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

Mercantile Credit Ltd.,
No. 55, Janadhipathi Mawatha,
Colombo 01.
PLAINTIFF

C.A. Case No. 527/2000 (F)

D.C. Colombo Case No.

7547/MHP

-Vs-

1. Winston Noel Thomas Perera,
   Winton Gems,
   No. 5/3, Kudugalwatta,
   Rathnapura.
2. Somapala Punchihewa,
   Kusumsiri, Galabada,
   Gallella.
3. Mr. Polukandura Vindanalage Heenmahattaya,
   Godakawela Gems,
   Godakawela.

DEFENDANTS

AND BETWEEN

Somapala Punchihewa,
Kusumsiri, Galabada,
Gallella.
2nd DEFENDANT-APPELLANT

-Vs-

Mercantile Credit Ltd.,
No. 55,Janadhipathi Mawatha,
Colombo 01.
PLAINTIFF-RESPONDENT

1. Winston Noel Thomas Perera,
Winton Gems,
No. 5/3, Kudugalwatta,
Rathnapura.
1st DEFENDANT-RESPONDENT

3. Mr. Polukandura Vindanalage Heenmahattaya,
Godakawela Gems,
Godakawela.
3rd DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Ashan Fernando for 2nd Defendant-Appellant.
Plaintiff-Respondent unrepresented.

Decided on : 28.04.2016

A.H.M.D. Nawaz, J.

The 2nd Defendant-Appellant in this case (hereinafter referred to as "the 2nd Defendant") who was a guarantor along with the 3rd Defendant seeks his exemption from his liability on the basis that there was no demand made of him by the Plaintiff-Respondent (the

Finance Company). The 1st Defendant was a hirer on a hire-purchase agreement which was entered into with the Finance Company on 28.06.1985 and upon his failure to pay the installments due on the contract of hire-purchase, the Plaintiff-Respondent had terminated the hire-purchase agreement on 07.10.1986.

It has to be noted that by a memorandum of agreement which was marked as **P2**, the 2nd and 3rd Defendants had guaranteed to the Plaintiff-Respondent the punctual payment by the hirer (the 1st Defendant) all monthly hire rentals and accordingly the Plaintiff-Respondent instituted action against all three Defendants and when the matter came up for trial, 4 admissions were recorded on behalf of the 2nd Defendant, one of which was that the 2nd Defendant had subscribed his signature to the memorandum of agreement. Though all three Defendants were sued jointly, the record reveals that summons could not be served on the 1st Defendant, and a trial inter parties proceeded only against the 2nd Defendant-Appellant, whilst an *ex parte* decree was entered against the 3rd Defendant.

The only issues that were framed on behalf of the 2nd Defendant-Appellant were two in number and the two issues engaged the questions whether the 2nd Defendant was a guarantor in relation to the 1st Defendant (the hirer) and whether in terms of Section 31 of the Consumer Credit Act, No. 29 of 1982, the 3rd Defendant was a guarantor. These two questions, as would be expected, have been answered in the affirmative and the learned District Judge, delivered judgment on 15.08.2000 finding the 2nd Defendant liable on the guarantee.

The judgment was assailed on several grounds.

No Demand

It was contended that there was no demand made of the 2nd Defendant. No doubt it is axiomatic that a demand is a condition before a guarantor is sued on a guarantee. A guarantee may expressly provide that a creditor is under a duty to notify a guarantor of any default by a principal debtor. If notice of default is made a condition precedent to the liability of guarantor, the guarantor will not be liable unless he has been duly notified of

the principal debtor's default-see *Eshelby v. Federated European Bank Ltd.*, (1932) 1 K.B 423.

In *Eshelby v. Federated European Bank Ltd.*, (*supra*), a bank provided a guarantee to cover the liability of a guarantor pertaining to certain payments for the renovation of a building. It was a requirement of the bank guarantee that notice of default by the guarantor was to be given to the bank. The English Court of Appeal decided, *inter alia*, that the bank came under no liability as no notice of default was given by the creditor to the bank.

In addition, a guarantee may also require a creditor to serve a notice of demand on the guarantor before commencing legal proceedings against the guarantor. There is a body of opinion taking the view that before a creditor s entitled to bring an action against a guarantor, the creditor has to make a demand on the guarantor. In *Esso Petroleum Co. Ltd., v. Alstonbridge Properties Ltd.,* [1975] 1 W.L.R. 1474, Walton J. expressed the view that when a debt was made payable on demand, the giving of a notice of demand was not a prerequisite to the bringing of an action to enforce payment of the debt, but in the case of a surety, a demand was generally necessary before an action might be brought. His Lordship said at p. 1483: "*I fully accept, of course, that where there is a pre-existing debt which is payable 'on demand', such a demand (other than the service of proceedings) is not a pre-requisite to the bringing of an action to recover that debt...[W]here the character in which payment is required is that of surety, a demand is, in general, necessary*". Similar views were also expressed by Lloyd J. in *General Produce Co. v. United Bank Ltd.,* [1979] 2Lloyd's Rep. 255, where Lloyd J. commenting on a creditor's duty to give notice of demand to a guarantor before suing on the guarantee said, at p. 259: "*Normally where a debt is repayable on demand it is not necessary for the creditor to make a demand before bringing his action. It is otherwise in the case of a guarantee. If a guarantor is liable on demand he cannot be sued until after a demand has been made on him*".

Our Courts too have emphasized the need for a demand that should be made of sureties-see *L.B Finance Ltd v. Manchanayake* (2000) 2 Sri.LR 142 (CA); *Mohinudeen v. Lanka Bankuwa* (2001)1 Sri.LR 390 (SC).

A quick look at the memorandum of agreement makes it clear that demand has been prescribed in the contract. Clause 21 of the Memorandum of Agreement sets out as follows:-

The Guarantors hereby-

(a) jointly and severally guarantee to the Owners the regular and punctual payment by the Hirer of all the monthly hiring rentals specified in Schedule I hereof and the performance and observance by the Hirer of the several terms and conditions herein;

(b) bind themselves jointly and severally to pay forthwith all monies which may become payable to the Owners hereunder whether by way of monthly rentals damage, interest, costs, charges or otherwise however;

(c) agree that the Owners shall be entitled to sue the Hirer and Guarantors **jointly and-or severally or to sue the Guarantors or either of them only in the first instance before recourse is had to the Hirer;**

(d) bind themselves jointly and severally **to pay forthwith on demand** to the Owners the amount of any judgment or decree that the Owners may obtain against the Hirer under this Agreement;

(e) renounce the right to claim that the Hirer should be excused I the first instance and the benefit of division and all other rights and privileges to which sureties are by law entitled;

(f) agree that each of the Guarantors is liable in all respects hereunder to the same extent and in the same manner as the Hirer.

Clause 21 alludes to the liability of the guarantors arising only upon demand and though this was not raised as an issue in the court *a quo*, Mr. Ashan Fernando argued that there was no demand made of the 2nd Defendant-the Guarantor. Upon a perusal of the record, I take a different view.

A notice of termination of the hire-purchase agreement dated 22.09.1986 in terms of Section 18(1) of the Consumer Credit Act, No. 29 of 1982 has been given to the hirer, along with copies dispatched to the 2nd and 3rd Defendants-the Guarantors -see P8.

Thereafter a demand dated 16.03.1988 has in fact been made of the guarantors which goes as follows:-

Mr. S. Punchihewa, Kusumsiri, Galabada, Gallelle.

Mr. B.V. Heenmahathmaya, Godakawela Gems, Godakawela.

Dear Sir/s,

HIRE PURCHASE AGREEMENT No. 08/01/KND/02254/PV

We have been instructed by Mercantile Credit Limited of Mercantile House, 55, Janadhipathi Mawatha, Colombo 1, to demand of you and we do hereby demand the payment of a sum of Rs. 63,216.52 being the aggregate of the amount due to them as at 25.11.1987 upon the above Hire Purchase Agreement. You are also required to pay a sum of Rs. 52.50 being legal charges.

You have joined the Agreement as Guarantor and, as such, you are liable for default or breach of any of the terms of the Agreement to the same extent as the Hirer. The Hirer has defaulted in the payment of his hire rentals and, on instructions from Mercantile Credit Limited, Colombo, rentals and, on instructions from Mercantile Credit Limited, Colombo, we write to request you to effect immediate settlement of the amount due.

If settlement in full is not effected within seven days from today, we are further instructed to file action against you as Guarantor for recovery of the sum due, with interest thereon and attendant costs.

Yours Faithfully

Attorney-at-Law

This explains the reason as to why no issue was raised on the requirement of demand. In the circumstances, this ground of appeal based on want of a demand must necessarily fail.

Joint and Several Liability

Another argument that was tangentially taken was that the sureties could not have been sued in the absence of the 1st Defendant (hirer). This argument goes contrary to Clause 21, which imposes joint and or several liability on the guarantors. In a joint and several guarantee, the liability of the guarantors are both joint and several. In *Re J.H. Davison* (1884)13 Q.B.D. 50, Cave J. considered the issue of whether a Plaintiff who had obtained a joint judgment even though he would have been entitled to obtain a joint and several judgment against the debtors was precluded from pursuing his claim against the other

debtors on their several liability. Holding that the joint judgment did not constitute a bar to the further action, Cave J. said at p.54: *"No authorities to the contrary can be found, and it seems clear both on principle and authorities that a joint judgment is not a bar to a separate cause of action".*

Therefore this ground too has to be decided against the 2nd Defendant.

Another argument that was advanced was that there has been long delay between the conclusion of the trial and the date of the judgment. The Counsel for the 2nd Defendant-Respondent relied on ***Kulatunga v. Samarasinghe*** (1990) 1 Sri L.R. 244 where there was a delay of two years and four months after the tender of written submissions before the judgment was delivered. This was a case which depended on the oral testimonies of witnesses. The Court commented that the advantage of the impressions created by the witnesses would have faded away from the mind of the District Judge with the passage of time. In fact, the observations of Basnayake C.J in ***Mohato v. Sarana*** 67 CLW 2 was adverted to by H.W. Senanayake J. (with A.S. Wijetunga J. concurring). The case was sent back for a retrial *de novo*. A similar application was made by Mr. Ashan Fernando - the Counsel for the 2nd Defendant.

But several distinguishing features in this case mark the instant case out from cases such as ***Kulatunga v. Samarasinghe*** and ***Mohato v. Sarana*** *(supra)*. No doubt the trial concluded in this case on 30.06.1997 and the written submissions of the Plaintiff-Respondent was finally filed on 16.10.1997. By this time the trial Judge had become a High Court Judge and it took considerable time before he was gazetted by the Judicial Service Commission to deliver the judgment-see the Journal entries from 30.06.1997 onwards. It was not until 15.08.2000 when the judgment was finally pronounced. This is not a case where the demeanor and deportment of witnesses would have an impact on the outcome of the case. Only one witness from the Finance Company testified in this case, with no real challenge being thrown to his testimony and even the want of a demand was never put to him, presumably because there was in fact a demand *in esse*.

In my view, this case depended wholly or substantially on documentary evidence and those documents speak for themselves, as eloquently before this Court, as they did in the

trial Court. If this Court can assess the merits and demerits of a case which depend wholly or substantially on documents, a trial *de novo* would needlessly prolong the labyrinth of litigation and this Court would desist from taking that course.

Accordingly on a foregoing conspectus of the view I have taken of the case, I affirm the judgment and dismiss the appeal but with no costs.

JUDGE OF THE COURT OF APPEAL