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

SC Appeal No.11/2001 (CHC)
Commercial High Court
Case No: 181/97(1)

Indian Bank,
Nos.22 24, Mudalige Mawatha,
Colombo 1.

Plaintiff-Appellant

Vs

Acuity Stock Brokers (Pvt) Limited.,
Level 6, 'Acuity House",
No.53, Dharmapala Mawatha,
Colombo 3.
Formerly
Forbes ABN AMRO SECURITIES (PVT) Ltd.,
No.463/38, Nawam Mawatha,
Colombo 2.

Defendant-Respondent

Before : S. Tilakawardane J,

N. G. Amaratunge J,

R. K. S. Suresh Chandra J.

Counsel: Prasanna Jayawardene with A.Siriwardane for Plaintiff-Appellant

Kushan de Alwis with Hiran Jayasuriya and Chamath Fernando for Defendant-Respondent

Argued on: 4th August, 2010.

Written Submissions tendered on

27th October, 2010 for Plaintiff-Appellant

8th November, 2010 for Defendant-Respondent

Decided on: 18th February, 2011

R. K. S. Suresh Chandra J,

This is an appeal from the judgment of the Commercial High Court whereby the action of the Plaintiff-Appellant was dismissed.

The Plaintiff-Appellant instituted action in the Commercial High Court against the Defendant Respondent to recover a sum of Rs.5,558,841/- with legal interest thereon.

In it's plaint the Appellant stated inter alia that one M.Sivasubramaniam was a customer of the Bank and maintained a current account and that he was also a customer of the Respondent who carried on business as a stockbroker, that the Respondent bought and sold shares on behalf of the said M.Sivasubramaniam and the Respondent held such shares on behalf of and for the account of the said Sivasubramaniam. On or about the 21st of January 1994 the said Sivasubramaniam had requested the Appellant to lend and advance monies to him by way of an Overdraft facility granted on his current account. That by the promise and/or contract and/or agreement in writing dated 21st January 1994 the Respondent had held out and assured the Appellant that (a) the Respondent held the shares listed therein and (b) that the Respondent shall credit all the sale proceeds of these shares to the current account of M.Sivasubramniam with the Appellant Bank.

Upon the basis of this assurance given by the Respondent, the Appellant had lent and advanced monies to the said Sivasubramaniam by way of an Overdraft Facility granted upon the said current account. That the said Sivasubramaniam had failed and neglected to repay a sum of Rs.6,385,077/42 which was due and owing to the Appellant upon the said overdraft facility, that the Appellant requested the Respondent to ensure that the sale proceeds of the shares were credited to the aforesaid current account. On or about the 21st of December 1994, the Appellant had become aware that the Respondent had acted in breach of the agreement and undertaking given by them and that the respondent had failed and neglected and was unable to credit the sale proceeds of the shares to the aforesaid current account. The monies remained due and owing to the Appellant. Had the Respondent acted in accordance with the undertaking given by them, the Appellant would have received a sum of Rs.5,558,841/- being the market value of the shares in reduction of the monies which remained due and owing and unpaid to the Appellant. That the Respondent's wrongful and unlawful breach of the agreement and undertaking had caused the Appellant to suffer loss and damage in a sum of Rs.5,558,841 and that the Respondent was liable to pay the said sum.

The Respondent took up the position in its answer that the letter dated 21st January 1994 was issued on the specific instructions of the said Sivasubramaniam, that on or about 25th March 1994 they received instructions from the said Sivasubramaniam that the shares held in his favour with the Respondent be sold and the monies be remitted to Seylan Merchant Bank, consequent upon which a tripartite agreement was entered into between Seylan Merchant Bank, M.Sivasubramaniam and the Respondent. That the instructions given by the

said M.sivasubramaniam to the Respondent to credit the said account maintained at the Appellant Bank by the said Sivasubramaniam with all sales proceeds of the said shares and/or stocks was countermanded and/or revoked with effect from 25th March 1994, that the purported promise and/or agreement and/or contract relied on by the Appellant was unenforceable against the Respondent and that the said writing was not a promise and/or agreement and/or contract.

After trial the Commercial High Court by its judgment dated 11th May 2001 dismissed the action of the Appellant on the ground that the Respondent was bound to act on the instructions of M.Sivasubramaniam, that the letter dated 21st January 1994 (P3) cannot be considered as a legally enforceable document as there was an absence of consideration and that the Respondent credited monies being the sales proceeds of shares held by M.Sivasubramaniam to his account held at the Appellant Bank until M.Sivasubramaniam countermanded such instructions. The learned High Court Judge has assumed that it is the English Law that applies by stating that 'consideration' is a requisite of a contract and concluded that a perusal of document P3 shows that there is a total lack of consideration and hence unenforceable.

The main argument of learned Counsel for the Appellant was based on the legality of the document dated 21st January 1994 (P3). His contention was that the Roman Dutch Law applied and that the said document P3 was enforceable against the Respondent and that even under the English Law as developed in later times it would be so. The argument of the learned Counsel for the Respondent was that the said agreement was unenforceable as according to English Law there had to be consideration and since that element was lacking the said agreement was not enforceable.

The Agreement (P3) on which the Appellant rests its case was an undertaking given by the Respondent to the Appellant on the basis of instructions given to them by M.Sivasubramaniam. The said undertaking had been given with all seriousness as was seen from the fact that when they had quoted the Account number of the client erroneously they acknowledged the corrected number of the account subsequently. The Respondent was a stockbroker and held the shares of the said Sivasubramaniam and was in control of the said shares and they had been given specific instructions regarding the sale and the acts to be performed on the sale of such shares.

The Respondent having undertaken to remit the proceeds of the sale of shares to the Appellant had subsequently entered into a tripartite agreement with the said Sivasubramaniam and Seylan Bank which had the effect of not being able to proceed with the undertaking given to the Appellant Bank. Although this agreement had been entered into by the Respondent, they did not take steps to inform the Appellant Bank that their client Sivasubramaniam had countermanded the said agreement with the Appellant by giving new instructions. Without informing the Appellant Bank of the new agreement, they had sold the shares and remitted the monies to Seylan Bank. The Respondent had informed the Appellant

Bank about the countermanding of the agreement only after the Appellant Bank had sent letter dated 17th December 1994 (P8) requesting the Respondent to sell the shares and remit the proceeds to the Appellant Bank as agreed in P3. In reply to this request in P8 the Respondent had for the first time informed the Appellant Bank by letter dated 21st December 1994 (P9) that their client Sivasubramniam had entered into a tri-partite agreement with another Bank and that action had been taken according to the said agreement and that there were no shares held by Sivasubramaniam in his share trading accounts. The Respondent had therefore failed to inform the Appellant Bank about the position taken up in P9 although they knew about it on 26th March 1994 as they were one of the parties to the said tri-partite agreement. It is thereafter that the Appellant sought to take steps to recover the monies due to them by sending a letter of demand on 11th January 1995 (P10) and instituting action thereafter. The aforesaid conduct on the part of the Respondent was definitely a breach on the part of the Respondent of the undertaking given to the Appellant Bank in P3. This breach was confirmed by the Respondent by the aforesaid letter P9 when the Respondent stated very clearly and assertively that the earlier instructions were **countermanded and/or revoked.** Countermanding means cancelling or reversing a previously issued command, instruction or order. The Legal Thesaurus defines countermand as a contrary command cancelling or reversing a previous command. Even though the said letter was sent by the Respondent's Lawyers it was a situation of conveying the instructions given to them by their client. Even if the Lawyers choose to use language which has serious overtones the client(the Respondent) has to take the responsibility for same. Not only does the said document state about countermanding, it goes further to state .. and/or revoking the earlier instructions which to my mind has a double cancellation effect or a very strong assertion of such cancellation. Therefore there is no doubt that the Respondent is in breach of the undertaking given in P3.

The question then arises as to whether the Appellant could recover the monies it claimed on the basis of the breach of the said undertaking in P3. Although the Respondent had transacted with the Appellant Bank, does the said transaction become a banking transaction merely because the Appellant was a Bank. What is a Banking transaction? There is no clear cut demarcation of the transactions that one has with a Bank being classified as Banking Transactions. It is usual to consider lodging money into a bank account, withdrawing money, adding interest to an account, direct debits, deducting bank charges, basically any sort of activity involving a change of money in an account is a banking transaction which are usually listed in a bank account statement. The transaction embedded in the agreement P3 is a pure and simple contractual undertaking given by the Respondent.

The Civil Law Ordinance No.05 of 1865 introduced the English Law relating to Banks and Banking. But there are many transactions where the Banks are parties which do not come within the realm of Banking Transactions and regarding which the Roman Dutch Law applies. In my view it is the Roman Dutch Law that would apply to the transaction engulfed in the document P3. Would the said transaction amount to an enforceable contract? Under the Roman Dutch Law there should be justa causa for a contract to be valid. In the present case

the undertaking given by the Respondent would satisfy the requirement for a valid contract as it was an undertaking given with all seriousness.

In Lipton v Buchanan 8 N.L.R. 49 Wendt J stated that "Causa denotes the ground, reason, or object of a promise giving such promise a binding effect in law. It also has a much wider meaning than the English term "consideration" and comprises the motive or reason for a promise and also pure moral consideration." Further "Nude pacts made in earnest and with a deliberate mind give rise to actions, equally with contracts."

In Jayawickreme v Amarasuriya 20 N.L.R. 289 Lord Atkinson observed that under the Roman Dutch Law a promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence can be enforced at law, the justa causa debendi sufficient according to the Roman Dutch Law to sustain a promise being something far wider than what the English Law treats as good consideration for a promise.

In Edward Silva v De Silva 46 NLR 510 Soertsz J stated that for all that appears to be required to support a promise and to make it enforceable is that "the agreement must be a deliberate, serious act, not one that is irrational or motiveless."

Therefore on a consideration of these authorities it is my view that P3 was an enforceable contract and that the Respondent had breached same and that the learned High Court Judge was in error in assuming that English Law applied without considering the nature of the transaction between the parties and dismissing the action of the Appellant.

Learned Counsel for the Appellant in his written submission has adverted to the fact that even in the developed English Law there have been instances where the English Courts have been flexible in dealing with the concept of consideration rigidly and that if there is evidence that the parties had acted upon the faith of a written document that the Courts would prefer to assume that the documents embodies a definite intention to be bound and will strive to implement its terms. I consider it not necessary to delve into the development of the concept of consideration in English Law as I have stated above that the Roman Dutch Law would apply to the transaction in question.

A further matter that transpired according to the evidence led in the case and which was sought to be used by the Respondent was that after giving the undertaking in P3, that they had honoured the undertaking to some extent by remitting certain monies by cheques V2 to V5 as being the sale proceeds of the shares held by the Respondent during the period 21st January 1994 to 25th March 1994. These cheques had been received by the Appellant from Sivasubramaniam and not from the Respondent, and the Respondent was unable to establish that these were monies from the sale proceeds which were given to Sivasubramniam to deposit in terms of the undertaking in P3. This brings to light two aspects, firstly it is an acceptance of the obligation undertaken by them in P3 and secondly that they had acted in furtherance of that obligation. If that was the objective of the Respondent, then their argument that P3 was not an enforceable contract has necessarily to

fail. It is to be observed that the learned High Court Judge too fell into this error by recognizing that the Respondent had credited monies with the Appellant Bank.

This action had commenced in December 1997 and the High Court had concluded same in May 2001. Since then, almost ten years had lapsed before it was taken up for final hearing. In these circumstances it would be reasonable to limit the legal interest that would otherwise accrue to the benefit of the Appellant. In the above circumstances the judgment of the Commercial High Court is set aside and judgment is entered in favour of the Plaintiff-Appellant in a sum of Rs.5,558,841/- together with a flat rate of interest at 6% per annum until payment in full and the Plaintiff will also be entitled to Rs.21,000/- as costs.

Judge of the Supreme Court

S.TILAKAWARDANE J.

I agree.

Judge of the Supreme Court

N.G.AMARATUNGA J.

I agree.

Judge of the Supreme Court