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

L.B. Finance Company Ltd.,
No. 101, Vinayalankara Mawatha,
Colombo 10.

C.A. Case No. 831/2000 (F)

D.C. Colombo 6971/HP

Plaintiff

-Vs-

1. Victor Dewapura *alias* Devapura Victorpala *alias* Victorpala Devapura
   No. 585, Waragoda Road,
   Kelaniya.
2. Pathiraja Mudiyanselage Nimalasena,
   No. 1490, Waragoda Road,
   Kelaniya.
3. Aloycious Joseph Alphonso Serasinghe,
   "Aloy Travel Srvices",
   Waragoda, Kelaniya.

Defendants

And Between

Pathiraja Mudiyanselage Nimalasena,
No. 1490, Waragoda Road,
Kelaniya.

2nd Defendant - Appellant

-Vs-

L.B. Finance Company Ltd.,
No. 101, Vinayalankara Mawatha,
Colombo 10.
Plaintiff-Respondent

1. Victor Dewapura *alias* Devapura Victorpala *alias* Victorpala Devapura (Deceased)
No. 585, Waragoda Road,
Kelaniya.

1A. Yakahatuge Somawathi,
No. 489, Waragoda Road,
Kelaniya.

2. Aloycious Joseph Alphonso Serasinghe,
"Aloy Travel Srvices",
Waragoda, Kelaniya.
Defendant - Respondents

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

COUNSEL : Viresh Nanayakkara with Yajish Tennakoon for the 2nd Defendant-Appellant.

Palitha Kumarasinghe, P.C. with V.Fernando and Viraj Bandaranayake for the Plaintiff-Respondent.

Decided on : 06.02.2017

A.H.M.D. NAWAZ, J.

This appeal raises the defence of *caveat subscriptor* or *non est factum* as the English Law would call it and the 2nd Defendant-Appellant who took up this defence in the District Court seeks to contend that the Plaintiff-Respondent Company misled him into signing the guarantee bond marked as **P4** and produced at the trial.

The litigation revolves around an agreement entitled "lease agreement" dated 9th September 1986 where the Plaintiff-Respondent-L.B. Finance Ltd., (the lessor) agreed with the 1st Defendant-Victor Dewapura (the lessee) to purchase the subject matter in question for the purpose of leasing it to the lessee upon the terms and conditions recited in the said lease agreement. The 2nd Defendant-Appellant (hereinafter sometimes referred to as the 2nd Defendant or appellant) and 3rd Defendant who guaranteed the lease agreement also signed this lease agreement at the bottom-Please *see* the agreement dated 9th September 1986 marked as **P1**. Both the 2nd Defendant-Appellant and 3rd Defendant proceeded to sign the guarantee which was contemporaneous with the lease agreement. The guarantee marked as **P4** recites:

> *"In consideration of your entering at our request into the foregoing lease agreement (hereinafter called "the lease agreement") with Victor Dewapura (hereinafter called "the lessee") we the undersigned do and each of us doth hereby jointly and severally guarantee to you the punctual payment by the lessee of all rental...."*

As one could observe, there is also a covenant of joint and several liability undertaken by the 2nd and 3rd Defendants and moreover, in the 2nd covenant which reads as follows there is liability undertaken as an indemnitor as well. The respective clause runs as follows:-

"We and each of us further jointly declare and specifically agree that our and each of our liability under this guarantee and indemnity shall be as principal debtors and not merely as sureties...."

The import of this covenant is quite significant. The 2nd and 3rd Defendants have undertaken to act not only as guarantors but also as indemnitors. In other words they guarantee the payment of lease rentals in the event of a default by the principal debtor– the 1st Defendant. In the same breath they also agree that liability may be imposed on them *qua* principal debtors as well. Whilst the 2nd and 3rd Defendants have undertaken secondary liability as guarantors, they have also assumed primary liability as indemnitors. Though there exists a distinction between a guarantee and an indemnity, it so happens that in modern commercial transactions both kinds of liabilities are incorporated in one and the same document. So the guarantee that the 2nd Defendant-Appellant and 3rd Defendant signed with the Plaintiff-Respondent was not only a guarantee but also an indemnity.

When a guarantee is also worded as an indemnity, the agreement has to be construed both as a guarantee and an indemnity. One could now see how a document, though entitled as a guarantee, also acts as an indemnity.

The learned Counsel for the 2nd Defendant-Appellant (Guarantor and Indemnitor) sought to impugn the judgment dated 20th October 2010 on two grounds-namely the learned Additional District Judge of Colombo failed to appreciate that a notice of termination of the lease agreement was not served on the 2nd Defendant-Appellant in terms of the law and secondly the learned District Judge failed to consider the defence of *non est factum.* In other words the 2nd mode of impugnation of the judgment flowed from the argument that the 2nd Defendant-Appellant did not understand the nature and content of the agreement which he signed. As I observed before, there were two agreements that were signed on 9th September 1986. One was a lease agreement between the leasing company (the Plaintiff-Respondent) and the lessee (the 1st Defendant in the case), whilst the guarantee which doubled up as an indemnity was

entered into by the 2nd Defendant (the Appellant) and the 3rd Defendant. I would presently go into the two grounds on which the judgment dated 20th October 2010 was impugned.

Notice of Termination was not in accordance with the law

The Counsel for the Appellant Mr Viresh Nanayakkara argued that the letter dated 8th April 1987 sent to the 2nd Defendant-Appellant was no notice at all as is contemplated in Section 18(1) of the Consumer Credit Act, No. 29 of 1982. Section 18(1) of the said Act enacts as follows:

> *"Where a hirer makes more than one default in the payment of hire as provided in a hire-purchase agreement then, subject to the provisions of section 21 and after giving the hirer notice in writing of not less than*
>
> *(a) one week, in a case where the hire is a payable at weekly or lesser intervals; and*
>
> (b) *two weeks in any other case"*

Thus the above provision makes clear that when there is a repeat default after the first default has occurred, a notice of termination of one week or two weeks depending on the frequency of the obligation to pay installments is triggered. The Counsel for the Appellant argued that the Appellant was entitled to two weeks' notice of termination since the hire was not payable at weekly or lesser intervals and this mandatory requirement was not followed in the case. The Counsel cited the case of ***Raymond Fernando vs. Bank of Ceylon***[1] wherein Her Ladyship Shirani Bandaranayake J (as she then was) held that in the context of a hire purchase agreement which stipulated 7 days' notice, the agreement had not been duly terminated in terms of section 18 of the Consumer Credit Act which required two weeks' notice of termination of agreement to be given and that Section 18 of the Act prevailed over clause 11 of the agreement in

[1] (2000) 1 Sri.LR 12

to be given and that Section 18 of the Act prevailed over clause 11 of the agreement in that case which stipulated 7 days' notice. The tenor of the holding is that parties could not have contracted out of the provisions of Consumer Credit Act, No. 29 of 1982.

In fact the relevant notice of termination in this case dated 8th April 1987 **(P7)** reads as follows:-

> "Lease Agreement No. LC/31
> Vehicle No. 50 Sri 2910
>
> This is to inform you have defaulted in the payment of rental/s due to us in terms of the aforesaid agreement for the months February 1987 – March 1987 amounting to Rs. 16,930.42.
>
> We hereby terminate the agreement in terms of clauses 17(1)(c), and request you to return Nissan Caravan immediately to our office at 101, Vinayalankara Mawatha, Colombo 10 and to make the payment of the sum of Rs. 16,930.42 which is due to us in terms of the agreement. Should you fail to do so, we will proceed with recovery action to safeguard our interests without further warning. You will of course, remain fully liable under the terms and conditions of the agreements signed by you.
>
> Your faithfully,
> L.B. Finance Limited
> General Manager"

The contention of the Counsel was that there was non-compliance with Section 18 of the Act and the notice was not in accordance with the law.

This argument engages another question-*whether the two transactions between the parties namely the leasing agreement and the contract of guarantee attract the provisions of the Consumer Credit Act, No. 29 of 1982 at all.* No doubt these two agreements were entered into in the

But it has to be noted that what was signed on 9th September 1986 was entitled a lease agreement and not a hire purchase agreement. But yet the counsel argued on the basis that it was a Hire Purchase agreement.

Is this argument that the Consumer Credit Act, No 29 of 1982 can be superimposed on an agreement which is entitled "lease agreement" sustainable having regard to the content of the agreement? A perusal of the agreement and its contents makes patently clear that it is nothing but a lease agreement. This agreement dated 9th September 1986 does not partake any of the features of a hire purchase agreement. The preamble to the lease agreement states as follows:

> *Whereas at the request of the lessee, the lessor has agreed to purchase/has purchased the property hereinafter described for the purpose of leasing the same to the lessee upon the terms and conditions as hereinafter appearing.....*

This preamble clearly identifies the purchaser to be the lessor who in turn leases the property to the lessee-the 1st defendant. It has to be noted that there is no hire that took place. The mutual covenants thereafter begin from Clause 1 onwards. Clause 23 (1) of the lease agreement makes it crystal clear that this is unmistakably a lease agreement.

Clause 23 (1) provides:

> *Upon the expiration or earlier termination of this lease agreement for any reason whatsoever Lessee shall deliver and surrender up property to Lessor at the address of the lessor stated in this lease agreement or at such other address as lessor may specify or if so required by lessor shall hold property available for collection by lessor or its agents.....*

The aforesaid clause makes it quite clear that property in the property never passes to the lessee. If the leased property has to come back to the lessor upon the expiration or earlier termination of the lease, that is indicative of the fact that the ownership in the property never passes to the lessee. That shows that what exists between the plaintiff finance company and the 1st defendant lessee is nothing but a lease agreement. This is analogous to the Roman Law concept of *locatio-conductio*, denoting a transaction under

which the owner of property, the lessor, grants possession of the property to another person, a lessee, for a specified or unspecified period of time (the lease term) in return for periodic payment of money (the lease rentals). At the end of the term, the property is returned to the lessor. The contemporaneous documents surrounding the lease agreement establish the fact that it was nothing but a lease agreement that the plaintiff company was entering into. For instance 17 days after the lease agreement was signed, it would appear that the 2nd defendant appellant was sent a copy of each monthly installment that was dispatched to the lessee-the 1st defendant. In other words, the 2nd defendant appellant was put on notice of the terms and conditions of the lease agreement-see P5 at page 157 of the appeal brief. The letter dated 17th September 1986 P7 which is called the determination of the leasing alludes to the default in the payment of rentals and it warns all the parties that recovery action will be proceeded with if outstanding rentals are not paid-see page 163 of the appeal brief. Even the letter of demand sent to the 2nd defendant-appellant refers to a lease agreement.

All in all, the contemporaneous documents demonstrate that what was entered into was a lease agreement, which was subject to payment of rentals and upon the expiration of the lease agreement, the property must revert to the owner-lessor -the plaintiff finance company.

This has to be contrasted with the definition of a Hire Purchase agreement which is set out in Section 31 of the Consumer Credit Act, No 29 of 1982. According to the definition, a hire-purchase agreement means an agreement under which goods are let on hire and under which-

(a) the possession of goods is delivered by the owner thereof to a person on condition that such person pays an agreed amount in periodic instalments: and

(b) (i) either the hirer has an option to purchase the goods in accordance with the terms of the agreement; or

(ii) the property in the goods is to pass to the hirer on the payment of the last of such installments, ...

This definition encompasses three elements in a contract of hire purchase. Possession of property is delivered by the owner to the hirer who is subject to a payment obligation. The hirer has an option to purchase the goods in accordance with the terms of the agreement or the property in the goods will pass to the hirer on the completion of the last instalment. Thus the element of purchase predominates in a hire purchase agreement, whereas the property in the goods will not pass to the lessee in the case of a lease agreement. The contrast is quite striking. In a lease the property comes back to the lessor at the end of the lease period, whereas in a hire purchase upon the fulfilment of all conditions, the property will be transferred to the hirer. Usually on the conclusion of the Hire Purchase contract, the article hired automatically vests in the hirer on payment of a pepper-corn rent. Sections 6 and 7 of the Consumer Credit Act, No 29 of 1982 respectively refer to passage of property and right of hirer to purchase the property at any time with rebate. The hirer can also pay the full amount and secure ownership of the property hired at an anterior point of time. Thus there is a marked difference between a Hire Purchase and a Lease and from the forgoing analysis of the agreement entered into between the plaintiff and the 1st defendant, it would appear that the agreement **P3** bears no features of a hire purchase agreement and therefore the argument of counsel for the 2nd defendant-appellant that Section 18 of the Consumer Credit Act, No 29 of 1982 would apply in regard to termination of the agreement must necessarily fail.

As Mr Palitha Kumarasinghe PC correctly submitted, it is the contract of lease that would apply to the termination of the lease agreement as this agreement was entered into on 9th September 1986, so long before the Finance Leasing Act, No 56 of 2000 came into effect. As far as the lease agreement is concerned, it is Clause 17 (1) (c) of the agreement that would apply and upon a perusal of the relevant notice of termination in this case dated 8th April 1987 (P7) which has been reproduced above in this judgment, it is quite clear that the notice of termination of the lease has been given to the 2nd

defendant-appellant in accordance with Clause 17 (1) (c) -the covenant relating to defaults. Thus the notice of termination was properly given.

Caveat Subscriptor or Non Est factum

The 2nd argument of Mr Viresh Nanayakkara for the 2nd defendant-Appellant was that the guarantee or indemnity that was signed contemporaneously by the 2nd defendant is vitiated by the fact that the 2nd defendant was unaware of the nature and contents of the document that he signed. In other words he signed it as a witness and not as a guarantor or indemnitor or indemnifier. This contention raises the defence of *caveat subscriptor* or *non est factum* as the English Law would call it. Mr Palitha Kumarasinghe PC argued that the conduct displayed by the appellant militates against this contention. It could be seen that the trial proceeded on a joint answer of the 1st and 2nd defendants dated 11.09.1990, though the 2nd defendant made two attempts to file an amended answer. The trial against the 1st defendant lessee was held *ex parte* and an ex parte judgment was delivered against him on 1.06.1995 after a witness had given evidence on behalf of the plaintiff finance company. In the *inter parte* trial that began against the 2nd defendant-appellant, the 2nd defendant raised issue No. 8 on misrepresentation which was material to the defence of non est factum or caveat subscriptor. Issue No 8 went as follows;

> *Had the plaintiff obtained the 2nd defendant's signature to the document marked "A" by misleading him into signing it?*

In fact the answer given by the learned Additional District Judge to this issue is in the negative. It has to be noted that by his judgement dated 20th October 2000, the learned Additional District Judge pronounced judgment in favor of the plaintiff finance company and granted all reliefs as prayed for in its plaint. I must observe at this stage that the defence of misrepresentation was never pleaded in the answer of the 2nd defendant. However, without any objections, the 2nd defendant raised an issue at the trial on misrepresentation on the part of the plaintiff finance company. The question arises whether his testimony at the trial has established the defence. I must also observe

that the issue as framed bears an error on its face. Apparently it is the document marked "A" that has been recorded as being the document to be vitiated for misrepresentation but the document marked A was not the contract of guarantee signed by the 2nd defendant but rather the lease agreement. The argument before this Court proceeded on the basis that the challenge was thrown not to the lease agreement but in fact to the guarantee. Though the error in the issue was not corrected (this once again emphasizes the need to correct proceedings and not walk into a next day's trial headlong), it was a given before this Court that the vitiating factor of misrepresentation or misleading so to speak was alleged only against the contract of guarantee and not the lease.

The testimony of the appellant was that he signed the documents in English and therefore he could not understand the contents. He further states that he does not remember whether the contents of documents (lease and guarantee) were explained to him by the officers of the plaintiff. One could see thus that there is no denial that the documents were read over and explained to him. It was just that he could not recollect whether they were explained. Thus this testimony falls far short of conclusively establishing a non explanation of the documents. He was also posed a question as to whether he knew the consequence of signing a guarantee. The answer was that it would entail liability on the part of the surety if the principal debtor defaulted. This item of evidence shows that the 2nd defendant appellant was quite possessed of the import of a guarantee.

I also find that the 2nd defendant appellant was a technician and a tradesman on his own admission. The witness came through as a man of the world who could not have been so naïve as to be unaware of the implications of placing one's signature to a guarantee. If he knew that the act of signing a guarantee would spell for him disastrous consequences of monetary burdens, he should have exhibited prudence. So his assertion that he only signed as a witness and not as a guarantor does not inspire confidence in this Court. The necessity to exercise prudence was emphasized by the House of Lords in the context of the plea of *non est factum*-(the plea that it is not my deed).

In *Saunders v. Anglia Building Society* {1970} 3 All ER 961 – The House of Lords redefined the scope of the principle of *non est factum*

The effect of this important decision (sometimes cited as *Gallie v. Lee*, the parties to the lower courts) is that there is a heavy burden of proof on the person relying on the principle;

1. There must be a fundamental difference between what he signed and what he thought he signed and perhaps most important.
2. He must show that he acted carefully (His want of care is relevant)-the requirement of prudence.

Why did not the 2nd defendant recoil from signing the guarantee if he knew the import of a guarantee? He was possessed of full understanding and knowledge and as a reasonable prudent man, he could have paused to reflect as to what he was subscribing and if it were to prove burdensome, he could have refrained from doing what he did.

Only in quite exceptional circumstances can any person of full age and understanding disavow his signature so as to prejudice the rights of an innocent third party.

The Court of Appeal considered the plea of *non est factum* in ***Jayasiriwardena v. Piyaratne*** 2004 1 Sri.LR p.37. Nimal Dissanayake J (with Somawansa J concurring) observed as follows particularly at p.47 :

> *The defendant-respondent at the commencement of the trial admitted only the signing of indenture of lease P1 and P4. His position was although he placed his signature on P1 and P4, the contents of P1 and P4 were not explained to him. Hence he was not aware of the contents of P1and P4.*
>
> *It is interesting to note that despite documents P1 and P4 being in English his son-in-law who was an Inspector of Police, accompanied him to the lawyer notary who attested P1 and P4. He had signed as an attesting witness. Therefore the evidence of the defendant-respondent*

that the contents of P1 and P4 were not explained to him and as such he did not know the contents cannot be believed. It has been held in Saunders v Anglia Building Society that a plea of non-est factum, will rarely succeed if the document was signed by an adult or a literate person.

Certain other items of evidence militate against accepting the defence of *caveat subscriptor or non est factum* raised by the appellant.

The plaintiff's witness in his evidence marked as "**P1**" the proposal made by the 1st defendant lessee , which contains under the heading "Guarantor/Indemnfier" including personal details such as the 2nd defendant's national identity card number, date of birth, names of children and most importantly personal bank account details clearly suggesting that the information was tendered voluntarily by the 2nd defendant. The 2nd defendant admitted in evidence that that he gave these details. The 2nd defendant further admitted to having tendered his income tax payment certificates , reiterating his voluntariness in the transaction. These are all antecedent acts of the 2nd defendant that would go to show that the 2nd defendant did not exercise reasonable care before signing the document.

In ***Mercantile Credit Ltd v Thilakaratne*** (2002) 3 Sri.LR 206 the plaintiff-appellant filed action against the 1st (principal debtor), 2nd and 3rd defendant-respondents (guarantors) jointly and severally to recover a certain sum of money, and the return of the vehicle (on hire purchase) and damages. The 2nd defendant-respondent (guarantor) whilst admitting signing the Guarantee Bond stated that he was not aware of the conditions of the agreement, he had not renounced all the rights and privileges to which the sureties are entitled to by law and that the clause relating to the renunciation of the benefit was not explained to the guarantors. The District Court held with the 2nd defendant-respondent. Nimal Dissanayake J held as follows:

(1) The burden of proving that the clauses relating to the renouncing of all benefits and privileges to which sureties are entitled to by law were not understood by him is a

the burden of proving that fact is with the person who asserts that fact.

(2) If as asserted to by the 2nd defendant-respondent that he was not aware of the conditions of the agreement at the time he signed it, it was open for him to have opted for his common law remedy of repudiating his suretyship when he came to know by receipt of certain letters. Furthermore, he states in evidence that he did not care to read it and that he signed because a friend told him to do so.

(3) Negligence on the part of the 2nd defendant-respondent is not an excuse to deny liability.

"Where a person who is neither illiterate nor blind signs a deed without examining the contents he would not as a general rule be permitted under the Roman Dutch Law to set up the plea that the document is not his."

The plea of *non est factum* arose before the Court of Appeal in the above case as to the term *beneficium sui divisionis excussionis* which the guarantor alleged was not explained to him. One could see how the Court disbelieved the guarantor on the assertion having regard to his conduct. The Court relied on Section 101 of the Evidence Ordinance to bring home the fact the burden lies squarely and fairly on him to prove this fact.

It is pertinent to observe that the claim of the 2nd defendant that he had been misled into signing as a guarantor is contrary to reason in light of certain other factors as well.

Business communications such as certified statement of accounts demonstrating the failure of the 1st defendant to make payments were copied to the 2nd defendant as well as notice of termination and letters of demand. None of these documents were contradicted nor were they repudiated by the 2nd defendant. Thus, it is abundantly clear that the 2nd defendant was aware of the breach of the lease agreement by the 1st

defendant and silence on the part of the 2nd defendant adds credence to the probability that the 2nd defendant was fully aware of his obligations as a guarantor namely, he became liable jointly and severally in terms of the lease agreement and the guarantee to pay the sums of money as reflected in the statement of accounts "P6" and as demanded by the letter of demand.

In commercial matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is addressed must reply if he does not agree with or means to dispute the assertions. Otherwise, the silence of the latter amounts to an admission of the truth of the allegations contained in that letter-see ***Saravanamuttu vs. R.A. De Mel*** 49 N.L.R. 529. In fact Wimalachandra J adverted to this case in ***Seneviratne and Another v Lanka Orix Leasing Company Ltd*** (2006) 1 Sri.LR 230. In this case by way of a promissory note the defendants had promised to pay the plaintiff a certain sum of money at its registered place of business. The plaintiff by its letter of demand demanded the sum of money set out in the promissory note. The plaintiff had to dispatch a letter of demand because a promissory note is a bill of exchange payable on demand. The defendants *though* did not respond to this letter of demand. In that context, Wimalachandra J held that this amounted to presentment of the promissory note to the defendants. The learned judge further held that the only possible conclusion, for the failure to reply to the letter of demand is that the amount stated is correct and the defendants have not repaid the sum stated in the promissory note. It is such silence that has been displayed by the 2nd defendant appellant at all times in this case.

Such conduct as was manifested by the 2nd defendant is inconsistent with his plea of *caveat subscriptor* or *non est factum*. If it is apparent that a particular conduct shows negligence vis a vis the plea of *non est factum*, the loss must fall on the negligent actor. In other words negligence of the 2nd defendant would preclude him from raising the defence of *non est factum*. In the *Saunders* case (supra), the House of Lords declared that a person who relied on a plea of *non est factum* was required to show that he had exercised reasonable care when he signed the document.

In order to establish the plea of *non est factum*, there must be clear and positive evidence. The burden lies on the party seeking to disown the document: this includes the burden of showing that in signing the document, he acted with reasonable care. If one examines the items of evidence pertaining to the acts indulged in by the 2nd defendant both prior to signing the guarantee and at the time of subscribing to the guarantee, there is no proof he took care. In the same way if one examines the way the 2nd defendant kept silent when he received the notice of default and the letter of demand, it is crystal clear that the 2nd defendant has not discharged his burden of showing that he took care. In the circumstances the third party who has paid or is owed money by the principal debtor (the lessee in this case) cannot be prejudiced to his disadvantage.

A belated plea of *non est factum* only at the trial, which is unsupported by evidence, is not sustainable and is bound to fail. In the circumstances the liability of the 2nd defendant arising from the contract of guarantee has to be affirmed.

For the reasons set out above I affirm the judgment of the learned Additional District judge of Colombo dated 20th October 2000 and dismiss the appeal of the 2nd Defendant-Appellant.

JUDGE OF THE COURT OF APPEAL