**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALSIT REPUBLIC OF SRI LANKA**

Bank of Ceylon
No. 4, Bank of Ceylon Mawatha
Colombo 1.

**PLAINTIFF**

C.A. 132/97 (F)
D.C. (Colombo) 13432/M

Vs.

1. General Engineers and Contractors Limited
No. 16, Alfred Place,
Colombo 3.

2. Cornel Lionel Perera
No. 2, Jawatha Road,
Colombo 05.

**DEFENDANTS**

**And Between**

1. General Engineers and Contractors Limited
No. 16, Alfred Place,
Colombo 3.

2, Cornel Lionel Perera
No. 2, Jawatha Road,
Colombo 05.

**DEFENDANT-APPELLANTS**

Vs.

Bank of Ceylon
No. 4, Bank of Ceylon Mawatha
Colombo 1.

**PLAINTIFF-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** N.R. Sivendran with D. Jayasuriya instructed by D. Ahangama for 2nd Defendant-Appellant

M.K. Muthukumara with S. Hewage for the Plaintiff-Respondent Bank.

**ARGUED ON:** 04.03.2011

**WRITTEN SUBMISSIONS FILED ON :** 25.04.2011

**DECIDED ON:** 04.05.2011

**GOONERATNE J.**

This was an action filed in the District Court of Colombo by the Plaintiff Bank against the Defendant-Appellants to recover a loan in a sum of Rs. 300,000/- with interest provided on an over draft facility. At the trial two admissions were recorded, and parties proceeded to trial on 15 issues. Documents P1 to P10B were produced at the trial through the Bank of Ceylon witness. Except for documents P3, P4, P6 & P9 all other documents

were marked in evidence without any objection. Perusal of the evidence led at the trial I find that loan application, security for such loan, acceptance of money due on the loan application and the statement of accounts were produced in the District Court and the Bank witness had given evidence on same without creating any doubt in the mind of the Court. Defendants were not successful in contradicting the official witness on the above material points, and the learned District Judge's conclusions on same need to be considered by this court.

The Plaintiff's evidence (Bank witness) reveal that overdraft facilities were made available and the amount due on such facility had to be re-paid within 18 months. The main defence of the Appellants appear to be the question of prescription. Appellants plead that action was filed 6 years after the date of repayment of the overdraft facility. Further that the statement of Accounts. (P6) show that the last transaction was on 07.1.1985. The question that needs to be decided in this appeal is whether there is merit in that argument in view of document P8. This letter P8 in no uncertain terms acknowledge the debt and the Appellants have suggested the scheme of settlement. Letter P8 is written by one legal officer called G.R de Vaz addressed to Legal Officer, Bank of Ceylon. The letter states that amount due would be settled in monthly instalments of Rs. 50,000/-. Letter P8 is

dated 23.10.1992. The learned District Judge rejected the plea of prescription. P8 had been dispatched to Legal Officer of the Plaintiff Bank in response to letters of demand marked P9 & P7.

This court is mindful of the following matters and has no hesitation in considering same in arriving at a conclusion.

(a) Document P4 which is a Mortgage Board and the 2nd Defendant was a signatory.
(b) Document P6 is the Statement of Accounts for which Section 90 of the Evidence Ordinance support producing same in a court of law.
(c) 2nd & 3rd Defendants were Directors of the 1st Defendant Company (principal debtor) who guaranteed the loan by document P3 (Guarantee Bond; jointly and severally). Clause No. 2, Pg. 3, of P3 indicates cause of action arise on demand. Debt not prescribed.
(d) Money due on the above overdraft facility accepted by receipt P5. Document P5 is a receipt of payment, by borrower. Appellant has signed as Director.
(e) No evidence led at the trial on behalf of the Defendant-Appellants.
(f) Clause 17 of document P3.
(g) Letter P8 in response to letter of demand which does not deny loan facility.

This Court heard oral submissions of both counsel at the hearing of the appeal. At the conclusion of the oral hearing parties were permitted to file written submissions. I would very briefly refer to the following submissions of learned Counsel for the 2nd Defendant-Appellant.

(a) No amount of money could be recovered from the 2nd Defendant-Appellant as the case of the Plaintiff-Respondent is prescribed
(b) If one has to rely on plea of prescription and any admission of debt made after date of prescription of action not valid

(c) Letter P8 does not contain any admission of debt.

(d) Plaintiff failed to accept letter P8 and same is conditional. It does not refer to absolute acknowledgment of debt. (without conceding)

The learned Counsel for Respondent inter alia made the following Submissions.

(a) Prescription does not lie and rely on clause 17 of document P3

(b) Document P8 is an absolute acknowledgement of debt.

(c) Debt due on demand – vide P7 & P9.

(d) Joint and several liability of 2nd & 3rd Defendants arising from P3.

It is apparent to this court that the evidence led at the trial cannot be faulted and I have no hesitation in observing that the Defendant-Appellants are in default based on evidence. However I am bound to consider the all important plea on prescription. As stated above clause 17 of document P3 suggest to waive the plea of prescription. In an identical decide case as incorporated below, would provide the answer. Having agreed to waive prescription one should not be permitted to approbate and reprobate the same transaction.

> Where one party is permitted to remove the blind which hides the real transaction the maxim applied that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief and insist upon its apparent character to prejudice his adversary. The maxim is founded not so much on any positive law as the broad and universally applicable principles of justice. 20 N.L.R at 124.

On overdrafts secured by mortgage of property and guarantee, I would incorporate in my judgment the judgment in Hatton National Bank Limited Vs. Helenluc Garments Limited & Others 1999 (2) S.L.R 365.

The appellant Bank (the plaintiff) by its plaint dated 27.5.96 instituted action against the 1st respondent (the 1st defendant) and the 2nd to 6th respondents (2 to 6 defendants) for recovery of monies advanced on overdraft facilities provided to the 1st defendant company. As security for monies advanced on overdrafts, the 1st defendant had by a mortgage bond dated 21.12.82 mortgage and hypothecated certain movable properties to the Bank. The rights under these transactions which were initially with the Dubai Bank were later assigned to another Bank and finally to the plaintiff. By a guarantee dated 27.01.82 the 2nd to the 6th defendants agreed to pay all monies due from the 1st defendant to the Bank. The Commercial High Court dismissed the action on the ground that it was prescribed.

The action had been filed on the basis that the demand on the overdraft facilities was made on 21.05.96. The cause of action arose on such demand; hence prescription would begin to run from that date both as regards the monies due on overdrafts as well as the mortgage bound which was given as security for repayment of the sums payable by the 1st defendant.

Held:

1. Overdrafts are loans by the banker to the customer, and in general no demand is necessary, so that time runs against the banker in respect of each overdraft from the time when it is made. A bank cannot, therefore, recover against a customer on an overdraft which has lain dormant for the prescriptive period which in Ceylon, in the absence of a written contract, would be three years. The overdraft facility in dispute was granted at or about the time the hypothecary bond was signed and hence the claim is prescribed.

As regards the mortgage bond, ten years had lapsed from the date of the mortgage or hypothecation. As such the action based on the bond is prescribed in terms of section 5 of the Prescription Ordinance.

2. The 2nd to the 6th defendants had in the guarantee made by them agreed to waive the plea of prescription. Such an agreement is valid and enforceable whether it is made before or after the period of limitation. Hence, the plaintiff is entitled to pursue the action against those defendants.

At page 370

Weeramantry (ibid) in section 844 at page 797 states under the heading: 'Agreements not to plead limitation' that "it is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law, except that such an agreement need not be supported by consideration".

Chitty (ibid) dealing with the English Law on 'Agreements not to plead the statute' also states at section 28 – 080 at page 1365 that "an express or implied agreement not to plead statute, whether made before or after the limitation period has expired, is valid if supported by consideration, and will be given effect to by the Court".

In the same manner as in the above case the guarantee marked P3 would be enforceable irrespective of the suggested prescriptive period pleaded by the Appellants. Court should not permit conduct of Appellant to approbate and reprobate or allow him to take advantage especially when a

party is a long standing confirmed debtor. As such I reject the Appellant's plea of prescription. It is nothing but an attempt by the Appellants to evade re-payment of the loan facility.

I would now deal with letter P8 which is described as a letter acknowledging debt by the Respondent Bank. The letters of demand P7 & P9 demand that the amount due be settled in 14 days. Letter P8 does not reject the claim made in P7 & P9. It is indicative of a settlement of the capital sum by instalement payments and regrets settlement within the stipulated time limit in P7/P9. This is no doubt an acknowledgement of the debt. However there is a request to waive interest. Such a request to waive interest is certainly not a conditional acknowledgement of the debt due to the Bank. Let me also consider the law on this point.

> The law is that there must be an acknowledgment of the debt in writing and a promise to pay the debt which promise is implied where the acknowledgment is not modified or qualified by words to the contrary. If there are words which amount to a refusal to pay there is no promise implied or expressed. If the words amount to a conditional promise to pay the condition should have been fulfilled. 32 N.L.R at 324.

If one carefully peruse letter marked P8, there is no doubt that the said letter acknowledge the debt and does not suggest a denial of the debt. Original debt stands without same being modified or qualified by the

words used in P8, though it could be argued that the Appellant employed a method to evade payment by writing the said letter. There is no refusal to pay the principal sum, but only an attempt to seek indulgence of the creditor for a concession to waive interest. This could be attributed to be the conduct of a usual debtor. P8 also revives the cause of action.

Peoples Bank Vs. Lokuge International Garments Ltd. (Bar Association Law Journal Pg 261)... When liability is admitted at some point before the term of prescription ends, this operates as a renewal of the running of prescription.

*at pg. 262.... In Moorthiapillai Vs. Sivakaminathapillai (14 NLR 30)*

Hutchinson C.J was of the view that,

> "When the time has expired within which an action to recover a debt is maintainable, and the debtor afterwards promises in writing to pay the debt, or makes a payment on account of it, the effect of the promise in writing or of the payment (from which a promise to pay the balance is inferred) is to take the case out of the operation of the enactments which prescribe the time within which an action must be brought."

Justice C.G. Weeramantry in his treatise "The law of contracts" appears to concur. He refers to Wigram V.C's observations in Philips v. Philips and states that the position in Ceylon is similar to that of in England.

> "An acknowledgement even after the full period of prescription has run, will take the case out of the statute"

The very recent judgment of Bradford & Bingley pic v. Rashid (2006) UKHL 37 also confirms the English law position.

I have perused the written submissions of both parties. At the outset the Appellant complains that the certificate of incorporation of the Plaintiff Bank was never produced. Plaintiff-Respondent Bank is a leading State Bank in this country. Appellants have never made a point of non production of the certificate of incorporate in the original court. Nor does the Petition of Appeal refer to such a point. Appellate Court cannot reject appeals based on this issue, as the end result should not give rise to any absurdity, when merits of the appeal have been considered by court subsequent to a hearing afforded to parties to an appeal. Court is bound to take judicial notice of all laws passed by the legislature and the Bank of Ceylon Ordinance was enacted long years ago to establish and regulate state-aided Bank in Sri Lanka.

I have also considered the submissions regarding prescription as argued by learned counsel for the appellant and also referred to in the written submissions.

I am unable to agree with those submissions, for the reasons stated in this judgment. Nor can I concur with the views expressed by the Appellant on document P8 and P3. The learned District Judge has carefully considered the oral and documentary evidence, and entered judgment in favour of the Plaintiff-Respondent Bank. I am not in a position to reverse

those findings. There is no merit in the arguments advanced on behalf of the Appellant.

In all the above circumstances judgment of the District Court is affirmed.

Appeal dismissed with costs.

JUDGE OF THE COURT OF APPEAL