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

In the matter of an Appeal

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

SC Appeal 120/2012
SC/HC(CA)/LA No. 165/2012
WP/HCCA/MT/58/2008 (F)
DC Mt. Lavinia Case No. 4329/03/M

Vs

Flex Port (Pvt) Limited.
No.127, Jambugasmulla Mawatha,
Nugegoda.
Defendant

AND BETWEEN

Bank of Ceylon
No.1, Bank of Ceylon Mawatha
Colombo 1
Plaintiff-Appellant

Vs

Flex Port (Pvt) Limited.
No.127, Jambugasmulla Mawatha,

Nugegoda.

Defendant-Respondent

AND NOW BETWEEN

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

Plaintiff-Appellant-
Petitioner- Appellant

Vs

Flex Port (Pvt) Limited.
No.127, Jambugasmulla Mawatha,
Nugegoda.

Defendant-Respondent-

Respondent- Respondent

Before: Sisira J. de Abrew J
Vijith. K. Malalgoda PC J &
P.Padman. Suresena J

Counsel: Rajeev Goonathilake SSC with HAC Caldera
for the Plaintiff-Appellant-Petitioner-Appellant
S.N.Vijithsingh with Iranga Perera, Anuradha Weerakkody and
Laknath Seneviratne for the
Defendant-Respondent-Respondent-Respondent

Written submission
tendered on : 8.1.2013 by the Plaintiff-Appellant-Petitioner-Appellant
18.3.2014 by the Defendant-Respondent-Respondent-Respondent

Argued on : 3.3.2020

Decided on: 3.7.2020

Sisira J. de Abrew, J

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant Bank) granted overdraft facilities (hereinafter referred to as O/D facilities) to the Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent). The said O/D facilities were granted by the Nugegoda Branch of the Plaintiff-Appellant Bank to the Defendant-Respondent who maintained a current account in the Nugegoda Branch of the Plaintiff-Appellant Bank. The Plaintiff-Appellant Bank instituted action No.4329/03/M in the District Court of Mount Lavinia against the Defendant-Respondent to recover a sum of Rs.1,232,642.57 and 24% interest per annum with effect from 1.8.1999 on the basis of the said O/D facilities granted to the Defendant-Respondent. The learned District Judge by his judgment dated 30.7.2008 dismissed the action of the Plaintiff-Appellant Bank on the basis that the action was prescribed. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant Bank appealed to the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 19.3.2012 dismissed the appeal of the Plaintiff-Appellant Bank and affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant Bank has appealed to this court. This court by its order dated 6.7.2012, granted leave to appeal on questions of law set out in paragraphs 11(a),(b),(c),(d) and (e) of the Petition of Appeal dated 26.6.2012 which are reproduced below.

1. When money is lent by way of an overdraft, when does prescription begin to run if there is a stipulation that overdraft is repayable on demand?

2. When there is an overdraft facility which does not stipulate repayment on demand and the customer makes a deposit (repayment) in reduction of the overdraft, when does prescription begin to run for the purpose of the Prescription Ordinance No.22 of 1871 as amended?

3. Where there is an overdraft facility which does not stipulate repayment on demand and the bank makes a last advance to the customer by way of an overdraft and the outstanding balance after the said last advance remains unpaid, when does prescription begin to run?

4. Where there is an overdraft facility which does not stipulate repayment on demand and there is a written acknowledgement and/or promise of liability incurred under the overdraft facility, when does prescription begin to run for the purpose of the Prescription Ordinance?

5. Where there is an overdraft facility which does not stipulate repayment on demand and there is a written acknowledgement and/or promise of liability in relation to the overdraft, what would be the period of prescription?

The learned Judges of the Civil Appellate High Court too decided that the action of the Plaintiff-Appellant Bank had been prescribed on the basis of Section 7 of the Prescription Ordinance which reads as follows.

No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money

received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be-commenced within three years from the time after the cause of action shall have arisen.

One of the factors that the learned Judges of the Civil Appellate High Court considered to arrive at the said conclusion was the date of default of payment by the Defendant-Respondent which was on 1.8.1999. The action was filed on 19.12.2003. They came to the above conclusion on the basis of letter marked P7 sent by the Plaintiff-Appellant Bank to the Defendant-Respondent. Although the learned Judges of the Civil Appellate High Court came to the above conclusion, the statement of account regarding the current account of the Defendant-Respondent marked P6 indicates that the Defendant-Respondent has made payments in the months of May to December 2000, May, July to November 2001, August and September 2002. P6 further indicates that as a result of these payments over draft balance has been reduced. Thus, the above conclusion reached by the learned Judges of the Civil Appellate High Court regarding the date of default of payment by the Defendant-Respondent (1.8.1999) is wrong.

Learned counsel for the Defendant-Respondent tried to contend that the account of the Defendant-Respondent had lain dormant from year 1999 to 2003 and that therefore the action of the Plaintiff-Appellant Bank has been prescribed. He cited a passage from the book titled 'Law of Contract by Prof. Weeramanthry' 1st Edition Vol. II page 874 which reads as follows.

> *"Overdrafts are loan by the banker to the customer, and in general no demand is necessary, so that the time runs against the banker in respect of each overdraft from the time when it is made. A bank cannot therefore*

recover against a customer on an overdraft which has lain dormant for the prescriptive period which, in Ceylon in the absence of a written contract, would be three years."

I now advert to this contention. Has the account of the Defendant-Respondent lain dormant? As I pointed out earlier, the Defendant-Respondent has made payments to his account in the years 2000,2001 and 2002. Therefore, it is clear that the account of the Defendant-Respondent has not lain dormant. For the above reasons, I reject the above contention of learned counsel for the Defendant-Respondent.

The learned Judges of the Civil Appellate High Court have, in order to arrive at the conclusion that the action of the Plaintiff-Appellant Bank was prescribed, considered the judgment in the case of Seylan Bank Limited Vs Intertrade Garments (Private) Limited 2004 BLR Vol. II page 41 wherein Justice Dr. Shirani Bandaranayake held as follows.

"In an action concerning a loan repayable on demand, the cause of action will arise only at the time when demand is made. An action for the recovery of money lent without written security, must be commenced within three years from the time after the cause of action had arisen."

At this stage it is necessary to consider whether the money obtained by the Defendant-Respondent on an O/D facilities is a loan or not.

The amount of money given by a bank to its customer on O/D facilities is money belongs to the bank and the customer is duty bound to repay the said amount. Therefore, the money given by a bank to its customer is a loan. This view is supported by the following legal literature.

Prof. Weeramanthry in his book titled 'Law of Contract' 1st Edition Vol. II page 874 which states as follows.

> *"Overdrafts are loan by the banker to the customer. ."*

In the case of Hatton National Bank Vs Helenluc Garments Ltd [1999] 2 SLR 365 Justice Wijetunga held as follows.

> *"Overdrafts are loans by the banker to the customer, and in general no demand is necessary, so that time runs against the banker in respect of each overdraft from the time when it is made."*

In 'Elinger's Modern Banking in Law' 5th Edition page 756 states as follows.

> *"From a legal point of view, an overdraft is a loan granted by the bank to the customer so that the bank is the creditor and the customer is the debtor"*

Considering all the above matters, I hold that an overdraft granted by a bank to a customer is a loan.

Justice Dr. Shirani Bandaranayake in the case of Seylan Bank Limited Vs Intertrade Garments (Private) Limited (supra) observed that 'in an action concerning a loan repayable on demand, the cause of action will arise only at the time when demand is made. An action for the recovery of money lent without written security, must be commenced within three years from the time after the cause of action had arisen.' I have earlier held that an overdraft granted by a bank to a customer is a loan. Thus, acting on the principles laid down in the above judicial decision, I hold that in an action to recover an overdraft granted by a bank to a customer, cause of action would arise at the time the demand was

made. In the present case the demand to repay the overdraft was made to the Defendant-Respondent on 26.9.2003 by letter marked P7. Thus, the cause of action in the present case has arisen only on 26.9.2003. The action in the present case was filed on 19.12.2003. Thus, the action has been filed within three years from the date of the cause of action arose. For the above reasons, I hold that the action of the Plaintiff-Appellant Bank has not been prescribed. Therefore, I hold that the learned District Judge and the learned Judges of the Civil Appellate High Court were wrong when they came to the conclusion that the action of the Plaintiff-Appellant Bank had been prescribed. Further I would like to point out that when the letter of demand marked P7 dated 26.9.2013 was sent to the Defendant-Respondent, the Chairman of Defendant-Respondent by letter dated 5.12.2003 marked P8, has stated that the overdraft granted to the Defendant-Respondent could be settled. Thus, even on the basis of letter marked P8 it can be said that the action of the Plaintiff-Appellant Bank had not been prescribed when the action was filed.

For the above reasons, I answer the 1st question of law as follows.

In the present case, prescription begins to run from the date of the demand.

In view of the answer given to the1st question of law it is not necessary to answer the 2nd and the 4th questions of law.

The 3rd and 5th questions of law do not arise for consideration.

For the aforementioned reasons, I set aside both judgments of the District Court and the Civil Appellate High Court. The Plaintiff-Appellant Bank has, by way of evidence, proved its case and is entitled to the relief claimed in the plaint. I therefore grant relief claimed in the plaint. The learned District Judge is directed

to enter decree in accordance with this judgment. The Plaintiff-Appellant Bank is entitled to costs in all three courts.

Appeal allowed.

Judge of the Supreme Court.

Vijith. K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

P. Padman Surasena J

I agree.

Judge of the Supreme Court.