

**PAN ASIA BANK LTD.****VS****KANDY MULTI PURPOSE CO-OPERATIVE SOCIETY AND OTHERS**

COURT OF APPEAL  
SOMAWANSA J (P/CA).  
BASNAYAKE J,  
CALA 92/2004,  
D. C. KANDY X/12785  
14TH FEBRUARY, 2005  
4TH MARCH, 2005

*Bank Guarantee - Enforcement - Circumstances? - Rule 3 (a) Court of Appeal (Appellate Procedure) Rule 1990 - Civil Procedure Code Sec.757 (1) - Affidavit - Catholic affirming - deponent placing his signature not in the presence of the Justice of Peace - validity? - Constitution - Article 140, 141 Oaths Ordinance Sec. 6.*

The 1st and 2nd Defendants entered into an agreement with the Plaintiff Respondent (Co-operative Society), wherein the plaintiff was appointed the sole distributor of a specific area for the purpose of distribution and sale of a product. For this purpose the plaintiff gave a Bank Guarantee in a sum of Rs. 1 Million in favour of the 3rd Defendant Petitioner Bank (Pan Asia Bank) and at the time of collecting the product the Plaintiff (Co-operative Society) was required to issue a cheque from the same Bank that gave the Bank Guarantee (4th Respondent Peoples Bank) for the entire value in favour of the 1st and 2nd Defendants. The 3rd Defendant Petitioner (Pan Asia Bank) made a claim from the 4th Defendant (People's Bank) for a sum of Rs. 1 Million on the above guarantee.

The Plaintiff Respondent (Co-operative Society) instituted action seeking a declaration that the Plaintiff Respondent owes nothing to the 1st and 2nd Defendants and that the 3rd Defendant Petitioner (Pan Asia Bank) has no right to demand any payment on the Bank Guarantee from the 4th Respondent (People's Bank).

The Court issued an interim injunction restraining the 4th Defendant People's Bank from honouring the demand on the guarantee.

**HELD**

- (1) The liability of the 4th Defendant Respondent Bank ( People's Bank) arises in the event the principal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal.

- (2) The Plaintiff is not a party to the above guarantee the parties to the guarantee are the 1st and 2nd Defendants (the principal debtors) the 3rd Defendant Petitioner (Pan Asia Bank the beneficiary) and the 4th Defendant Bank the People's Bank (the Guarantor)
- (3) Nowhere in the Guarantee it is stated that the 4th Defendant People's Bank will be liable in the event the plaintiff defaults payments in respect of the products supplied.
- (4) Judges who are asked to issue an injunction restraining payment by a Bank under a bond or a guarantee or letters should ask whether there is any damage to the validity of the letter, bond or the guarantee itself, if there is not .... *prima facie* no injunction should be issued and the Bank should be left free to honour its contractual obligations.

#### Held further

- (5) The deponent in the affidavit states that he being a Roman Catholic do hereby make oath, the attestation clause instead of stating that the deponent having sworn to the contents thereof, states the contents thereof are affirmed thereto. The affidavit is bad in law.
- (6) It is also apparent that the deponent had placed his signature at a different place and not in the presence of the Peace Officer.
- (7) There is no proper affidavit as required by law therefore the 3rd Defendant Petitioner cannot succeed.

**APPLICATION** for Leave to appeal from an Order of the District Court of Kandy.

#### Cases referred to :

1. *Smith vs. Hughes* 6QB 597 at 607
2. *L. Schuler AG Vs. Wickman Machine Tool Sales Ltd.* 1974 AC 235, 263, 1973 2AU ER 39 at 35
3. *Bolovinter Oil SA Vs. Chase Manhattan Bank* (1984) 1 All ER 351, (1984) (1984) Lloyds Rep. 251

4. *Jeganathan Vs. Sefyath* - 2003 2 Sri LR 372
5. *Clifford Ratwatte Vs. Thilanga Sumathipala and Others* 2001 2 Sri LR 55
6. *Inaya Vs. Lanka Orix Leasing Company Ltd.* 1999 3 Sri LR 197.

*SA Parathalingam PC with Varuna Senadheera and K. Kaneshyogan for the 3rd Defendant Petitioner.*

*Gomin Dayasiri with Mursheed Maroof for Plaintiff Respondent.*

*Ronald Perera with Ms. Deepa Govinna for 4th and 5th Respondents.*

September 14, 2005

**ERIC BASNAYAKE J.,**

The 3rd Defendant petitioner (hereinafter referred to as the 3rd defendant) filed this petition seeking leave to appeal against the order of the learned District Judge, Kandy dated 17.02.2004.

The facts in this case are as follows. The 1st and the 2nd defendant respondents (hereinafter referred to as the 1st and 2nd defendants) were in the business of distributing milk powder by the name of "Lakcow". The 3rd defendant was their bank.

The 1st and the 2nd defendants entered into an agreement with the plaintiff respondent (plaintiff) (P1b) wherein the plaintiff was appointed the sole distributor of a specified area for the purpose of distribution and sale of the said milk powder. For this purpose the plaintiff was required to have a bank guarantee in a sum of Rs. 1 million in favour of the 3rd defendant bank. At the time of collecting the milk powder the plaintiff was required to issue a cheque from the same bank that gives the guarantee for the entire value in favour of the 1st and the 2nd defendants.

In terms of the above agreement, on the instructions of the plaintiff, a bank guarantee was issued by the 4th defendant respondent (hereinafter

referred to as the 4th defendant) in favour of the 3rd defendant in a sum of Rs. 1 million. On 11.09.2003 the 3rd defendant made a claim from the 4th defendant a sum of Rs. 1 million on the above guarantee. On 18.09.2003 the plaintiff filed action in the District Court of Kandy seeking a declaration that the plaintiff owes nothing to the 1st and 2nd defendants and that the 3rd defendant therefore has no right to demand any payment on the bank guarantee from the 4th defendant. The plaintiff also prayed for an interim injunction restraining the 4th defendant from making any payment to the 3rd defendant on the said bank guarantee.

The 3rd defendant filed objections (P2) and the learned District Judge after inquiry, on 17.02.2004 issued an interim injunction as prayed for in the plaint. An English translation of the relevant passages of the order of the learned District Judge is as follows :-

*"The plaintiff had given a guarantee in a sum of Rs. 1 million through the 4th defendant bank with regard to the sale and the distribution of Lakcow milk powder".*

*"The law relating to bank guarantees is clear. The bank guarantee was issued in respect of the milk powder supplied to the plaintiff by the 1st and the 2nd defendants. If the plaintiff had defaulted payments in respect of the milk powder so supplied the 4th defendant is obliged to pay on demand on the said guarantee. The facts in this case are different. The bank guarantee is in respect of the milk powder supplied to the plaintiff by the 1st and the 2nd defendants.*

*The bank guarantee cannot be used to settle any other dues of the 1st and the 2nd defendants to the 3rd defendant".*

I will now set out some parts of the bank guarantee marked 'P1d'. "The principal (1st and the 2nd defendant,) having requested from the Pan Asia Bank (3rd defendant, the beneficiary) for credit facilities amounting to Rs. 1 million for the distribution of "Lakcow" milk powder to the plaintiff - the 3rd defendant has agreed to grant the said facilities on condition **that the principal furnishes a bank guarantee from a reputed bank to the value of Rs. 1 million.**

*We (4th defendant) hereby guarantee and undertake to pay the beneficiary a sum of Rs. 1 million in the event the principal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal.*

This guarantee will be in force from 03.01.2003 until 02.01.2004 ..... Claims if any under this guarantee should be submitted to us in writing to reach us on or before the expiry date 02.01.2004 ..... (emphasis added)."

The liability of the 4th defendant bank arises **"in the event the principal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal"**. The plaintiff is not a party to the above guarantee. The parties to the guarantee are the 1st and the 2nd defendants (principal debtors), the 3rd defendant (beneficiary) and the 4th defendant (guarantor). Nowhere in the guarantee it is stated that the 4th defendant will be liable in the event the plaintiff defaults payment in respect of milk powder supplied.

Although the bank guarantee was issued in the instance of the plaintiff by the plaintiff's bank, namely the 4th defendant, the liability could be attached only by interpreting the bank guarantee itself.

The effect of a guarantee like that of other contracts depends on the words of the contract. In *Smith vs. Hughes*<sup>(1)</sup> at 607 Blackburn J said "if whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the party's terms". "The question to be answered always is "what is the meaning of what the parties have said?" not "what did the parties mean to say" Lord Simon of *Glaisdale L Schuler AG Vs Wickman Machine Tool Sales Ltd.*<sup>(2)</sup>

The observation made by the Court of Appeal in *Bolovinter Oil SA V Chase Manhattan Bank*<sup>(3)</sup> is that 'the judges who are asked to issue an injunction restraining payment by a bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is any challenge to the validity of the letter, bond or the guarantee itself. If there is not ..... *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligations .... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent'. The court further observed that 'if, save in the most exceptional cases, he is to be allowed to derogate

from the bank's personal and irrevocable undertaking. ... by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined'.

I am of the view that the learned District Judge erred in interpreting the bank guarantee and thereby erred in issuing an interim injunction restraining the 4th defendant (People's Bank) from honouring the demand made on the guarantee.

However, the learned counsel for the plaintiff submits that the 3rd defendant cannot succeed in this case due to the following reasons :-

- (1) There is no valid affidavit filed along with the petition as required by Rule 3 (1) (a) of the Court Appeal (Appellate Procedure) Rules of 1990 and Section 757 (1) of the Civil Procedure Code. Counsel submits that whilst the person giving the affidavit is a Roman Catholic and at the beginning of the affidavit states that he "do hereby make oath and state as follows", the jurat to the affidavit states "Affirmed there to". Therefore he submits that the affidavit is defective and should be rejected.
- (2) Failure to tender the document marked 4 VI amounts to suppression of a material fact.
- (3) The Bank Guarantee in pursuance to an agreement between the plaintiff and the 1st and the 2nd defendants was for the purpose of distribution and sale of Lakcow milk powder. The learned counsel submits that the bank guarantee is only for the purpose of covering the monies the plaintiff could have owed the 1st and 2nd defendants under and in terms of the agreement marked P1b. He further submits that all the documents pertaining to this transaction should be examined ; that the bank guarantee should not be considered in isolation.

In *Jeganathan vs. Selyath*<sup>(4)</sup> where the plaintiff has commenced her affidavit after making an oath does not end the jurat in a manner consistent with the oath she has taken, the court held that she has not sworn to the contents of the affidavit in the true sense of the expression as expected by law. In *Clifford Ratwatte vs. Thilanga Sumanthipala and Others*<sup>(5)</sup> on similar

facts Edussuriya J. states "It is not a case where there has been an omission to make any oath, or make any affirmation or the substitution of anyone for any other of them has taken place. Nor is there a question of any irregularity in the form in which the oath or affirmation was administered ..... If the contents of the affidavit were read and explained by the Justice of Peace, I cannot fathom how he could have, after having read that the deponent was a Christian and was making oath, at the end in the jurat clause stated that the deponent affirmed ..... The contradiction that has occurred could never have occurred, had the Justice of Peace (actually) read over and explained to the deponent the contents of the affidavit as he claims he did ..... or had the deponent (actually) made oath and sworn to the contents of the affidavit in the presence of the Justice of Peace".

Edussuriya J. held that "the Justice of Peace did not read and explain to the deponent the contents of the affidavit as he claims in the jurat clause, nor did the deponent make oath and swear to the contents of the affidavit in the presence of the Justice of Peace, but that the Justice of Peace "blindly" signed an "affidavit" which had been already signed by the deponent in some other place at some other time". The affidavit was therefore held not an affidavit which has any legal validity and/or sanctity and therefore there was no affidavit as required by law. In *Inaya vs. Lanka Orix Leasing Company Ltd.*<sup>(6)</sup> the defendants being Muslims had failed to solemnly, sincerely and truly declare and affirm the specific averments set out in the affidavit. The recital merely states that they make a declaration and in the jurat there is no reference as to whether the purported affidavit was sworn to or affirmed to. Jayasinghe J. said "the technicalities should not be allowed to stand in the way of justice. But however the basic requirements of the law must be fulfilled".

The bank guarantee marked 'P1b' does not refer to the agreement the plaintiff had with the 1st and the 2nd defendants and therefore the terms of the agreement cannot be considered in interpreting the bank guarantee. The document 4VI is relevant only if the agreement is material. Further more there is no dispute that the guarantee was issued at the instance of the plaintiff on the agreement marked 'P1b'.

Anyhow I am of the view that the plaintiff respondent should succeed on the point raised with regard to the validity of the affidavit filed by the 3rd respondent. The petition of the 3rd respondent in this case is supported by an affidavit in terms of the Court of Appeal (Appellate Procedure) Rules

1990 which states thus, "every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein....." Section 757 (1) of the Civil Procedure Code states thus, "Every application for leave to appeal against an order of court made in the course of any civil action proceeding or matter shall be made by petition ..... Such petition shall be supported by affidavit". The Oaths Ordinance in Section 6 states that "All oaths and affirmations made..... shall be administered according to such forms and with such formalities as may be ... prescribed by rules ..."

The deponent in that affidavit states that he being a Roman Catholic "do hereby make oath". The attestation clause, instead of stating that "the deponent having sworn to the contents thereof" states thus : "the contents thereof affirmed thereto". It may be argued that the Peace Officer who made the attestation made a mistake in the attestation. The matter to be considered is in fact whether there was an attestation or not ; that is whether the deponent had placed the signature at a different place and sent the papers to the Peace Officer for his signature, to make it look as if the signatures were placed at the same time.

There is another fact which assists the court in coming to the conclusion that the deponent placed his signature at a different place and not in the presence of the Peace Officer. I find that the deponent has placed the signature on two crosses made with a ball pen which is visible to the naked eye. The two crosses would usually indicate where one should place the signature. If the oath was administered and the signature was placed in the presence of the Peace Officer, there is no necessity to indicate where to place the signature. Therefore it could be safely assumed that the signatures were placed at different places and the contents were never read over and hence there was no swearing in at all. Hence, I take the view that there is no proper affidavit as required by law and therefore the 3rd defendant cannot succeed. Hence leave is refused.

SOMAWANSA J. P/CA - I agree.

*Application dismissed*