

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In the matter of an appeal under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Sections 754 and 758 of the Civil Procedure Code.

**SC (CHC) Appeal No. 55/2006**

Case No. H.C. (Civil) 197/2003(1)

1. Araliya Impex (Private)  
Limited  
No. 69, Old Moor Street,  
Colombo 12.
2. Mylvaganam Rajkumar  
No. 58/24, Templers Road,  
Mount Lavinia.
3. Liyanage Mahesh Paul De Silva  
St. Leonards Kohalwila,  
Kelaniya.

**Defendants-Appellants**

-Vs.-

Bank of Ceylon  
No. 04, Bank of Ceylon Mawatha,  
Colombo 1.

**Plaintiff-Respondent**

**BEFORE** : Tilakawardane, J.  
Ekanayake, J. &  
Dep, PC, J.

**COUNSEL** : M. Javed Mansoor for the Defendants-  
Appellants.

S. Rajaratnam, DSG, with Fazly Razik, SC, for  
the Plaintiff-Respondent.

**ARGUED ON** : 08.07.2013

**DECIDED ON** : 30.07.2013

**Tilakawardane, J.**

The High Court of the Western Province (exercising Civil Jurisdiction) holden in Colombo, (hereinafter referred to as the Commercial High Court) in its judgment dated 9<sup>th</sup> October 2006 found in favour of the Respondent on all issues and granted relief accordingly. The Application was preferred to this Court on 07.12.2006 and appeal taken up on the 29.05.2012. Issues before the Court are as follows:

1. Whether there was evidence in support of the amounts claimed by the Plaintiff- Respondent (hereinafter referred to as the Respondent) and whether the amounts claimed had been arrived at arbitrarily. Whether the Learned Judge had manifestly failed to asses and/ or evaluate the evidence before the Court.

2. Whether personal guarantees were sought from the 2<sup>nd</sup> Defendant – Appellant (hereinafter referred to as the 2<sup>nd</sup> Defendant) and the 3<sup>rd</sup> Defendant – Appellant (hereinafter referred to as the 3<sup>rd</sup> Defendant) at any stage.
3. Whether the Commercial High Court had jurisdiction to hear and determine this matter.

The 1<sup>st</sup> Defendant – Appellant (hereinafter referred to as the Appellant Company) applied for credit facilities (marked “P2”) up to a limit of Rs. 30 Million on 2<sup>nd</sup> September 1998. Thereafter the Appellant Company obtained a Hypothecation Loan (marked “P1”) from the Respondent. This was on the security of a Mortgage Bond No. 15/98 (marked “P3”) and a joint and several guarantee of the Directors of the Appellant Company in favour of the Respondent as stated at the bottom of page 1 of the Hypothecation Loan marked P1. The guarantee bond by the 2<sup>nd</sup> Appellant and the 3<sup>rd</sup> Appellant who were directors of the Appellant Company, dated 2<sup>nd</sup> September 1998, is marked P22.

The Appellant Company by letters dated; 08.09.2000 (marked “P4”), 22.09.2000 (marked “P7”), 22.09.2000 (marked “P10”), 04.10.2000 (marked “P13”), 19.10.2000 (marked “P16”) and 02.08.2000 (marked “P19”) admittedly borrowed money from the Respondent under the Hypothecation Loan marked P1.

Under the Guarantee Bond marked P22, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant provide a guarantee for the loans taken by the Appellant Company under Hypothecation Loan P1. Under law, the loan is secured by the guarantor and the Bank retains the right to sue both the borrower and the guarantor in the event of default by the borrower. The guarantor's liability only arises when the debt becomes due. Therefore when the 2<sup>nd</sup>

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and 3<sup>rd</sup> Appellants signed P22, they were providing a personal guarantee of a maximum of Rs. 30 Million, although they were Directors of the Appellant Company. This would not have been in their capacity as Directors of the Appellant Company, as the Company would then be guaranteeing itself, which is not the intended purpose of a guarantee. Therefore at no time could it have been the intention, of the Respondent, the Appellant Company or the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants, for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants to provide a guarantee for the Hypothecation Loan, P1, in their capacity as Directors.

The guarantee bond P22 dated 2<sup>nd</sup> September 1998, was signed on the same date as the Application for the Hypothecation Loan P2, and the Hypothecation Loan, P1. Paragraph 15 of the Guarantee Bond P22 states;

“IT BEING AGREED that I/we and each of us am/are and is liable in all respect hereunder not merely as surety or sureties or guarantor or guarantors but as sole or principle debtor or where this guarantee is signed or executed by more than one person as sole or principle debtors severally or separately and jointly and severally to the extent aforementioned, including the liability to be sued before recourse is had against the debtor, or without any recourse whatsoever being had to the debtor for any reason or cause whatsoever and in the absolute discretion of the Bank.”

This clearly indicates that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants provided a personal guarantee for the Hypothecation loan and did not sign the documents in their capacity as Directors of the Appellant Company. Furthermore the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants as Directors are responsible for reading all the terms of any agreement pertaining to the business of their Company, in fulfilment of their fiduciary duty as Directors to act for the benefit of the company. Further Section 189 (a) of the Companies Act No 7 of 2007

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states that a director should not act in a manner which is *reckless or grossly negligent* and should exercise the *level of skill and care that may reasonably be expected of a person of his knowledge and expertise*. This concept is also supported by the case of **Lister Vs. Romford Ice and Cold Storage Co. Ltd.** (1957) A.C. 555.

It is apparent therefore that a Director signing a document on behalf of a company is expected to read the document thoroughly and ensure that it is in the company's best interests, prior to signing it. Therefore as the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants are Directors of the Appellant Company, it would be deemed a breach of their duties as Directors if they had failed to read the terms of the Guarantee Bond P22.

In addition it is this Courts finding that even if, as argued by the Appellant Company and 2<sup>nd</sup> & 3<sup>rd</sup> Appellants, the guarantee was in their capacity as Directors at the point of making their signatures the word 'Director' would have been printed under the signature . However this is not the case in relation to the signatures on the Guarantee Bond P22.

For these reasons it is the finding of this Court that the Commercial High Court was correct in finding that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had provided personal guarantees on the Hypothecation loan.

The Appellant Company challenges the 26% interest claimed on the loans, by the Respondent and the total sum deemed, by the judgment of the Commercial High Court, to be owed to the Respondent. This position is based on the interest rate indicated in paragraph 4 of P1 which provides that; “interest to be payable monthly at a rate of 24% per centum per annum”. However this Court highlights the fact that in the same paragraph it is provided that the interest rate can be changed by the Respondent from time to time or as agreed in relation to a specific loan. Furthermore similar wording is used at paragraph (f) of P3. Therefore it is this Court’s finding that the interest rate imposed on the

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Appellant Company's loans was not an arbitrary figure but one the Respondents would have arrived at in relation to loans issued at the time.

Furthermore, the letters by the Appellant Company, P4, P7, P10, P13, P16 and P19, requesting the loans expressly state the interest rate as 26%. Further the letters were on the Appellant Company's letter head which is an indication that the Company was aware of the interest rate. By signing the letters the Appellant Company's Directors acknowledged the interest rate as 26%, and therefore it would be the applicable interest rate on the loans.

Further the learned Judge of the Commercial High Court in his judgment clearly set out his reasoning and indicated that he had considered the Statements of Account entered into evidence, and marked P11, P14, P17, P20, when calculating the sums due by the Appellant Company. Having perused these documents this court concurs with these findings.

Furthermore as the loans obtained by the Appellant Company were over a single year it is the finding of this Court that the change in interest would have been detected by the Appellant Company prior to this action being brought by the Respondent. Therefore if the Appellant Company found the interest rate to be incorrect it could have brought this error to the attention of the Respondent Bank by written communications. This was not done.

The Appellant Company and 2<sup>nd</sup> & 3<sup>rd</sup> Appellants submit that the figures inserted as interest were inserted after the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants' signatures were obtained. However no evidence to support this submission could be identified. Therefore it is the finding of this Court that such an accusation is baseless.

In addition this Court highlights the fact that any application for a loan, made by a Company, would be evaluated thoroughly by the Company's Directors prior to agreement, specifically provisions relating to the interest payment. As there is no evidence to suggest that the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants, Directors of the Appellant Company, were unable to carefully scrutinise the agreements prior to signing them, it is the finding of this Court that the learned Judge of the Commercial High Court had correctly given the necessary weight to the evidence put forward when considering the amounts due.

The Appellant Company and 2<sup>nd</sup> & 3<sup>rd</sup> Defendants also appeal the on the grounds that the Commercial High Court had no authority to hear the case. Section 7, High Court of Provinces (Special Provisions) Act No.10 of 1996 states;

*2. (1) Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act, if the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No. 17 of 1982 the registered office of the Company is situated, within the province for which such High Court is established.*

This section when read in conjunction with Item (1) of the First Schedule indicates that the High Court has jurisdiction over the case as any cases pertaining to debt where the cause of action relates to banking and exceeds Rs. 3Million (to which the Minister has changed the Rs. 1Million

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requirement) the case falls within the jurisdiction of the High Court. In the current circumstances as the parties to the case are in the Western Province the case falls within the jurisdiction of the Commercial High Court holden in Colombo. The case of **Cornel and Company Ltd. Vs. Mitsui and Company Ltd. and Others** (2000) Vol.1 S.L.R. 57 confirms the issue of jurisdiction where the sum in question is over Rs. 3Million.

This Court holds that the Commercial High Court had jurisdiction over the case at hand and therefore the findings of the learned Judge of the Commercial High Court dated 09.1.2006 are affirmed. Further where the Appellant Company is unable to pay the total sum due it is enforceable against the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants, up to Rs. 30 Million. The appeal is dismissed and this court order costs to be paid by the Defendant Appellants in sum of Rs 100,000/-to the Plaintiff Respondent.

**JUDGE OF THE SUPREME COURT**

**Ekanayake, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**Dep, PC, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

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