ROBERT DASSANAYAKE AND ANOTHER
v.
PEOPLE'S BANK AND ANOTHER

COURT OF APPEAL
S. N. SILVA, J. P/CA.,
RANARAJA, J.
C.A. 401/94
C.A. L.A. 81/94
D. C. COLOMBO 10892/MR
JUNE 6, 1995.

Civil Procedure – Civil Procedure Code S18 – Contract of Guarantee – Third party taking over the liabilities – Addition of parties – Necessary parties.

The 1st Respondent Bank instituted action against the Petitioners on a Contract of Guarantee for the repayment of a loan given to 'X' Ltd., by the 1st Respondent Bank. The Petitioners admitted that they signed the agreement personally guaranteeing the repayment of the amount falling due from the Company. The Petitioners however pleaded that 'X' Ltd., fell into financial difficulties and by an agreement recorded between 'X' Ltd., and the National Development Bank (NDB) the latter took over all liabilities of the Petitioners; and further sought to add the NDB as a party almost after 1 1/2 years of filing answer. The learned District Judge refused this application.

Held:

(1) On a perusal of the documents it is quite clear that by none of them has the 1st Respondent Bank agreed to release the Petitioners from their liabilities on the guarantee.

"If a plaintiff can show that he cannot get effectual and complete relief, unless the new party is joined or a defendant can show that he cannot effectually set up a defence, which he desires to set up unless the new party is joined, the addition should be allowed".

(2) There is nothing to prevent the 1st Respondent Bank obtaining complete and effectual relief against the petitioners without joining the NDB as a party.

Any claim the Petitioners may have against the NDB in no way precludes the 1st Respondent Bank from obtaining relief against the Petitioners on the agreement.

Cases referred to:

1. *Coomaraswamy v. Andiris Appuhamy* 1985 2 SLR 219.
2. *Kanagammah v. Kumarakulasingham* 66 NLR 525.
3. *Senarathne v. Perera* 26 NLR 225.
4. *Kandavanam v. Kandaswamy* 57 NLR 241.
5. *Fernando v. Fernando* 41 NLR 208.
6. *Banda v. Banda* 42 NLR 475.

APPLICATION in revision from the order of the District Court of Colombo.

Faiz Mustapha, P.C. with *N. Sivendran* for Petitioner.

K. Paul, S.C. for 1st Respondent.

Cur adv vult.

June 27, 1995.
RANARAJA J.

The 1st Respondent instituted action against the petitioners and another on a contract of guarantee X10, for the repayment of a loan given to B. P. G. (Lanka) Ltd., by the 1st respondent. The petitioners filed answer admitting *inter alia,* that they signed the said agreement personally guaranteeing the repayment of the amounts falling due from the company upto a sum of Rs. 500,000/- and interest thereon from the date of demand. They also admitted that the 1st Respondent had made a demand by letter dated 19.4.91 and that they have failed and neglected to pay the sum demanded. However, they went on to plead that B. P. G. (Lanka) Ltd., fell into financial difficulties and by an agreement reached between B. P. G. (Lanka) Ltd., and the National Development Bank, (NDB) the latter took over all liabilities of the petitioners. The 1st Respondent having consented to this agreement, it was pleaded, was estopped from denying the agreement between the petitioners and the NDB and making a claim against the petitioners on the guarantee. Although the petitioners pleaded that the NDB was a necessary party, they took no steps to have it added as a defendant till 17.5.93, that is one and a half years after filing their answer. The respondents objected to this application.

The Learned District Judge after inquiry refused to issue notice on the NDB, to be added as a party defendant. The decision was based on evidence of the officer of the NDB who stated at the inquiry that no

originals or certified copies of the alleged agreements between the petitioners and the NDB were available, and in any event, the 1st Respondent Bank was not a party to the alleged agreements between the petitioners and the NDB. This application in revision is from that order. Parties agreed to be bound by this order in the connected application CALA 81/94.

Learned President's Counsel for the petitioners submitted that the District Judge was in error when he concluded that the documents E4 and E5 do not bind the 1st Respondent Bank. On a perusal of the two documents it is quite clear that by none of them has the 1st Respondent agreed to release the petitioners from their liability on the guarantee X10.

Learned Counsel then submitted that Section 18 of the Civil Procedure Code requires Court to add a person as a plaintiff or defendant in order to effectually and completely adjudicate upon and settle all questions involved in the action, so that costs of litigation may be diminished as much as possible and multiplicity of actions be avoided. He cited the decisions in *Coomaraswamy v. Andiris Appuhamy* [1] and *Kanagammah v. Kumarakulasingham* [2] in support. The facts of the first of these cases differ from the instant case in that the party sought to be added has shown no enthusiasm to be joined as a party to this action. That judgment lays down the guidelines applicable to addition of parties thus;

"If a plaintiff can show that he cannot get effectual and complete relief unless the new party is joined or a defendant can show that he cannot effectually set up a defence which he desires to set up unless the new party is joined, the addition should be allowed."

The 1st Respondent to this application is content if judgment is entered in its favour against the petitioners. The petitioners having admitted the 1st Respondent's claim are now attempting to pass on that liability to the NDB on an alleged agreement of which the 1st Respondent disclaims any knowledge. In other words, the intention of the petitioners is to obtain judgment against the NDB in the action

brought against the petitioners by the 1st Respondent, which was not a party to any alleged agreement between the petitioners and the NDB. There is nothing to prevent the 1st Respondent obtaining complete and effectual relief against the petitioners without joining the NDB as a party. Similarly, there is no effective defence available to the petitioners which they may raise against the 1st Respondent by adding the NDB as a defendant.

Learned President's Counsel submitted that the decision in Kanagammah v. Kumarakulasingham (*supra*) supports the proposition that a defendant may add another as a defendant where the former has a claim against the latter and it is open to a Court to adjudicate upon adverse claims set up by defendants *inter se.* This decision is based on the judgment of Jayawardene A.J., in *Senaratne v. Perera* [3]. But on reading that judgment it appears that it does not go so far, but supports the proposition that when the plaintiff cannot obtain relief the claims without an adjudication between the defendant and another, such other party may be added as defendant. In the instant case however the 1st Respondent does not suffer from such a disability. Any claim the petitioners may have against the NDB in no way precludes the 1st Respondent from obtaining relief against the petitioners on agreement X10.

I would prefer to follow the decision in *Kandavanam v. Kandaswamy* [4] where Gratien J. expressed the view that;

"The Civil Procedure Code does not empower a Court to entertain substantive claims preferred by defendants *inter se.* It is no doubt possible, and sometimes necessary, to adjudicate upon competing claims of one set of defendants against the other, but only in so far as would enable Court to determine whether the relief asked for by the plaintiff (or against him in reconvention) ought to be granted. *Fernando v. Fernando* [5] and *Banda v. Banda* [6]. But the formal decree cannot award substantive relief except in favour of the plaintiff or against him. Accordingly the claim of the 3rd and 4th defendants for a declaration of title and for damages against the 1st and 2nd defendants could only have been entertained in separate proceedings."

Therefore if the petitioners wish to proceed against the NDB on the alleged agreement by which the latter took over the liabilities of the former, they should pursue such a claim by way of separate proceedings. I see no reason to interfere with the order of the learned District Judge. This application is accordingly dismissed with costs.

S. N. SILVA, J. – I agree.

Application dismissed.