, but in fact the proposal form P1 is both in Sinhala and English. In cross-examination he stated that he did not care to read it. With regard to the agreement (P2) he stated that he signed because a friend told him to do so and that he had not read the contents thereof.

Despite his admission in evidence that he was a businessman in whose names the businesses are registered and he is a payee of income tax, he took up the position in cross-examination that he was not aware of the nature of the contract to which he entered into. He is a person who has taken loan facilities offering guarantors as security. Therefore, his evidence that he did not understand or did not care to see what he was required to sign and that he did not know the meaning of the word guarantor in its colloquial sense makes his testimony unacceptable.

Weeramantry on *"The Law of Contracts"* 1999 reprint, vol. 1 at page 300 enunciates the rule as follows:

> "In accordance with the rules of justus error the Court would not readily come to the aid of a person who states that he did not sufficiently attend to the terms of a contract or did not read it sufficiently carefully, or altogether neglected to read the document containing the contract. Thus, where a person who is neither illiterate nor blind signs a deed without examining its contents, he would not, as a general rule, be permitted in Roman Dutch Law to set

up the plea that the document is not his. If however, without negligence, a person executes a document in ignorance of its true nature, he may repudiate it, and this repudiation holds good even as against 3rd persons who have in good faith acted upon it as a genuine expression of intention."

Therefore, negligence on the part of the 2nd defendant-respondent is not an excuse to deny liability and burden on his part. The 2nd defendant-respondent did not make use of numerous opportunities as aforesaid to repudiate the agreement, if he *bona fide* was of opinion that he had not renounced the benefits to which guarantors are entitled to. Thus, his evidence is untenable.

In the backdrop of the above evidence it would appear that the learned District Judge misdirected himself when he came to the finding that it was incumbent on the plaintiff-appellant to have called Rajasundera to establish that the 2nd defendant-respondent renounced his rights and privileges that he is entitled to as a surety.

Taking the totality of the evidence the irresistible conclusion that could be arrived at is that the 2nd defendant-respondent signed P2 to be liable jointly and severally as the hirer, after having renounced all his rights and privileges which he was entitled to as a surety.

I set aside the judgment dated 03.09.1993 of the learned District Judge and direct the learned District Judge to enter judgment and decree for the plaintiff-appellant as prayed for in the plaint. The appeal is allowed with costs.

WEERASURIYA, J. (P/CA) – I agree.

Appeal allowed.