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

C.A. Case No.725/1997 (F)

D.C. Nuwara Eliya Case No.911/M

Central Province Provincial Council,
Provincial Secretarial Office,
Kandy.
PLAINTIFF

-Vs-

Hatton National Bank,
No.42, Queen Elizabeth Drive,
Nuwara Eliya
DEFENDANT

AND BETWEEN

Hatton National Bank,
No.42, Queen Elizabeth Drive,
Nuwara Eliya
DEFENDANT-APPELLANT

-Vs-

Central Province Provincial Council,
Provincial Secretarial Office,
Kandy.
PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Shammil J. Perera PC with Duthika Perera for the Defendant-Appellant. Lakshman Perera PC with Thishya Weragoda, Anjali Amarasinghe and Niluka Sanjani Dissanayake for the Plantiff Respondents.
Decided on	:	18.07.2018

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

The Plaintiff instituted this action for the recovery from the Defendant bank a sum of Rs.1,765,345/- due to the Plaintiff Provincial Council on a letter of guarantee No.22/02 dated 17.06.1991 issued by the Defendant bank in favour of the Plaintiff provincial Council. These reliefs have been prayed for in prayers 1 and 2 of the plaint.

The letter of guarantee was marked as **P1** and is admitted. The Defendant bank marked the original of the guarantee as **ඒ1**.

The contention of the Defendant bank has been that the said letter of guarantee automatically ceased to be valid after 31.10.1991. Another contention is that the Plaintiff by letter dated 18.11.1991 **ඇ9** withdrew the claim made by it upon the said letter of guarantee by its letter dated 24.10.1991 **(P2)** the Defendant further contended that the said letter of guarantee was not extended after 31/12/1991 and therefore the Plaintiff has no cause of action against the Defendant bank.

On the contrary the Plaintiff contended that the letter of guarantee **P1** was duly extended for a period of two months after 31.12.1991. On the 31.12.1991 the Plaintiff Provincial Council made a valid demand on the Defendant bank through the Plaintiff's lawyer **(P12)** for the said sum of Rs.1,765,345/-. The Defendant bank was requested to pay this sum on or before 31.12.1991 while the Defendant bank has failed to do so it has even failed to reply

to the letter of 21.12.1991 **(P12)**. The Plaintiff therefore argued that the Defendant bank was bound and obliged in law honor the said guarantee **P1**.

Let me indulge in a narrative of facts to acquaint oneself with the nitty-gritty of this case.

The Plaintiff Provincial Council entered into a contract bearing No.87/G/01 dated 10.10.1990 with a contractor called Cashian Herath who had been carrying on the business of a building contractor under the name style and firm of Cashian & Sons. This contract was entered into for the purpose of constructing an office complex for the Integrated Rural Development project at *Nuwara Eliya* which is a project funded by the Netherlands Government. The contract was for a sum of Rs.5,429,795/- and was to be completed by 30th June 1991.

The contractor Cashian Herath failed to discharge and complete his contractual obligations by 30th June 1991 and requested the Plaintiff to grant an extension of time to complete the work. The Plaintiff granted an extension to the contractor till 31st October 1991 to complete the work subject to certain conditions one of which was that the contractor should provide an unconditional and irrevocable bank guarantee for a sum of Rs.1,765,345/- which was the amount advanced to the contractor as an advance on the said contract by the Plaintiff.

At the request of the said contractor Cashian Herath, the Defendant bank furnished to the Plaintiff the letter of guarantee **P1** executed at *Nuwara Eliya*.

MATERIAL FACTS TO THE ISSUE TO BE DETERMINED IN THIS CASE

The contractor Cashian Herath was unable to complete the work by 31st October 1991 as undertaken by him and the Plaintiff by letter dated 24.10.1191 **(P2)** duly made the demand on the guarantee from the bank for Rs.1,765,345/-.

It was at this stage that Cashian Herath on 28th October 1991 filed an application in the Court of Appeal No.924/1991 for a temporary injunction against the Central Provincial Council, the Chief Secretary of the Central Provincial Council and the Project Director of the Integrated Rural Development Project under Article 143 of the Constitution restraining them from making any demand from the Defendant bank for the said sum of

Rs.1,765,345/- under the said letter of guarantee for a period of six weeks to enable the said Cashian Herath to institute action against the Provincial Council after giving due notice of action. The petition and affidavit filed in the Court of Appeal application No.924/1991 have been marked as **P3** and **P4**.

The Registrar of the Court of Appeal had granted Cashian Herath an injunction operative till 28.11.1991 restraining the Central Provincial Council the Plaintiff in this case and the other Respondents referred to above from demanding payment from the Defendant bank under the said letter of guarantee and from receiving payment thereunder. The said fax was marked as **P5** and was received by the Plaintiff on 30.10.1991.

On receipt of the said fax **P5** the Plaintiff wrote to the Manager of the Defendant bank at *Nuwara Eliya* two letters both dated 30.101991.

a. By a letter marked **P6** the Plaintiff intimated to the Defendant bank of the restraining order against the Plaintiff made by the Court of Appeal and requested that the said letter of guarantee be extended for a further period of two months ending 31.12.1991 as per paras 8 and 9 of the letter of guarantee.

b. By the second letter **P7** the Plaintiff requested the defendant bank to suspend further action on the letter of 24.10.1991 by which the Plaintiff had made a demand of the Defendant bank in view of the restraining order of the Court of Appeal and referred to above until a settlement from the Court of Appeal was determined.

Having received **P6** and **P7**, the Defendant bank through its legal officer dispatched a letter dated 11.11.1991 **(P8)** to the Plaintiff wherein the bank informs the Plaintiff that if it were to accede to the Plaintiff's request to extend the bank guarantee for a further two months, the Plaintiff must make an express withdrawal of the claim made on the bank under the guarantee **(P1)**. The bank further stated in this letter **(P8)** if there was no withdrawal of the claim, it would not be possible for the bank to extend the validity of the guarantee.

It is pertinent to observe that this letter **(P8)** gives an express and clear undertaking by the Defendant bank to the Plaintiff that if the claim was withdrawn by the Plaintiff, the guarantee would be extended for a further two months. No other consideration was insisted upon for the extension of the guarantee **(P1)** by the Defendant bank.

In response to this letter **P8** the Plaintiff by its letter dated 18.11.1991 wrote to the Defendant bank that the Plaintiff was withdrawing its demand on the guarantee **(P1)** by its letter dated 24.10.1991 **(P2)**.

At this stage I would observe that the Defendant bank wrote to the Plaintiff by **P8** promising to extend the bank guarantee provided the Plaintiff withdrew its demand on the Bank guarantee made on 24.10.1991. The Plaintiff acted upon this promise and withdrew its claim by its letter dated 18.11.1991. But it is pertinent to observe that the Bank reneged on its promise by writing to the Plaintiff on 28.11.1991 that the Defendant Bank was unable to extend the guarantee since Cashian Herath the Contractor had written a letter dated 04.11.1991 asking the bank not to extend the guarantee and that the Defendant bank's liability under the guarantee **(P1)** was therefore completely at an end.

The learned President's counsel for the Plaintiff Respondent described it as a deception practice upon the Plaintiff when one juxtaposed the two letters **P8** and **P11**. The letter **P11** refers to a letter from Cashian Herath dated 04.11.1991 informing the bank not to extend the guarantee. It is quite apparent that the Defendant bank would have had Cashian Herath's letter of 04.11.1991 when it wrote the letter **P8** dated 11.11.1991 to the Plaintiff. However, no reference was ever made by the Bank in letter **P8** of 11.11.1991 to Cashian Herath's letter of 04.11.1991. In other words the Defendant bank while suppressing Cashian Herath's letter of 04.11.1991 in its letter **P8** of 11.11.1991 sought by its letter **P8** to obtain a withdrawal of the demand made by the Plaintiff on the guarantee **P1** by making a promise to the Plaintiff that it would extend the guarantee for a further two months if the Plaintiff withdrew the claim he had made by its letter of 24.10.1991**(P2)**.

The learned President's counsel argued that by having deceived the Plaintiff into withdrawing its claim, the bank instead of extending the guarantee as undertaken in

letter **P8** wrote letter **P11** of 28.11.1991 stating that it could not extend the guarantee as Cashian Herath by his letter of 04.11.1991 had requested the Bank not to extend the guarantee.

In the circumstances the learned President's counsel for the Plaintiff Respondent contended that the Defendant made a fraudulent misrepresentation to deceive the Plaintiff into withdrawing its demand and thereafter refused to extend the bank guarantee for further two months with a view to relieving itself of the liability of having to pay the said sum of Rs.1.765,345/- demanded by the Plaintiff on the said bank guarantee **P1**.

The learned President's counsel for the Plaintiff Respondent contended that there had been collusion between the Defendant Appellant and Cashian Herath. The counsel attempted to construct an argument on collusion beginning from the application of Cashian Herath made in the Court of Appeal for a temporary injunction.

Having obtained a temporary injunction from the Court of Appeal, he later informed that he would not be proceeding to extend the restraining order on the Provincial Council and further obtained a dismissal of the said application in the Court of Appeal. The learned President's Counsel argued that the common design was to accomplish the net result that both the Defendant and Cashian Herath would finally be relieved of their liability to meet the lawful demand on the guarantee **P1** made by the Plaintiff.

If Cashian Herath's letter of 04.11.1991 had been available with the bank they could have informed of Cashian Herath's request in their letter **P8**. Instead the bank sought to obtain a withdrawal of a due claim made by the Plaintiff on the guarantee **P1**. If they had given to extend the guarantee provided the Plaintiff withdrew his claim it is crystal clear that it was incumbent upon the Defendant bank to honour its undertaking to extend the guarantee. These are serious omissions and failures on the part of the Defendant Appellant which call for an explanation at the trial. When all this evidence pertaining to the conduct of the bank was placed by the Plaintiff's witness, the chief secretary of the

Provincial Council the bank chose not to cross examine the Plaintiff's witness. In other words the Defendant bank failed to explain its conduct by giving evidence in the case.

The only matters that was sought to be established by the Defendant bank were;

i. the claim was withdrawn by the Plaintiff;

ii. the guarantee automatically ceased after 31.10.1991;

iii. the bank refused to extend the guarantee after 31.10.1991.

It would appear that except for cross examining the Plaintiff's witness on the above matters there was no attempt made by the Defendant bank to offer any explanation for their conduct by way of defense evidence.

The learned additional District Judge of Nuwara Eliya by his judgment dated 11.08.1997 has pronounced judgment in favour of the Plaintiff-Respondent.

The Defendant-Appellant has preferred this appeal against the said judgment on the following grounds:-

a. the learned Judge in dismissing the Appellant's case has made the award as a matter of course without any analysis of the relevant legal issues or the evidence;

b. the learned Judge failed to consider that the guarantee in question becomes automatically null and void and ceases to be of any force or avail in law after the 31.10.1991 and that the liability of the Appellant would be completely extinguished after the said date unless a claim was made on the Appellant prior to the 31.10.1991.

c. the learned Judge erred in law in failing to consider that the guarantee in question had expired prior to an application being made for its extension;

d. the learned Judge erred in law in failing to consider that the guarantee bond in question expired on the 31.10.1991 and therefore the Respondent could not have maintained his action as it was seeking to enforce a guarantee bond which had expired;

e. the Respondent by document **P9** withdrew the claim it made on the said guarantee and it was so admitted by the Respondent's own witness but the

learned District Judge has not addressed her mind to the legal principals involved in the said withdrawal;

f. the learned District Judge has not considered the relevant law with regard to guarantees in that contacts of guarantee are strictly construed in favour of the surety.

The bank had promised to extend the bank guarantee for a further period of two months provided the Plaintiff made an express withdrawal of the claim that had already been made on the bank. It is in response to this representation that the Plaintiff withdrew the claim that it had already made on 24.10.1991.

I take the view that if a representation is made and the representee acts on that representation to his/her detriment, the representor is obligated to keep his promise and not renege on it. Section 115 of the Evidence Ordinance quite clearly lays down that;

> "When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing"

So it does not lie now in the mouth of the Defendant bank to contend that the guarantee extinguished itself on the 31/10/1991. In fact on the 24.10.1991 the Plaintiff had already made its call on the bank guarantee. The Plaintiff was compelled or induced to withdraw its call on the guarantee by the representation made to it by the bank that it would extend the guarantee provided the Plaintiff withdrew the demand made on 24/10/1991. It was the Defendant-Appellant bank that secured the withdrawal of the demand. It was not a voluntary withdrawal made by the Plaintiff Respondent. It was a withdrawal brought upon by the promise held out by the Defendant-Appellant Bank. Estoppel would operate against the bank from going back on this promise.

Whichever name one might call it, promissory estoppel too would prevent the bank from going back on the promise which it gave the Plaintiff.

Promissory Estoppel

The doctrine of promissory estoppel is not really based on the principle of estoppel but it is a doctrine evolved by equity in order to prevent injustice. It is neither in the realm of contract nor in the realm of estoppel. Its object is to interpose equity to mitigate the rigour of strict law. The essential ingredients of a promissory estoppel are:-

(i) a party should have by his word or conduct given to the other party a clear and unequivocal promise or assurance;

(ii) this promise or assurance was intended to be acted upon so as to create a binding legal relationship;

(iii) the promisee has in fact acted upon such promise and has significantly altered his position as a result.

The essence of the doctrine of promissory estoppel is the principle that when one party has by his words or conduct made to the other a promise or assurance which is intended to affect the legal relations between them and to be acted upon accordingly, then, once the other party has taken him at his words and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relation subject to the qualifications, which he himself has so introduced-See ***Combe vs. Combe*** 1951 All E.R. 767 at 770. Whereas common law estoppel was confined to representations of existing fact, promissory estoppel is not so circumscribed in its scope and may be founded upon a representation in regard to future conduct- See Halsbury, *Laws of England 3rd ed. Vol. 15, p. 175*

A statement of intention or a promise not to raise further dispute would not operate as an estoppel according to the earlier view taken in ***Perdurupillai vs. Mariampillai*** (1916)

2 C.W.R. 42. This view has now been revised and even a promise or a statement of intention as to the future may found an estoppel. The decision of Denning L.J. in ***Central London Property Ltd. vs. High Trees House Ltd.*** (1956) 1 AER 256, has now become an established authority. He followed this decision in the case of Lyle-Mellor vs. A. Lewis & Co. Ltd. (1956) 1 AER 247 (CA). Relying on the above two English cases, it was held in the Indian case of ***Sat Narain vs. Union of India*** (1968) 2 SCWR 335, that 'there must be a promise or assurance intended to be acted upon which in fact must have been acted upon and only then the question to honour it arises. No estoppel arose where there is no evidence to show that a party acted on the representation made by the other not to claim compensation, if the property was released'.

So even this doctrine the promise to extend the letter of guarantee must have been honored by the bank instead of offering a belated excuse that Cashian Herath had objected it. If it had been extended, it would have enabled the Plaintiff to make a call again.

Fiduciary Duties

There is a catena of cases which impose fiduciary duties on the part of banks and in view of the extension of the term customer today as developed in banking law and recognized by Section 33 of the Financial Transactions Reporting Act No.6 of 2006, the plaintiff Provincial council would also be a customer of the Defendant Appellant bank as it was in a contractual relationship of the beneficiary and surety vis-à-vis the bank guarantee involved in this case.

In view of the fact that the Defendant Appellant bank had given a letter of guarantee to the Plaintiff Respondent as far back as 17.06.1991 (P7), the Plaintiff Respondent became its customer by virtue of Section 33 of the Financial Transactions Reporting Act No.6 of 2006 and the customer is owed fiduciary duties by banks.

A bank cannot give advice when there is a conflict of interest. Once it has established a contractual relationship such as the issuance of bank guarantee which imposes on it duties to honour the promise of payment upon demand, it cannot offer advice to the beneficiary to withdraw a demand in exchange for its prmise to extend the validity

period of the bank guarantee and later turn back on that promise-see ***Woods v Martins Bank*** (1959) 1 Q.B. 55.

A definition is also offered on the meaning of a demand guarantee in Article 2(a) of the ICC's Uniform Rules for Demand Guarantees ('URDG')[publication 458].

> "For the purpose of these Rules, a demand guarantee (hereinafter referred to as "Guarantee") means any guarantee, bond or other payment undertaking, however named or described, by the a bank, insurance company or other body of persons (hereinafter called as ("Guarantor") given in writing for the payment of money on presentation in conformity with the terms of the undertaking of a written demand for payment and such other document(s) (for example, a certificate by an architect or engineer, a judgment or an arbitral award) as may be specified in the Guarantee, such undertaking being given:
>
> (i) at the request or on the instructions and under the liability of a party (hereinafter called "the Principal"); or
>
> (ii) at the request or on the instructions and under liability of a bank, insurance company or any other body or person (hereinafter "the Instructing Party") acting on the instructions of the Principal,
>
> to another party (hereinafter the "Beneficiary")"

Article 2 of ICC's Uniform Rules for Demand Guarantees ('URDG') [publication 758, 2010] gives a concise definition of a demand guarantee. Demand guarantee or guarantee means any signed undertaking, however named or described, providing for payment on presentation of a complying demand;

As articulated in cases such as **Edward Owen Engineering Ltd. vs. Barclays International Ltd. (1978) 1 All ER 976,** the fact that a bank guarantee imposes on the bank a duty to make the payment to the beneficiary according to its terms was adopted by S.N. Silva J. (as His Lordship then was) in the case **of Indica Traders (Pvt) Ltd. and Others (1994) 3 SLR 387**. at page 398;

"It is thus clear that business transaction between a bank and a beneficiary, constituted in the nature of a performance bond, a performance guarantee, letter of guarantee or an irrevocable letter of credit, whereby the bank is obliged to pay money to a beneficiary, are not tripartite transactions between the bank (surety), the beneficiary (creditor) and the party at whose instance the bond, guarantee or letter is issued (the principal debtor) but, simply transaction between the bank and the beneficiary. A bank thereby guarantees to the beneficiary payment of money and is obliged to honour that guarantee according to its terms. Any dispute that may arise between the beneficiary (creditor) and the party at whose instance the guarantee or letter is given (the principal debtor), on the underlying contract, cannot be urged to restrain the bank from honourig the guarantee or letter according to its terms"

The above articulations show the autonomous nature of a bank guarantee and as the demand was made by the Plaintiff Respondent on the guarantee long before it was due to expire, the restraining order issued by this court had no impact on the call made by the Plaintiff-Respondent because it was not a permanent restraining order.

In view of the passages that I have cited above on the autonomy of performance guarantees and bank guarantees, the payment on them cannot be legally restrained by someone like Cashian Herath unless fraud was alleged and proved. There is no allegation of fraud on the part of the Plaintiff Respondent. The demand made by the Plaintiff Respondent was in accordance with the terms of the letter of guarantee. Unfortunately the demand was caused to be withdrawn at the instance of the bank when it was its mandatory obligation to have honoured its obligations in response to the call made. The withdrawal of the demand or call on the bank guarantee was secured by the bank on a promise but this promise was not honoured. In my view the securing of the withdrawal was vitiated by a misrepresentation which will nullify any attempt to tie the Plaintiff Respondent to an obligation not to make a demand on the bank guarantee.

Since I find that the Defendant Appellant secured the withdrawal by a misrepresentation in breach of its fiduciary duty, the demand made on 24.10.1991 still survives and the bank

cannot wrongfully and unlawfully refuse to make the payment on the demand made by the Plaintiff Respondent. Moreover, promissory estoppel engulfed to some extent in section 115 of the Evidence Ordinance will estop the bank from reneging on its obligations on the bank guarantee.

In the circumstances I hold that the Defendant Appellant bank cannot shy away from its legal obligation on the letter of guarantee and it is obligated to make the payment on the demand that has survived.

Accordingly, I affirm the judgment of the learned Additional District judge of *Nuwara Eliya* and dismiss the appeal of the Defendant Appellant with costs.

JUDGE OF THE COURT OF APPEAL