IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Union Trust and Investment Limited
(Formerly known as Maharajah
Investments Ltd)
No. 347 Union Place
Colombo 02.

PLAINTIFF

Vs.

C.A. 336/1997 (F)
D.C Colombo 11316/MR

1. H. S. Parakrama
   No. 29/A Auburn Side,
   Dehiwala.

2. B. J. Sarath de Fonseka
   No. 36/6, Lady de Soysa Drive,
   Uyana, Moratuwa.

DEFENDANTS

B.J.. Sarath de Fonseka
No. 36/6, Lady de Soysa Drive,
Uyana, Moratuwa.

2nd DEFENDANT-APPELLANT

Vs.

1. Union Trust and Investment Limited
(Formerly known as Maharajah
Investments Ltd)
No. 347 Union Place
Colombo 02.
Presently (Under Liquidation)
No. 30-2/1, GalleRoad, Colombo 6.

PLAINTIFF-RESPONDENT

1. H. S. Parakrama
No. 29/A Auburn Side,
Dehiwala.

1st DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Anil Silva P.C for the 2nd Defendant-Appellant

D. Ratnayake for the Plaintiff-Respondent

ARGUED ON: 29.8.2011

DECIDED ON: 07.10.2011

GOONERATNE J.

In this action the Plaintiff Company filed action against the Defendants to recover a sum of Rs. 100,310/51 based on a lease agreement and Guarantee Bond. The principal debtor was the 1st Defendant and the 2nd

Defendant was the guarantor. This court was informed that the 1st Defendant was not in the country and as such summons could not be served in the District Court. Thereafter trial proceeded in the original court against the 2nd Defendant (Guarantor). On or about 6.6.1997 judgment was pronounced in favour of the Plaintiff. The judgment indicates that 10 issues had been answered by the District Judge and issue No. 10 answered in favour of Plaintiff and against the 2nd Defendant as prayed for in sub paragraphs 'a' & 'b' of the prayer to the plaint.

The only short point argued before me by either counsel was on the question of demand, by Letter of Demand and that whether cause of action had arisen or not to sue the 2nd Defendant on the Guarantee Bond marked P12. Learned President counsel took up the position that his client the 2nd Defendant-Appellant never received a letter of demand and that he was not resident at the address referred to in the Guarantee Bond marked P12 at the time and date when the letter of demand had been dispatched and emphasized on certain items of evidence led in the trial Court especially regarding dispatch of the Letter of Demand and sought to demonstrate to this court that no reliance could be placed regarding the dispatch of the Letter of Demand and that evidence cannot be acted upon to come to a conclusion that the cause of action arose as against the 2nd Defendant-Appellant

It was the evidence inter alia of Plaintiff witness who was the Accountant of the Plaintiff Company, that Plaintiff entered into agreement marked P1 with the 1st Defendant and the items referred to in the schedule to P1 was leased to 1st Defendant. Further at pg. 6 of P1 the lease rental was Rs. 1,27,65.65 per month which cover a period of 44 months. The initial payment was Rs. 1062.80. At the time of entering into agreement P1 initial four instalements were paid. The item referred to in the schedule had been given to the 1st Defendant. The 1st Defendant had paid Rs. 82721.89. Statement of Account was marked P2. The 1st Defendant had from time to time paid rentals. Having given credit to the 1st Defendant for the payments made, a sum of Rs. 1,78,400/- was due (vide P2). The agreement was determined and Letter of Demand P3 was sent to 1st Defendant. Copy of Letter of Demand sent to the 2nd Defendant marked P4. Letter of Demand P4 marked subject to proof. The registered postal article was marked P5. (pertain to both P3 & P4). The Guarantee Bond P12 was also produced and marked in evidence. The guarantor was the 2nd Defendant. Witness who gave evidence for Plaintiff had signed agreement P1 as a witness. In cross-examination on the question of default of payment witness state that principal debtor (1st Defendant) was notified. Guarantors are also notified of default of payment.

The learned President's Counsel drew the attention of this court to the following items of evidence in cross-examination to demonstrate that the 2nd Defendant was not notified of default of payment. Leading questions suggested by the Counsel for 2nd Defendant at the trial are included in the proceedings as follows:

ප්‍ර නමුත් මේ නඩුවේ 2 වන විත්තිකරු ට දැනුම් දුන්නේ නැහැ?

උ අපි ඇපකරුවන්ට දැනුම් දෙනවා.

ප්‍ර තමා හිතනවාද, දැනුම් දෙනවාද?

උ දැනුම් දෙනවා.

ප්‍ර මෙම නඩුවට ආදාල 2 වැන විත්තිකරු සම්බන්දයෙන් එවැනි දැනුම් දීමක් කලාද නැද්ද කියලා මතක හැටියෙන් කියන්න බැහැ?

උ මතක නැහැ.

ප්‍ර එහෙම දැනුම් දීමක් නොකර තිබෙනවාද, මහත්තයා පිලිගන්නවාද දැනුම් දීමක් කර නැහැ කියලා?

උ ඔව්

ප්‍ර ඒ අනුව මා යෝජනා කර සිටිනවා මෙම නඩුවේ 2 විත්තිකරුට කිසිම දැනුම් දීමක් නොකර තමා ඔහුව 02 වැනි විත්තිකරු හැටියට සම්බන්ධ කර තිබෙන්නේ කියලා?

උ නැහැ එහෙම වෙන්න බැහැ.

If one peruse the above evidence it could be suggested that in a way the witness does not specifically state he dispatched the letter of demand to the 2nd Defendant. That part of the evidence is somewhat weak but court is mindful of the fact that to some of the above leading questions witness does not give a specific answer or reject the position put forward by

the 2nd Defendant. Even if the oral evidence is weak or suggest a confused state of mind of the witness, documents P5 & P6 were produced without objection. Further at the closure of Plaintiff's case all documents were read in evidence (P1 – P12) without any objection to document P4. In re-examination an attempt is made to explain that in terms of P4 receipt P5 & schedule P6 are referred to in order to support dispatch. Though learned President's Counsel thought it fit to comment and criticize P6 as it only refer to the name and place (Moratuwa) without the address, I am unable to agree with learned President's Counsel on that aspect. Experience shows that postal authorities do not refer to precise details in their records. It may not represent the correct details of address etc. But official act are deemed to be properly performed. (Section 114 illustration (d) of Evidence Ordinance). Learned District Judge has answered issue No. 8 regarding cause of action of the 2nd Defendant and state a cause of action has arisen as against the 2nd Defendant. (though reasoning to that answer is not suggested).

I would at this point in my judgment advert to the following authorities which would highlight the position of Guarantee Bond and as to when and at what point the cause of action would arise.

As stated in "The Law relating to Banking" (4th Ed.) by T G Reeday at page 322:

"The bank can at any time make a demand for immediate repayment ... The bank need not sue the debtor before resorting to the guarantor.

As regards limitation of actions, if the guarantor promises to pay on demand, as is customary in bank guarantees, no right of action accrues against him until a demand for payment has been made: Bradford Old Bank v. Sutcliffe (1919). Consequently, until such demand has been made of him... time does not begin to run in favour of the guarantor".

Practice & Law of Banking – W. Rajapakshe P.C. Pgs. 280/281 ...

> Unlike in fixed loan, in overdraft facilities, the liability of the guarantor arises only upon the repayment is demanded from the guarantor. Under normal circumstances the banker needs not sue the principal before he takes action to recover the outstanding amount from the guarantor. But if the guarantee contract provides otherwise, the banker shall follow such terms as in the agreement. In any event the banker can sue the guarantor only after he makes a proper demand from the guarantor and after the lapse of the period given in the demand notice to re-pay the dues.

In Sivasubramaniam, Appellant, and Alagamuttu, Respondent
S.C 449 – D.C Jaffna, 3,818 – pg. 150.

On July 25, 1940, plaintiff deposited with the defendant, who was not a banker, a sum of Rs. 928. In acknowledgment a document was given the construction of which indicated that the document had to be surrounded and a request made before payment could be claimed. Plaintiff made demand for the repayment of the money on July 18, 1947.

In an action instituted on September 15, 1947, on the footing that "plaintiff deposited with the defendant a sum of Rs. 928 and the defendant agreed and undertook to pay the said sum with interest at 6 per cent. per annum whenever demanded" –

Held, that the cause of action accrued to the plaintiff only on July 18, 1947, and that the claim was therefore not prescribed…

Pg. 153.

It seems to me that the Roman Dutch Law should govern the rights of the present parties. Under the Roman Dutch Law, unlike under the English Law, it is for the creditor to seek out the debtor to claim payment. Even in the case of a simple loan, "where no time has been fixed for repayment, it is not immediately claimable but after the lapse of a reasonable time' so that it would be seen that under our common law a demand is essential before it could be said that a cause of action accrues to a creditor to sue the debtor. But, as was rightly remarked by Bankers L.J. in the case of Joachimson v. Swiss Bank Corporation (supra) "In every case, therefore, where this question arises, the test must be whether the parties have or have not agreed that an actual demand shall be a condition precedent to the existence of a present enforceable debt," and it is therefore necessary to see whether there are any special terms of agreement between the parties throwing light on the question for determination in this case, irrespective of the question whether the English or the Roman Dutch Law applies.

Practice and Law of Banking – P.J.M. Fidler, Pg. 309…

In Parr's Banking Co. v. Yates it was held that, in the case of an overdraft, each advance becomes due as and when it is made by the banker, but in Joachimson v. Swiss Bank Corporation it was suggested that an advance made on overdraft does not become due until the banker has actually demanded repayment. The second view is now generally preferred, and in any event the point can be put beyond doubt as regards the guarantor by

specifying in the guarantee that the liability of the guarantor arises only when demand has been made on the guarantor.

As regards admission of document P4 (although marked subject to proof) in evidence and it's evidentiary value I refer to the case of Sri Lanka Ports Authority Vs. Jugo (Inija – BOAL East 1981 (1) SLR 18 at 19 & 24... If no objections taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the Cursus Curiae of the original courts.

I would also incorporate the latest view on the above case. vide Latheef and another vs. Mansoor 2011 BLR at 204...

> There remains, however, one more matter on which learned Counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27th April 1993. This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial? There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts. For instance, in Sri Lanka Ports Authority and Another v. Jugolinija – Boat East (1981) 1 Sri LR 18 Samarakoon, C.J., commented on this practice, and ventured to observe at pages 23 to 24 of his judgment that if no objection to any particular marked documents is taken when at the close of a case documents are read in evidence, "they are evidence for all purposes of the law." It has been held

that this is the cursus curiae of the original courts. See, Silva v. Kindersle (1915-1916) 18 NLR 85; Adaicappa Chettiar v. Thomas Cook and Son (1930) 31 NLR 385 Perera v. Seyed Mohomed (1957) 58 NLR 246; Balapitiya Gunananda Thero v. Tolalle Methananda Thero (1997) 2 Sri LR 101; Cinemas Limited v. Sounderarajan (1998) 2 Sri LR 16; Stassen Exports Ltd., v. Brooke Bond Group Ltd., and Two Others (2010) BLR 249.

When I consider all the facts and circumstances and the law applicable to Guarantee Bonds I am unable to come to a conclusion that no cause of action has arisen. The 2nd Defendant is liable on the Guarantee Bond (P12) and the cause of action has duly arisen as far as the 2nd Defendant is concerned on the dispatch of Letter of Demand marked P4. Even if oral evidence is weak, still document P4 is duly admitted in evidence without an objection at the <u>closure</u> of the Plaintiff case. Further P4 has not been returned by the postal authorities. Documents P5 and P6 prove the fact that the letter (P4) was not returned and it has been duly dispatched and handed over to the address referred to therein. I am not in a position to excuse the Appellant merely because he was not present in the given address, or that he has changed the address during the relevant period. As far as the Plaintiff is concerned letter P4 is dispatched according to the details given to the Plaintiff company by the Defendants. Court should not permit an abuse of the process. P4, P5 & P6 are a legally admissible document. (vide Jugolinija's case) Court is entitled to presume that document P4 has

been duly dispatched as evidence does not suggest that it was returned by the Postal Department.

I have considered the case of Podisingho vs. P.A.W. Perera 75 N.L.R 333. I do not think that any parallel could be drawn from the said case with the case in hand. The case in hand there is nothing to state that the address of the Defendant-Appellant was incorrectly addressed. P4 given the correct address. P5 should be considered along with P6. One cannot expect the postal authorities to include all details of addresses of each and every person (addressees). The name is correct in P6. Further P6 refer to 15 registered letters dispatched and the Appellant is one among the 15 names. This is sufficient proof of dispatch. I am not in a position to consider the dicta in the above case since those facts and circumstances are different from the case in hand. To hold with the Appellant on this aspect would lead to an unacceptable/illegal abuse of process.

A person who accepted registered letter P4 has accepted it on behalf of the 2nd Defendant or else same could have been returned to the postal authorities. I reject the contention of learned President's Counsel on this aspect. Therefore I hold that the 2nd Defendant is liable to be sued on the Guarantee Bond and that on default of the principal debtor the 1st Defendant, law makes the 2nd Defendant liable. Though the learned District Judge has

not given much reasons for his conclusions I find that all issues have been answered correctly. Even if it is suggested that the original court Judge erred in certain respect I state that his ultimate conclusions to hold that the 2nd Defendant is liable cannot be faulted. There are no material lapses in the judgment of the original court. In any event in terms of the proviso to Article 138(1) of the Constitution I observe that no failure of justice or any prejudice has been caused to either party to vary the judgment of the original court. I affirm the judgment of the learned District Judge. Appeal dismissed with costs fixed at Rs. 20,000/-.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL